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Non-Judicial Constitutional Review and the Rule of Law

The Case of Ethiopia

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Contents

Publications arising from the research undertaken during the candidature

The following publications were written solely by me during my candidature.

1. Legesse Tigabu Mengie, 'COVID-19 and Elections in Ethiopia: Exploring Constitutional Interpretation by the House of the Federation as an Exit Strategy' (2021) 25(1) *Law, Democracy & Development* 64 <https://heinonline.org/HOL/Page?handle=hein.journals/laacydev25&id=64&collection=journals&index=>.

2. Legesse Tigabu Mengie, 'The House of Federation of Ethiopia: Unfit for Federalism' (2023) 27(2) *Review of Constitutional Studies* 129 <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/revicos27&div=22&start_page=129&collection=journals&set_as_cursor=3&men_tab=srchresults>.

Chapter 3 of this thesis contains an updated version of the second publication. I have made the necessary revisions to ensure the coherence and flow of the thesis. The thesis does not contain the first publication.

Abstract

Most democracies have embraced the principle of constitutional supremacy and use the institution of constitutional review to maintain it. However, enforcing the rule of law as expressed in the constitution against political power has remained controversial. Central to this controversy is the alleged conflict between constitutional review and democracy, or what Bickel calls the counter-majoritarian difficulty with allowing unelected judges to set aside legislation. This has prompted diverging views. Some subscribe to this alleged conflict but justify constitutional review on grounds other than democracy. For others like Waldron, the courts having the power to strike down legislation is not only undemocratic but also intolerable. The solution according to them is political constitutionalism (determining constitutional controversies through majoritarianism) instead of legal constitutionalism (subjecting political power to constitutional limits). In contrast, Dworkin and his followers' definition of democracy embraces rights, and hence enforcement of such rights through constitutional review constitutes a democratic exercise.

The arguments for and against constitutional review are essentially reflections of strong and weak models of constitutional review in a real-world situation. In strong forms of review, the final say on constitutional matters belongs to the courts, and in weak forms to the legislature. There is an exception to this dichotomy, however: the Ethiopian model of non-judicial review where neither the country's apex court nor the legislature have the ultimate authority on constitutional matters. It is the non-legislative upper house, which is known as the House of Federation, that decides constitutional disputes in Ethiopia. This thesis explores whether such a politically leaning constitutional review is a viable alternative.

Drawing on Ethiopia's experience and the views of leading thinkers on constitutional review, this thesis presents a case against politically oriented constitutional review and, for a stronger reason, political constitutionalism. By explaining why Ethiopia's House of Federation is an inherently political institution and how this has impacted the rule of law in the country, the thesis highlights limitations with political constitutionalism. It argues that democracy embraces both legal (constitutional) and majoritarian (political) elements. Its constitutional element embodies the implied or express agreement of the people as a political community and should thus be superior to the political element so governance can be characterised as people rule. This distinguishes the constitution which is ideally an expression of the people's constituent power (to create or fundamentally alter the constitution) from decisions produced by constituted

power, including legislative power. For the constitution to remain superior to the majority, and to make governance attributable to everyone (the people), it should be enforced through an open and insulated institution. Constitutional review should thus be accessible and ideologically and structurally fit to uphold the rule of law (constitutionalism). This responsibility includes upholding constitutional rights and principles of political organisation, like federalism, that a constitutional system embraces. This thesis examines Ethiopia's non-judicial review through the lens of these constitutional values. Due to its political nature, Ethiopia's form of review has profound limitations in this regard. This thesis concludes that Ethiopia's politically oriented constitutional review and political constitutionalism constitute assailable constitutionalism, as majority votes on constitutional controversies are more reflections of political views than outcomes of a sober analysis of the constitution. Ethiopia's House of Federation's experience, as will be elaborated in Chapter 5, attests to this. It highlights how political constitutionalism could contradict the very purpose of constitutional review, which is controlling political power through the constitution. Based on identified theoretical and practical limitations with political institutions as constitutional review mechanisms, this thesis calls for their reform.

Declaration

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

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Acronyms

ANC	African National Congress
AU	African Union
CCI	Council of Constitutional Inquiry
CSOs	Civil Society Organisations
CUD	Coalition for Unity and Democracy
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
FCC	Federal Constitutitonal Court
FFIC	Federal First Instance Court
FHC	Federal High Court
FSC	Federal Supreme Court
FSCCD	Federal Supreme Court Cassation Division
HoF	House of Federation
HPR	House of Peoples' Representatives
NEBE	National Electoral Board of Ethiopia
SNNPRS	Southern Nations, Nationalities and Peoples Regional State
SSLM	Support Structure for Legal Mobilisation
TDP	Tigray Democratic Party
TGE	Transitional Government of Ethiopia
TPLF	Tigray People's Liberation Front

Chapter 1: Introduction

1.1 Thesis overview

This thesis is about non-judicial constitutional review and its legitimacy and capacity to uphold the rule of law as enshrined in the constitution. This model of constitutional review has been established in Ethiopia with a view to address the alleged conflict between judicial constitutional review and democracy, and to ensure that the task of constitutional review is carried out by a representative body. The framers of Ethiopia's Constitution believed that judicial constitutional review is both illegitimate and a threat to the sovereignty of the purported authors of the Constitution. This type of constitutional review is distinct from other forms of non-judicial constitutional interpretation, for example, by human rights bodies and political branches of government,[1] as it not only involves a non-judicial body but also authorises such a body to set controls on political power, including legislative power.

The institution that is tasked with upholding constitutional supremacy in Ethiopia is its upper house, the House of Federation (HoF). The HoF is an unusual non-judicial non-legislative political institution responsible for resolving constitutional controversies and managing intergovernmental issues. Like strong forms of constitutional review (such as the US, Australian, German and South African models), the HoF has the mandate to maintain the Constitution, including by striking down legislation. Like in weak forms of review (the Commonwealth model such as in the UK, Canada and New Zealand), the ultimate authority to determine the meaning of the Constitution in Ethiopia belongs not to the judiciary but to this representative body.

Ethiopia's model of constitutional review thus has features of both strong and weak forms of review but belongs to neither category. It nonetheless leans towards the weak form of review, as the HoF is a primarily majoritarian institution, though it does not form part of the legislature. The question then is whether the HoF is, as the founders of Ethiopia's Constitution believed, a legitimate (theoretically sound) and practically feasible alternative to the widely known strong and weak forms of review or an ill-designed institutional arrangement. This raises related questions like: Is strong constitutional review, which is also referred to as legal constitutionalism, irreconcilable with democracy as the supporters of weak forms of review

[1] Mark V Tushnet, 'Non-Judicial Review' (2003) 40(2) *Harvard Journal on Legislation* 453, 454-5.

(political constitutionalism) claim? In other words, is upholding the rule of law as enshrined in the constitution to control political power or majority rule a legitimate enterprise? Assuming that the answer to this question is positive and political constitutionalists are wrong, what institution should be tasked with constitutional review? To be more specific, should this power be given to non-majoritarian institutions like courts or a HoF-like majoritarian body?

Through analysing the theories of constitutional review and the rule of law, and by dissecting democracy into an end (people rule) and a means (majority rule), I argue that democracy as an end embraces the rule of law (an enforceable agreement of the people as a political community) under which majoritarianism should function. This hierarchical relationship between these two elements of democracy represents, as will be elaborated in Chapter 5, a political order in which constituted power derives its legitimacy from constituent power. It is only when there is such a hierarchical political order in which the main unit of democracy, the individual, can invoke the rule of law against a rule imposed by the majority that everyone's right to self-rule is attainable. Stripped of this, majoritarianism leads to monopoly of power by the majority and can hardly be characterised as people rule. It just remains one step short of being an ideal democracy. There should thus be an institution that can uphold constitutional limits on political power.

Upholding the rule of law through constitutional review and making governance attributable to everyone via this mechanism requires a structurally fit, competent, and accessible institution which can settle constitutional disputes. This is not to suggest that there is a single mechanism that fits all political systems. As will be elaborated in Chapter 2, constitutional disputes could be resolved through different institutions. The scope of power of these institutions depends primarily on the nature of the constitution under which they function and the scope of implied and express constitutional rights and principles.[2] In jurisdictions where federalism is one of the main principles of political organisation, for example, institutions of constitutional review bear the added responsibility of maintaining the federal balance through enforcing the constitution. As federalism entails that the different levels of government remain independent of each other in a single political system, being subject not to each other but a supreme constitution, resolving disputes arising out of such a political arrangement necessitates an independent institution.

[2] Organisation for Economic Cooperation and Development, *Constitutions in OECD Countries: A Comparative Study* (2022) <https://doi.org/10.1787/0a0bcbbf-en>.

Ethiopia has a federal and supreme Constitution. Its Constitution embraces a catalogue of human and democratic rights. Despite this, there is a prevailing lack of constitutionalism in the country, including widespread violation of human and democratic rights, and a remarkable inability to resolve federalism disputes through non-violent means. There is a general lack of reliance on constitutional means to resolve disagreements on the issues of greatest importance, as demonstrated by the 2020-2022 Tigray War, the ongoing War in the Amhara Region between the Amhara forces also known as Fano and the federal army, and decades-old insurgencies in several regions, including in the regional states of Oromia, Somali and Benishangul Gumuz.[3]

To bring an end to these conflicts, the federal government established a national dialogue commission, the Ethiopian National Dialogue Commission, in December 2021. The main task of this Commission, as set out under art 6 of the proclamation that established it (the *Ethiopian National Dialogue Commission Establishment Proclamation No. 1265 /2021*) is to facilitate an inclusive dialogue towards forging consensus on fundamental political issues, and to help creating a new and legitimate political system based on mutual trust. The Commission has set to convene the first national dialogue conference in the first quarter of 2024.[4] Ethiopia is thus undergoing a transition and this transition aims to reform the existing constitutional dispensation.

It is, therefore, worth investigating the design of Ethiopia's Constitution in general and its unusual non-judicial review system more specifically. One can raise questions as to the viability of this model of constitutional review as an alternative to judicial constitutional review. Is the HoF consonant with and capable of upholding constitutionally cherished organisational principles, such as federalism? Is it accessible and thus apt for making

[3] See, eg, Takele Bekele Bayu, 'Is Federalism the Source of Ethnic Identity-Based Conflict in Ethiopia?' (2022) 14(1) *Insight on Africa* 104. In April 2023, Ethiopia's government decided to disarm the Amhara regional special force and Fano. These regional forces and the wider public in the region protested this decision. The government continued with its plan and started taking military measures to that effect. Since then, fighting has continued between the federal army and Amhara forces. The fighting intensified and spread to major towns and cities in the region, and in response the federal government declared a six-month state of emergency on 4 August 2023. This fighting is ongoing. As Ethiopia follows an ethnic-based federal system that has resulted in loosely connected, rival and at times warring regional states, the people in the respective regions consider local forces as their last lines of defence. See also, Adane Tadesse, 'A Reflection on the Conflict in the Amhara Region of Ethiopia', *Wilson Centre* (Blog Post, 29 September 2023) <https://www.wilsoncenter.org/blog-post/reflection-conflict-amhara-region-ethiopia>; Crisis Group, 'Ethiopia's Ominous New War in Amhara' (Briefing No 194, 16 November 2023) <https://www.crisisgroup.org/africa/horn-africa/ethiopia/b194-ethiopias-ominous-new-war-amhara>.

[4] 'National Dialogue Conference to Convene in the First Quarter Next Year', *Fana Broadcasting Corporate* (online, October 2023) <https://www.fanabc.com/english/national-dialogue-conference-to-convene-in-first-quarter-of-next-year/>.

governance attributable to everyone? Is it ideologically and structurally fit to uphold the rule of law against political power?

These are the specific questions which this thesis seeks to answer. To answer these questions, I employ doctrinal and, to some extent, socio-legal approaches. Through analysing theories of constitutional review and the rule of law, I develop lenses through which to examine the Ethiopian model. To understand Ethiopia's experience of non-judicial review, I examine the HoF's design, the cases it has decided over the last three decades, and the historical, cultural, and political context under which this review system functions.

Based on the relevant theories on constitutional review and the rule of law, and Ethiopia's experience, I conclude that Ethiopia's non-judicial review leans to political constitutionalism and is ill-suited to the idea of controlling political power through the rule of law. I argue that HoF's failure to uphold the rule of law is attributable primarily to its political nature, and that this highlights limitations with political constitutionalism. I further argue that this model of constitutional enforcement constitutes assailable constitutionalism. By assailable constitutionalism I mean a form of constitutionalism that is not accompanied with an institutional mechanism that is structurally and ideologically fit to oversee exercise of power by those who may benefit from disregarding or misapplying the constitution. Chapters 3, 4 and 5 explain why Ethiopia lacks such an institutional mechanism and how this has undermined the rule of law in the country.

1.2 Ethiopia's non-judicial review: Brief outline

Ethiopia has an unusual ethnically defined political system. One of the consequences of this system is its form of constitutional review. Contrary to the growing importance of judicial bodies around the world in the realisation of the rule of law, particularly since the mid-20th century,[5] in 1995 Ethiopia introduced a constitutional review system that lacks the structural and functional features of judicial institutions. Most post–World War II and post–Cold War era constitutions have paid close attention to the institution of constitutional review. Authoritarianism and oppression under unrestrained majoritarianism have provided the incentive for the proliferation of written and supreme constitutions along with courts with the

[5] Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30(3) *Journal of Law, Economics, & Organization* 587, 593; H Klug, 'Constitutionalism, Comparative' in James D. Wright (ed), *International Encyclopedia of the Social and Behavioural Sciences* (Elsevier, 2001) 2643, 2646.

power of constitutional review. Ethiopia's politically leaning model of constitutional review is at odds with this trend. I will elaborate in Chapter 3 why Ethiopia departed from this trend. At this stage, it suffices to provide a bird's eye view of the logic behind the Ethiopian model of constitutional review and what this model is.

Ethiopia's Constitution, the Federal Democratic Republic of Ethiopia Constitution,[6] was adopted in 1994 (and came into force in 1995) during the post–Cold War era, at the same time as South Africa adopted its internationally hailed post-apartheid constitution. Both constitutions seek to uphold the rule of law.[7] They also entrench a catalogue of human and democratic rights and declare their supremacy over other laws. Both Ethiopia and South Africa have thus embraced in their respective constitutions a broad or rights-based conception of the rule of law. Ethiopia is however lagging in terms of realising the rule of law through enforcing its Constitution arguably due to a profound flaw in its constitutional design. Ethiopia's Constitution reconstructed the Ethiopian state and its institutions based on ethnicity. It proclaims ethnic self-rule as the main principle of political organisation and has established ethnic federalism to this effect.[8]

This Constitution diverges from most post–Cold War constitutions as it puts ethnic groups, and not individuals, at the forefront of the political system. This has led to unusual institutional arrangements including entrusting the representative of ethnic groups, the House of Federation (the HoF), with the power of constitutional review.[9] The Constitution denies a legislative role to this 153-member[10] upper house and distances the judiciary from adjudicating constitutional cases.

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[6] *Constitution of the Federal Democratic Republic of Ethiopia* (1995) ('*FDRE Constitution*'). The architects of this constitution were ethnic-based liberation fronts that came to power by removing the Dergue regime in 1991. Because the process of drafting the Constitution was dominated by such fronts and its excessive devotion to ethnic-based privileges, the legal, sociological, and moral legitimacy of Ethiopia's Constitution has remained controversial.

[7] The preambles of the two constitutions emphasise establishment of a system which can forge unity out of diversity and ensure the rule of law and democratic stability.

[8] John Cohen, '"Ethnic Federalism" in Ethiopia' (1995) 2(2) *Northeast African Studies* 157, 164. See also John Ishiyama, 'Does Ethnic Federalism Lead to Greater Ethnic Identity? The Case of Ethiopia' (2023) 53(1) *Publius: The Journal of Federalism* 82, 83-9; Alemante G Selassie, 'Ethnic Federalism: Its Promise and Pitfalls for Africa' (2003) 28 *Yale Journal of International Law* 51, 54.

[9] *FDRE Constitution* arts 62, 83.

[10] Assefa Fiseha, 'Constitutional Adjudication through Second Chamber in Ethiopia' (2017) 16(3) *Ethnopolitics* 295, 297.

Ethiopia is home to over 80 ethnic groups[11] which are referred to in the Constitution as 'nations, nationalities and peoples' starting from the very preamble of the Constitution,[12] and these ethnic groups are represented in the HoF mainly based on their population size.[13] The Constitution considers the ethnic groups as its authors and the main units of the federation, reversing the longstanding understanding of the Ethiopian polity as a single body of collected citizens or people, and empowers the ethnically organised HoF to adjudicate constitutional cases. Thus, Ethiopia's Constitution has established a political system that combines ethnic federalism with non-judicial constitutional adjudication.

Given that the HoF is a political body composed of representatives who lack legal training,[14] one may wonder whether such an adjudication system is legitimate and feasible to handle constitutional cases and to realise the ideals of the rule of law. This study aims to explore this issue and advance scholarship on constitutional review in general and the implications of non-judicial review for the rule of law specifically. Drawing on the views of leading thinkers on the relationship between constitutional review and democracy, and Ethiopia's experience in non-judicial review, I challenge the theoretical premises of non-judicial review and explain how this form of review has impacted the rule of law in practice.

1.3 Problem statement

Although Ethiopia's Constitution vests the highest federal judicial power in the Federal Supreme Court and the highest state judicial power in the respective State Supreme Courts,[15] it denies the judiciary the power to determine constitutional disputes. The Constitution boldly declares that 'all constitutional disputes shall be decided by the House of the Federation'.[16] As this house is a non-judicial body which represents ethnic groups across the country and has

[11] Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet' (2012) 22(4) *Regional & Federal Studies* 435, 438.
[12] See *FDRE Constitution* preamble, arts 8, 39.
[13] Ibid art 61.
[14] Ibid art 61(3). The Constitution does not set any educational or professional requirements for one to become a member of the House of Federation. The relevant provision reads 'Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of the Federation, or they may hold elections to have the representatives elected by the people directly.' Over the last three decades, that is, since the Constitution was adopted, members of the house have been elected by the State Councils themselves. The members include senior federal and regional sitting officials including the heads of regional state governments.
[15] Ibid art 80.
[16] Ibid art 83.

state governors and federal sitting politicians as members,[17] its adjudicative role could put the principles of the rule of law in jeopardy.

Leaving the rights conception of the rule of law aside, one can easily develop arguments in support of this constitutional adjudication system. As the representative of the entities that are acknowledged as the authors of the Constitution — nations, nationalities, and peoples — the HoF could be considered the most legitimate body to interpret the Constitution.[18] The Constitution may also be considered as a political document — a result of a series of negotiations among the political actors — and a political body may thus appear to be a legitimate choice to handle constitutional disputes. It could be further argued that constitutional adjudication by the HoF is not problematic as it is assisted by an advisory body.[19] This advisory body, the Council of Constitutional Inquiry (CCI), comprises eight legal professionals including the President of the Federal Supreme Court and three politicians drawn from among the members of the HoF.[20] It is responsible for screening constitutional cases which require constitutional interpretation and submitting recommendations to the HoF.[21] The Constitution does not set the criteria for this screening but allows the CCI to 'draft its rules of procedure and submit them to the House of the Federation; and implement them upon approval'.[22]

However, all these points are not able to answer the questions the rule of law would pose. An independent and impartial body is indispensable to realise the rule of law. The way the HoF is designed raises questions as to its consistency with the counter-majoritarian, if not undemocratic, nature of the rule of law. As indicated, the HoF is a political institution that represents over 80 ethnic groups in the country.[23]

Entrusting the task of maintaining the rule of law in a political body could mean leaving this key role in the hands of those who may benefit from disregarding or misapplying it. The arguments supporting the HoF's role are also not as strong as they look. Written constitutions often incorporate individual rights and call themselves supreme laws as opposed to political documents. The Constitution of Ethiopia is no exception. One third of its content concerns fundamental rights and it declares itself the supreme law of the land and thus embraces the

[17] Fiseha, 'Ethiopia's Experiment in Accommodating Diversity' (n 11) 448.
[18] Tesfa Bihonegn, 'The House of Federation: The Practice and Limits of Federalism in Ethiopia's Second Federal Chamber' (2015) 9(3) *Journal of Eastern African Studies* 394, 404.
[19] See *FDRE Constitution* art 84.
[20] See ibid art 82.
[21] Ibid art 84(1).
[22] Ibid art 84(2).
[23] See ibid art 61(1–3).

features of both the formal and substantive conceptions of the rule of law which are elaborated in Chapter 2.

Realising the rule of law in general and guarding constitutional rights against political power in particular requires counter-majoritarian, if not anti-democratic, impartial adjudication. It is questionable whether a majority vote of the HoF is more a reflection of the meaning of the Constitution or of the political views of its members. Tamanaha, one of the strong advocates of the substantive conception of the rule of law, observes that the limits introduced through the rule of law are 'anti-majoritarian' by their nature.[24] According to him, determining the rule of law via representative bodies would defeat the purpose of such limits.[25] It can be further argued that democracy, by definition, includes anti-majoritarian elements. If democracy means people rule and not just a consent to be ruled, majoritarianism needs to be, as I will elaborate in Chapter 5, subjected to what the people agree to be their rule. How then can a majoritarian institution fit this role? The legitimacy arguments in support of the HoF, therefore, raise more questions than answers.

A polarised political environment in diverse polities like Ethiopia can generate an unusual constitutional arrangement. After all, constitutions are results of a compromise among various conflicting political visions and cannot be expected to produce identical institutional arrangements. It may however be difficult, as I will explain in Chapter 3, to attribute Ethiopia's unique constitutional arrangement to a compromise between rival political views as the Constitution is largely a by-product of a military triumph[26] rather than a genuine negotiation among political factions.

The constitution-making process was dominated by forces that advocated ethnic-based autonomy. *Ethiopianists*, political groups that envisioned a strong central government, were condemned by the triumphant ethnic-based liberation fronts as subversives and excluded from this process. Had there been a genuine negotiation between these rival forces, the Ethiopian state would arguably not have been defined by ethnicity. Instead, such a negotiation would have most likely resulted in recognition, but not institutionalisation, of ethnic diversity.

[24] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 105.
[25] Ibid.
[26] See, eg, Teguadda Alebachew, 'The Making and Legitimacy of the Constitution of the Federal Democratic Republic of Ethiopia' (2017) 5 *Mekelle University Law Journal* 101, 138. For more on the domination of the constitution drafting process in the 1990s by victorious and ethnic-based liberation fronts, see Theodore M Vestal, 'An Analysis of the New Constitution of Ethiopia and the Process of Its Adoption' (1996) 3(2) *Northeast African Studies* 21, 26; Aregawi Berhe, 'The EPRDF and the Crisis of the Ethiopian State' [2001] *International Conference on African Development Archives* 1, 5.

Recognition of diversity is important to win over diverse social groups and thus facilitate a political environment in which the rule of law can take hold. Recognising and equipping traditional arrangements can also broaden access to justice opportunities, particularly in places where state institutions are inaccessible. As Grenfell observes, 'Ideally a post-conflict constitution needs to set out guidelines and non-violent spaces through which any tensions between the rule of law and legal pluralism can be incrementally debated and reconciled.'[27]

Ethiopia's Constitution emphasises diversity but does not offer a space to reconcile the tension between the rule of law and pluralism. The ethnically defined non-judicial review system and the diversity-oriented federal structure attest to this. On balance, this unique political arrangement has not meaningfully improved the main features of constitutional democracy. Instead, it appears to be constraining them. Freedom House has consistently rated Ethiopia as 'not free', including in its 2023 report.[28] The Economist Intelligence Unit's 2022 global democracy index likewise classified Ethiopia as authoritarian.[29] Ethiopia ranked 123rd out of 140 countries in the World Justice Project's 2022 rule of law index.[30] These facts demonstrate that political power is left largely unchecked in Ethiopia.

Ethiopia has a rights-rich and supreme constitution, as will be elaborated in Chapter 3. As per the Constitution, Ethiopia is a federal and democratic state guided by the rule of law. In this sense, the Constitution appears to have embraced important features of limited government. One would then wonder why such tenets of limited government have failed to enhance constitutionalism. The key question in this regard is whether Ethiopia's Constitution establishes a viable constitutional enforcement mechanism. As indicated, this important role is conferred on the country's upper house, the HoF.

The HoF's overall performance has remained unimpressive.[31] Its three decades of experience suggests it has not been successful in guarding constitutional rights and principles nor in offering a non-violent space for tensions to be resolved. Even though it is assisted by the CCI, such assistance is limited to selecting cases requiring constitutional interpretation and

[27] Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge University Press, 2013) 8.
[28] 'Freedom in the World 2023: Ethiopia', *Freedom House* (Web Page, 2023) <https://freedomhouse.org/country/ethiopia/freedom-world/2023>.
[29] 'The World's Most and Least Democratic Countries in 2022', *The Economist* (online, 1 February 2023) <https://www.economist.com/graphic-detail/2023/02/01/the-worlds-most-and-least-democratic-countries-in-2022>.
[30] World Justice Project, 'Ethiopia Ranks 123 out of 140 in Rule of Law Index' (2022) <https://worldjusticeproject.org/sites/default/files/documents/Ethiopia.pdf>.
[31] Fiseha, 'Ethiopia's Experiment in Accommodating Diversity' (n 11) 447–9.

submitting recommendations to the HoF.[32] The HoF was introduced as a constitutional review body by the then dominant 'left-leaning' party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), which did not want to see courts emerging as strong counter-majoritarian mechanisms.[33] Therefore, the house's three decades of performance and its overall design warrant a thorough investigation through the lens of the rule of law to comprehend its theoretical and practical prospects.

1.4 Research questions

This study considers Ethiopia's non-judicial constitutional review system from the perspective of the rule of law. Accordingly, the main question to be addressed by this study is: *Is Ethiopia's non-judicial constitutional review a theoretically sound and practically viable alternative to constitutional review by judicial bodies, that is, ordinary or specialised courts?*

In answering this question, the study will address specific questions. As indicated, the scope of constitutional review is dependent on the nature of a given constitution. For example, in jurisdictions where federalism is one of the main principles of political organisation, the aim of constitutional review includes maintaining the balance of power between multilevel and independent governments within a single political system. Federalism, albeit defined ethnically, is one of the fundamental constitutional principles in Ethiopia. This principle is, therefore, one of the main features of Ethiopia's rule of law project. This study will thus examine *whether Ethiopia's HoF is a prudent choice to maintain federalism*.

Based on the main purpose of constitutional review, maintaining people rule through enforcing the constitution against political power, still weightier questions need to be answered. *Is the Ethiopian model of constitutional review compatible with open access to constitutional justice? Is it capable of upholding constitutional supremacy*? Asking these questions is important because Ethiopia's Constitution has embraced the features of both legal and political constitutionalism in a complex manner that creates uncertainties as to its potential to realise constitutionalism.

[32] Bihonegn (n 18) 405. See also *FDRE Constitution* art 84.
[33] Peter Slinn, 'Book Review: Constitutional Adjudication in Africa' (2018) 62(2) *Journal of African Law* 329, 330–1.

1.5 Aims and objectives

This study aims to understand the interaction between non-judicial constitutional review and the rule of law by using Ethiopia as a case study. It intends to contribute to the scholarship on constitutional review as an instrument for the realisation of the rule of law. As the rule of law functions in Ethiopia under a federal system, this study also aims to understand the HoF's potential to determine federalism disputes amicably and maintain the federal balance. The study also seeks to identify the theoretical and practical challenges to non-judicial review.

Accordingly, this study will:

1. explore the interaction between the rule of law and constitutional review
2. examine the HoF's potential to advance the rule of law by maintaining the federal balance
3. investigate the compatibility of non-judicial review with open access to constitutional justice
4. evaluate whether Ethiopia's form of constitutional review is theoretically acceptable and practically feasible.

1.6 Limited understanding of Ethiopia's non-judicial constitutional review

Unlike constitutionalism, which can be traced back to 17th-century England, the history of constitutional review began in the United States in the early 19th century.[34] Yet, controlling political power through constitutional review was uncommon until the second half of the 20th century.[35] The Supreme Court of the United States emerged as the first constitutional adjudication body through invalidating legislation which it found unconstitutional in its 1803 landmark decision in *Marbury v Madison*.[36] Since the second half of the 20th century, post-authoritarian constitution drafters have considered constitutional review essential to constitutionalism and hence the rule of law.[37]

[34] Dieter Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 *NUJS Law Review* 15, 15.
[35] Ibid.
[36] *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).
[37] Grimm (n 34).

Constitutional review is one of the hallmarks of federal systems in particular.[38] To ensure that governments within a federation are independent of each other and subject to a federal and supreme constitution, there must be an impartial constitutional review system. While a constitutional umpire is common in federations, there are institutional differences. Federations including the United States and Australia use their federal supreme courts as final constitutional adjudicators; several federations in Europe including Germany and Austria have a constitutional court; the Swiss Federation uses its Federal Tribunal and legislative referendums; while Ethiopia's federation is quite unique and confers the power of constitutional review on the federal upper house.[39]

Ethiopia is not, however, the first country to use its upper house as a constitutional adjudication body. France (until 1946) and Brazil (until 1891) used their senates as constitutional adjudicators.[40] They eventually found this arrangement flawed and inefficient and conferred that power on the Conseil constitutionnel and Supreme Court respectively.[41] Although it largely remains dormant, the National People's Congress of China is also the current constitutional review body in the country. Unlike the HoF, the primary role of this congress is law making and the Chinese Communist Party arguably does not want to see citizens questioning laws and government decisions through constitutional review.

As constitutional review is key to constitutionalism (the constitutional dimension of the rule of law) and constitutionalism requires state institutions to derive their authority from and be limited by a constitution, there is a close relationship between constitutional review and the rule of law. Like other universal and yet obscure ideals including democracy and justice, the rule of law is still an opaque concept despite the fact that its history can be traced back to the time of ancient Greek philosophers.[42] As Tamanaha explains, 'Plato and Aristotle were acutely concerned about the potential for tyranny in a populist democracy'.[43] The modern notion of the

[38] Ronald L Watts, *Comparing Federal Systems* (McGill-Queen's University Press, 3rd ed, 2008) 158–1. For more on the relationship between constitutional review and federalism, see John O McGinnis and Ilya Somin, 'Federalism vs. States Rights: A Defense of Judicial Review in a Federal System' (2004) 99(1) *Northwestern University Law Review* 89; Leonid Sirota, 'Federalism and Democracy: A Defence of Federalism-Based Judicial Review' [2012] *SSRN 2162161*.
[39] Watts (n 38).
[40] Belachew Girma, 'Constitutional Adjudication by Parliaments: Lessons from Comparative Experience' (2018) 12(1) *Mizan Law Review* 29, 29.
[41] Ibid 50.
[42] Tamanaha (n 24) 7–9.
[43] Ibid 8.

rule of law arose late in the 20th century and has been highly promoted in the post–Cold War era.[44]

Many scholars have devoted their time to constitutional review from different perspectives. Yet, most of these works have focused on judicial constitutional review. Nelson, Haskins, Johnson and many others have, for example, examined the applicability of the rule of law in constitutional adjudication[45] in contexts where the power of constitutional review is exercised by the judiciary. Similarly, Monaghan, in his work 'Constitutional Adjudication: The Who and When', explains how the United States judiciary evolved into a constitutional adjudication body while exercising its judicial review power.[46] He also thoroughly explains the further expansion of the constitutional adjudication role of the judiciary through the shift from 'private rights' based competence to the recognition of constitutional adjudication as 'fundamentally a political-legal undertaking'.[47] These works provide little to no insight into the roles non-judicial constitutional adjudicators play in the realisation of the rule of law.

German law constitutional expert Grimm has followed the same approach — he has examined the judiciary (courts and constitutional courts) as a constitutional adjudication body — when analysing the relationship between law and politics in the constitutional adjudication process.[48] Winters also assumes that judges in a courtroom are the only adjudicators of constitutional disputes, when presenting his discussion on general principles guiding constitutional adjudication.[49] It is not surprising that many works on constitutional review have neglected non-judicial constitutional adjudication as this form of adjudication is rare.

Being a lawyer and an academic from Ethiopia, Fiseha, in his enlightening work 'Constitutional Adjudication through Second Chamber in Ethiopia', explains the experiences of the HoF in adjudicating constitutional cases.[50] His work excellently describes stories of the success and failure of the HoF as an adjudicator. Fiseha does not, however, approach constitutional adjudication in Ethiopia with clear reference to the rule of law and its various conceptions. His

[44] Grenfell (n 27) 3.
[45] William E Nelson, George L Haskins and Herbert A Johnson, 'Emulating the Marshall Court: The Applicability of the Rule of Law to Contemporary Constitutional Adjudication' (1982) 131(2) *University of Pennsylvania Law Review* 489, 490-5.
[46] Henry P Monaghan, 'Constitutional Adjudication: The Who and When' (1973) 82(7) *Yale Law Journal* 1363, 1363–97.
[47] Ibid.
[48] Grimm (n 34) 17–21.
[49] John A Winters, 'General Principles of Constitutional Adjudication: The Political Foundations of Constitutional Law' (1968) 10 *William & Mary Law Review* 315, 320.
[50] Fiseha, 'Constitutional Adjudication through Second Chamber in Ethiopia' (n 10) 295–13.

work is rather dedicated to describing the HoF's record over three decades as an adjudicator, linking its experiences to the single and dominant ruling party in the country. Another Ethiopian scholar, Bihonegn, explains the political and adjudicative roles of the house with a focus on its practical limitations in representing groups and adjudicating cases.[51] Although this work is relevant in understanding the nature of Ethiopia's constitutional review system, it does not examine the HoF through the lens of the rule of law.

There are also some other pioneer works on Ethiopia's constitutional review system. Abebe, in his contribution on the HoF,[52] has explored 'the unique institutional and procedural aspects of constitutional review in Ethiopia' with the aim to identify the salient features of this form of review and their relationship with the country's political history. Assefa also elegantly narrates the jurisdiction of the HoF with a reference to Ethiopia's Constitution and its making process with the sole objective of demonstrating 'the intention of the makers of the Ethiopian Constitution on the scope and meaning of constitutional interpretation'.[53] Bulto and Vibhute similarly examine the Ethiopian constitutional adjudication system in their works 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory'[54] and 'Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct'[55] respectively. Bulto and Vibhute dedicate their works to explaining the jurisdictional border between the courts and the HoF over constitutional interpretation. Thus, they do not thoroughly investigate Ethiopia's non-judicial constitutional review system through the lens of the rule of law.

Furthermore, most of the previous works on Ethiopia's non-judicial review rarely refer to the cases decided by the CCI and HoF due to these institutions' poor publication and documentation culture and the resultant difficulty of accessing the relevant data. There is also a tendency to explore specific aspects of Ethiopia's constitutional review system instead of evaluating its legitimacy and prospects based on its main purpose, which is constitutionalism and hence upholding the rule of law. A thorough investigation of the implications of the Ethiopian constitutional adjudication system for the rule of law is thus a task still awaiting a scholarly undertaking. As the Ethiopian model is distinct from the widely known forms of

[51] Bihonegn (n 18) 394–11.
[52] Adem Abebe, 'Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia' in Charles M Fombad (ed), *Constitutional Adjudication in Africa* (Oxford University Press, 2017) 181, 181.
[53] Getachew Assefa, 'All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 *Journal of Ethiopian Law* 139, 139.
[54] Takele Bulto, 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory' (2011) 19(1) *African Journal of International and Comparative Law* 99, 99–23.
[55] KI Vibhute, 'Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct' (2014) 22(1) *African Journal of International and Comparative Law* 120, 120-139.

constitutional review, namely judicial constitutional review (legal constitutionalism) and legislative supremacy (political constitutionalism), it needs to be closely examined through the lens of the rule of law to evaluate its viability as an alternative.

1.7 Significance

This study complements the previous works on constitutional review in general and the role of constitutional review in the realisation of the rule of law more specifically through analysing a non-judicial constitutional adjudication mechanism. It has academic, applied and methodological significance. It has academic significance as it advances the understanding of the implications of a non-judicial constitutional adjudication mechanism for the rule of law. As Ethiopia's constitutional review system has not yet produced impactful constitutional jurisprudence, it has not drawn international attention. For this reason and due to poor publication and documentation of cases by the HoF and CCI, the existing scholarship on Ethiopia's non-judicial review is inadequate. This thesis, therefore, aims to contribute to addressing this intellectual inadequacy.

The applied significance of this study is that it offers an output that can help Ethiopia and other jurisdictions with a politically leaning constitutional review system and political constitutionalism to revisit and improve their constitutional review systems. As Ethiopia is undergoing a transition and constitutional reform is one of its most important agendas, this study is topical and contributes to the country's constitutional future.

The methodological significance is that it offers a comparative perspective on constitutional review that can be used in future studies that involve both judicial and non-judicial constitutional review. Although I focus on the Ethiopian case, this research is comparative in its background as it locates Ethiopia's complex form of review between the widely known strong and weak forms of review and evaluates its prospects as an alternative to the two.

1.8 Methodology

This research is primarily doctrinal and theoretical. It systematically analyses the relevant legal rules that govern constitutional adjudication in Ethiopia and the theories on constitutional review and the rule of law. This analysis identifies the theories of constitutional review and the rule of law that are germane to constitutional democracy and evaluates the Ethiopian model of review through the lens of these theories to understand its theoretical soundness.

This research is also socio-legal study to some degree. As Graham, Davies, and Godden aptly state, 'many socio-legal approaches do not rely on empirical research in a conventional sense but may be informed by existing empirical studies or by the textual substance of law, society and culture'.[56] I use socio-legal approach in this broad understanding of the term with a view to expounding the context in which Ethiopia's model of constitutional review functions and to examine the practicability of this review system.

1.8.1 Data collection and analysis

In this study I used document analysis as my main data collection methodology. Accordingly, qualitative data was generated through the analysis of primary and secondary sources including laws, HoF and CCI decisions, reports, law review articles, commentaries, and other sources. I then evaluated the data generated through analysing the relevant documents against relevant theories of constitutional review and the rule of law. Despite their widespread acceptance, constitutional review and the rule of law are opaque concepts. Therefore, in this thesis I first develop a theoretical framework of the two concepts. More specifically, I elaborate the different forms of constitutional review and the formal/thin and substantive/thick conceptions of the rule of law to develop a clear conceptual backdrop that guides the analysis of the implications of Ethiopia's constitutional review system for the rule of law.

There is no universally accepted definition of the rule of law. Despite its growing importance and worldwide acceptance, the concept is understood dissimilarly. Indeed, it is these diverse understandings of the concept that make it universally acceptable. The rule of law is accepted and promoted by the global north and south, liberal and authoritarian regimes, and poor and rich states.[57] However, there is no consensus on what it means exactly.[58] Chapter 2 is dedicated to elaborating this indeterminate concept with a view to develop an operational theoretical framework relevant to constitutional review.

With the methods explained above in mind, the interaction between the rule of law and constitutional review are put in perspective before Ethiopia's constitutional review system is examined considering the former. The judicial and political roles of the HoF are explicated to

[56] Nicole Graham, Margaret Davies, and Lee Godden, 'Broadening law's context: materiality in socio-legal research' (2017) 26 (4) *Griffith Law Review* 480, 483.
[57] Tamanaha (n 24) 2.
[58] Ibid 3.

highlight the peculiar feature of Ethiopia's constitutional review system and its implications for the rule of law. Inferences are drawn based on analysis of the sources mentioned above.

1.9 Structure

The remaining chapters are dedicated to examining the concepts of constitutional review and the rule of law, the relationship between the HoF and federalism, the accessibility of Ethiopia's non-judicial review, and the implications of this form of review for the rule of law.

Chapter 2 elaborates the concepts of constitutional review and the rule of law with a view to developing a workable definition of these concepts. It also aims to clarify the relationship between constitutional review and the rule of law. It concludes that, although there is no single and universally accepted definition of the rule of law, there is a progressive convergence between the formal and substantive conceptions and a rising interest in the substantive understanding of the concept. This chapter demonstrates the incomplete nature of the formal conception of the rule of law and associates constitutional review with the substantive conception.

Chapter 3 clarifies the political and judicial roles of the HoF. It also presents the context of constitutional review in Ethiopia, the composition of the HoF and the selection of members of the HoF. It then evaluates the unique features of the HoF against the concept of federalism. It concludes that, although the HoF has broad political and adjudicative roles that have the potential to foster federalism, its overall institutional design and the ethnic-based federal system under which it functions demonstrate profound inconsistency with what federalism as a principle of political organisation entails.

Chapter 4 focuses on constitutional adjudication by the HoF and its implications for access to constitutional justice. It explores the jurisdiction of the HoF, the constitutional adjudication procedures to be followed by the HoF and the CCI, and decision-making by the HoF. It also elaborates the role of the CCI and the courts in the constitutional adjudication process. It concludes that, despite the fact that Ethiopia's Constitution has broadly defined access rules, its language and the design of the HoF have substantially restricted the application of such rules. The Constitution's excessive emphasis on ethnic-based privileges rather than individual rights and the inherent limitations of the HoF and the CCI, including their incapability to meet and work on constitutional cases on a full-time basis, have undermined the Constitution's apparently liberal approach to constitutional justice.

Based on the exploration from Chapters 2 to 4, Chapter 5 examines Ethiopia's constitutional adjudication system through the lens of the rule of law. It does so to evaluate the theoretical soundness and practicability of this form of constitutional review. This chapter argues that, if a constitution is not beyond the reach of the legislature, governance is majoritarian democracy and stops short of constitutional democracy. It dissects democracy to discern its constitutional (legal) element from its political element and then associates the former with the rule of law. This chapter locates the Ethiopian model of constitutional review between the widely known strong (US and Europe) and weak (Commonwealth) forms of constitutional review and evaluates it as an alternative instrument of the rule of law. Drawing on the relevant theories on constitutional review and Ethiopia's experience in non-judicial constitutional review, this chapter concludes that this form of review is neither theoretically sound nor a practically workable alternative.

Finally, Chapter 6 offers concluding remarks. It highlights the theoretical and practical challenges with Ethiopia's non-judicial review. It further underscores that using a politically leaning constitutional review amounts to accumulation of power in the hands of those who may benefit from the outcome of the review or favour, for whatsoever reason, disregarding the rule of law. It concludes that this constitutes an assailable constitutionalism. It also recommends that the purpose of constitutional review, the rule of law, and the legal-political nature of constitutional cases should be the defining elements of a constitutional review system.

Chapter 2: Constitutional review and the rule of law

2.1 Introduction

This chapter introduces the key concepts of my thesis, the rule of law and constitutional review, which will be used later in evaluating the theoretical soundness and practical viability of Ethiopia's non-judicial constitutional review. Ethiopia follows an ethnic federal system and its population of 120 million is home to over 80 ethnic groups.[1] Ethiopia's Constitution emphasises ethnic-based group rights including the right to self-determination which extends to secession/independence.[2] The representative of Ethiopia's ethnic groups, the HoF, is constitutionally empowered to adjudicate constitutional cases.

Such a system raises the question of how the rule of law can be nurtured where ethnic diversity is a central organising element in constitutional arrangements. This chapter aims to analyse historical and contemporary perspectives on the rule of law and constitutional review to provide the necessary conceptual framework for the discussion on Ethiopia's non-judicial review and the rule of law in the coming chapters. While reference is made to Ethiopia's system of constitutional review and the rule of law in some instances, this chapter is mainly dedicated to exploring the rule of law and constitutional review in general. These concepts are dynamic and constantly evolving alongside political and social changes. The form of rule of law and constitutional review a state follows is a product of historical, political, and social circumstances. This chapter, therefore, presents historical and contemporary accounts of the rule of law and constitutional review with a view to shed light on the development of these concepts.

Constitutional review and the rule of law have become the hallmarks of constitutional democracies. Constitutional democracy entails both constitutionalism and democracy.[3] Grimm observes: 'In this combination, the constitution tends to be the weaker part.'[4] Subjection of majoritarian decisions to review by a constitutional and independent body is thus 'an attempt to make up for this weakness'.[5] It is obvious that constitutional review poses a challenge to a

[1] Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet' (2012) 22(4) *Regional & Federal Studies* 435, 438.
[2] See *FDRE Constitution*, preamble, arts 8, 39, 47, 61, 62.
[3] Dieter Grimm, 'Constitutional Adjudication and Democracy' (1999) 33(2) *Israel Law Review* 193, 212.
[4] Ibid.
[5] Ibid.

majoritarian understanding of democracy. It subjects majoritarian decisions to review by judicial or quasi-judicial bodies usually composed of unelected officials. Yet, it aims at realising constitutionalism, which both constitutes and protects constitutional values including democracy. It rectifies the deficits associated with majoritarian democracy including the majority's potential to trample on the rights of minorities. Indeed, constitutional review, or the application of the rule of law as expressed in the constitution against majoritarianism, can be justified based not only on its instrumental value to protect rights but also as an essential element of democracy. As will be elaborated in Chapter 5, the majoritarian conception of democracy is reductionist and, seen from the standpoint of its constitutional conception, democracy incorporates the rule of law as one of its fundamental elements.

Constitutional review fosters the rule of law through applying constitutional limits on political power. It generally involves review of legislative and executive decisions to check their constitutionality.[6] In most democracies with a written constitution, constitutional review is guided by the principle of the supremacy of the constitution. Maintaining this principle requires nullification of unconstitutional laws and decisions. Enforcing such constitutional limits on political power is key to the realisation of the rule of law in modern constitutional democracies. Despite this strong correlation between the rule of law and constitutional review, there is a dearth of in-depth consideration of their intersection in the context of diverse constitutional review mechanisms. Most of the scholarship on constitutional review focuses on judicial constitutional review or constitutional review by courts (either regular or constitutional courts). An inquiry into the interaction between constitutional review and the rule of law cannot be comprehensive without a reference to diverse mechanisms of constitutional review including non-judicial review, the Ethiopian model.

There is a huge divergence of opinion among theorists concerning the scope and nature of constitutional review and the rule of law. Historical, social, and political realities explain such divergence. The human misery caused by authoritarian and oppressive regimes in the first half of the 20th century is usually mentioned by advocates of the substantive conception of the rule of law to explain the shortcomings of formal rule of law,[7] while the formalists defend their conception by referring to scenarios where modern authoritarian regimes adhere to the rule of

[6] Tom Ginsburg, 'The Global Spread of Constitutional Review' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 81, 81.
[7] See, eg, Ronald M Dworkin, 'What Is the Rule of Law?' (1970) 30(2) *Antioch Review* 151, 151–3.

law (in its formal sense).[8] Protection of civil, political and socio-economic rights through written constitutions has also significantly shaped our understanding of the rule of law.

Constitutional review is not immune from the influence of specific contexts either. While countries with a written and supreme constitution like the United States use judicial review to enforce constitutional limits on political power, the lack of such a sacred constitutional document and the concept of parliamentary sovereignty in countries like the UK prevent courts from invalidating legislative Acts. Constitutional review by uniquely designed institutions like the House of Federation (HoF) in Ethiopia and Constitutional Council (Conseil constitutionnel) in France are also good examples of how specific political, social and historical circumstances shape constitutional review systems. The coming to power of ethnic-based liberation fronts in 1991 in Ethiopia resulted in an ethnic federal system and a constitutional review mechanism which is composed of representatives of ethnic groups,[9] while the pre-eminence given by the framers of 1958 French Constitution to the separation of powers between the legislative and executive branches led to the establishment of the Constitutional Council.[10] Yet, the Constitutional Council of France eventually transformed from an institution whose role was limited to overseeing the separation of political power between the legislative and executive branches into a constitutional court-like body following expansion of the scope of its power in 1971 and again in 2010 as a result of its own ruling and constitutional amendment particularly as to the protection of individual rights.[11]

The rule of law and constitutional review are also influenced by customary law and traditional institutions particularly in countries with a plural society. Constitutions of multicultural states such as South Africa recognise customary law and traditional institutions, if not unreservedly. As the concepts of the rule of law and constitutional review are continuously shaped by the contexts they operate in, I explore the different understandings of these concepts with a reference to historical and contemporary perspectives.

This chapter, therefore, analyses the advancement of these concepts with the aim to develop a theoretical framework that guides the following chapters. It argues that there is some degree of

[8] See, eg, Jeremy Waldron, 'The Rule of Law in Contemporary Liberal Theory' (1989) 2(1) *Ratio Juris* 79, 93-4.
[9] See, eg, Lovise Aalen, 'Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: The Case of Ethiopia' (2006) 13(2–3) *International Journal on Minority and Group Rights* 243, 243–9.
[10] Marcel Waline, 'The Constitutional Council of the French Republic' (1963) 12(4) *American Journal of Comparative Law* 483, 485.
[11] See Arthur Dyevre, 'The French Constitutional Council' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 323, 328.

convergence between the formal and substantive conceptions of the rule of law, and that constitutional review should serve the substantive conception because the formal conception is not self-sufficient. It also explains the growing interest powerful international organisations and constitutional democracies have shown in the substantive conception of the rule of law. Moreover, this chapter illustrates the strong relationship between the rule of law and constitutional review. As these concepts are opaque and contested, this chapter aims to thoroughly analyse and elaborate them. Accordingly, the next section expounds the historical development of these concepts. Then Section 2.3 focuses on the formal and substantive conceptions of the rule of law. Section 2.4 explains the relationship between constitutional review and the rule of law. Then, Section 2.5 presents different forms of constitutional review and their implications for the rule of law. Section 2.6 concludes that the formal conception of the rule of law is not self-sufficient, and that the institution of constitutional review is linked to the substantive conception.

2.2 History of the rule of law and constitutional review

While the history of the rule of law can be traced back to Ancient Greek political thought,[12] constitutional review is a relatively recent phenomenon. As constitutional review has been introduced as a key instrument of maintaining constitutional supremacy and hence the rule of law, it came later with modern written constitutions. With this in mind, I elaborate the history of the rule of law first and constitutional review next. Discussing the history of the rule of law and constitutional review is important as these concepts are, to some extent, a product of social and political contexts and are not pure abstract concepts. In Chapter 5, we will see how Ethiopia's social and political history has influenced its institutions of constitutional review and its conception of the rule of law.

2.2.1 History of the rule of law

Historical accounts of the rule of law can be traced to ancient political thought. According to Lewin, 'the rule of law first becomes a subject for debate in fifth century BC Greece'.[13] The deliberations about law in Ancient Greece, and Athens more specifically, depict some aspects of the rule of law.[14] Both Plato and Aristotle asserted that the rule of law is better than the rule

[12] Christopher May, 'The Rule of Law: Athenian Antecedents to Contemporary Debates' (2012) 4(2) *Hague Journal on the Rule of Law* 235, 236.
[13] Shirley R Letwin, *On the History of the Idea of Law* (Cambridge University Press, 2005) 238.
[14] May (n 12) 238–40.

of men.[15] As the overarching system was the *polis* composed of all male citizens of age in the fifth century BC in Athens and because such a system was governed by direct democracy (law being the product of citizens),[16] 'democracy was synonymous for the Athenians with the "rule of law"'.[17] The principle of equality before the law was an indispensable value for male citizens of Athens; the law recognised women, non-citizens and slaves differently though.[18]

Although Athens demonstrated some features of the rule of law, its supreme ideal was majoritarian democracy. According to Tamanaha, the problem with such a popular system 'is that democracies can be as tyrannical as absolute monarchies'.[19] Athenians tried to address this tension between majoritarian democracy and the rule of law by recognising some pre-existing laws as sacred (an entrenched constitution) and thus not subject to frequent change by courts or assemblies.[20] Plato and Aristotle also expressed serious concern about the risks associated with popular rule.[21] They emphasised government bound by law, which is related, if not identical, to the present day formal version of the rule of law; and the modern substantive accounts of the rule of law were present in Plato's assertion 'that the laws which are not established for the good of the whole state are bogus law'.[22] Though Aristotle preferred the rule of law to the rule of men, he was also sympathetic to Athenian democratic values.[23] In modern democracies, the alleged tension between democracy and the rule of law is often claimed in politically sensitive constitutional cases. Aristotle's discussion is thus still relevant for appreciating the dynamic role of the rule of law in constitutional democracies.[24] In Chapter 5, I explain the legal-political nature of constitutional controversies but reject the characterisation of constitutional review as a difficulty involving a conflict between democracy and constitutionalism. I do so by treating constitutionalism or the rule of law as an essential and superior element of democracy under which majoritarianism, the second element of democracy, operates.

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[15] Ibid 240.
[16] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 7.
[17] John W Jones, *The Law and Legal Theory of the Greeks* (Clarendon Press, 1956) 90, quoted in Tamanaha (n 16) 7.
[18] Georgios Anagnostopoulos, *Democracy, Justice, and Equality in Ancient Greece Historical and Philosophical Perspectives* (Springer International Publishing, 2018) 2–6.
[19] Tamanaha (n 16) 8.
[20] Ibid.
[21] Ibid.
[22] Aristotle, *Nicomachean Ethics*, tr Terence Irwin (Hackett, 1985) 117, quoted in Tamanaha (n 16) 9.
[23] Steve Wexler and Andrew Irvine, 'Aristotle on the Rule of Law' (2006) 23(1) *Polis: The Journal for Ancient Greek Political Thought* 116, 116–20.
[24] Ibid 116.

The first-century Roman lawyer and philosopher Cicero is also among the giant minds in the development of the rule of law. Like Plato, Cicero's political and legal dialogues were based on 'the rule of reason'. As Miller states, Cicero considered 'the law as a codification of reason which is based on the ideal of natural reason'.[25] For Cicero, a king who disregards the law is a despot and 'it is the law that rules, not the individual who happens to be the magistrate'.[26] According to him, as the rule of reason (natural law) is the underpinning of law, law must be just and protect the good of the society.[27] The codification and compilation of Roman law and the writings of jurists at the direction of Emperor Justinian in the sixth century is also worth mentioning. Although the emperor was above the law in principle, as set out in the Justinian Code, 'in practice the law still mattered and imposed constraints on regal conduct'.[28] Tamanaha observes: 'it was generally understood that the emperor, when not exercising his law-making power, was subject to the framework of the legal tradition'.[29] He adds that emperors had minimal involvement 'in actual law making' as their 'legislation consisted mostly of edicts and decrees prepared by jurists'.[30]

According to Couser, 'a series of law codes' were also introduced in the early medieval period, 'for the new "barbarian" kingdoms of Europe, which succeeded the Western Roman Empire'.[31] These codes were largely inspired by Roman law and the customs of the respective peoples for whom the codes were written.[32] Some of these customs were antagonistic to the Roman legal tradition which placed the emperor above the law. As Tamanaha puts it, 'The German customary law proposition that the king is under the law has been widely identified as an independent source of the rule of law in the Medieval Period'.[33]

The other notable contribution to the development of the rule of law is Magna Carta, which was written and signed in 1215, and then altered and issued subsequently in 1216, 1217 and 1225.[34] Magna Carta is of great importance to the understanding of the rule of law as it laid the

[25] Fred D Miller Jr, 'The Rule of Reason in Cicero's Philosophy of Law (Marcus Tullius Cicero)' (2014) 33(2) *University of Queensland Law Journal* 321, 332.
[26] Tamanaha (n 16) 11.
[27] Ibid.
[28] Ibid 14.
[29] Ibid 13.
[30] Ibid.
[31] Jonathan Couser, '"Let Them Make Him Duke to Rule That People": The Law of the Bavarians and Regime Change in Early Medieval Europe' (2012) 30(3) *Law and History Review* 865, 865.
[32] Ibid.
[33] Tamanaha (n 16) 23.
[34] James Spigelman, 'Magna Carta: The Rule of Law and Liberty' (2015) 31(2) *Policy: A Journal of Public Policy and Ideas* 24, 24.

foundation for individual rights, which now form the core of the substantive version of the rule of law. This Middle Ages charter can thus be linked to the modern thick version of the rule of law as it proclaimed both a substantive promise of the freedom of the Barons of England and procedural safeguards.[35] 'Liberties granted to all free men and binding King John and his heirs' were at the core of Magna Carta.[36] As Spigelman puts it, 'From the point of view of the rule of law, nothing was more critical than the proposition that the King was subject to the law'.[37] The content of the charter was largely directed to restraining the king's power over 'tenure and social structure' in relation to revenue raising.[38] According to Spigelman, provisions of the charter set 'restrictions on the exercise of powers that were a product of the complex of mutual rights and obligations attached to the possession of land — which was "held" from a superior'.[39] Magna Carta thus has a significant place in the history of the rule of law in general and the supremacy of the law over arbitrary action more specifically.

The 17th- and 18th-century works of Locke and Montesquieu also significantly influenced the development of the rule of law. Locke and Montesquieu considered law as an essential instrument to realise freedom.[40] Locke's idea of 'a limited delegation of power' aimed at protecting the public good (the property and freedom of all members of the society) from an 'absolute arbitrary power'.[41] Although the independence of the judiciary and concrete limits on law-making power are missing in Locke's design, his idea of freedom under the law where the delegated making, execution and application of law are for the protection of freedom[42] seems to be still resonating. Montesquieu concurred with Locke on the relationship between law and freedom. 'Freedom and security', according to Montesquieu, are the main 'values guaranteed to individuals by law's protection against arbitrariness'.[43] Laws can be severe and undermine such values. That is why Montesquieu went further and asserted that 'Liberty exists only if people are secure from tyranny'.[44] He also indicated that there should be strict adherence to law in making judgments.[45] To restrict the power of judges, he suggested that they should

[35] Jesús Fernández-Villaverde, 'Magna Carta, the Rule of Law, and the Limits on Government' (2016) 47 *International Review of Law and Economics* 22, 22.
[36] Spigelman (n 34) 25.
[37] Ibid.
[38] Ibid 26.
[39] Ibid.
[40] Pietro Costa, *The Rule of Law: History, Theory and Criticism* (Springer Netherlands, 2007) 78.
[41] Tamanaha (n 16) 49.
[42] Ibid.
[43] Costa (n 40) 78.
[44] Tamanaha (n 16) 52.
[45] Ibid 53.

be selected 'from the people for a temporary duration'.[46] Though the judicial system he suggested was 'a sort of occasional assembly'[47] and not a professional and permanent one, Montesquieu's theory of the separation of powers and his emphasis on the judiciary as the guardian of the rule of law remain valid.

The other significant contribution to the development of the rule of law is *The Federalist Papers.* Although it was written by the framers of the US Constitution (Madison, Hamilton and Jay) to advocate approval of the proposed federal Constitution of the US, its discussion on the threats inherent in a majoritarian democracy and institutional mechanisms to strike the right balance between such a form of democracy and individual liberties remains pertinent.[48] Representative democracy, separation of powers (horizontally and vertically) and judicial review were the three key institutional mechanisms explained by *The Federalist Papers*.[49] While the first two institutional mechanisms are clearly set out in the US constitution, the third one was developed by the federal Supreme Court through its landmark decision in *Marbury v Madison* based on the spirit of the Constitution.[50] However, this institutional mechanism was articulated by the framers of the Constitution long before it was realised by the Supreme Court. In *Federalist Papers* No. 78, Hamilton explained that constitutional limits on law making 'can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void'.[51] Although they may take different forms, representative democracy, separation of powers and judicial review are key instruments in modern constitutional democracies for the realisation of the rule of law.

The transition to the modern conception of the rule of law began with the prominent formulation of the concept by the English legal theorist Dicey late in the 19th century.[52] Though Dicey's definition is criticised because it 'failed to include the imperative of the independence of the judiciary'[53] and it was 'concerned no more than to describe the principles of the English

[46] Ibid.
[47] Iain Stewart, 'Men of Class: Aristotle, Montesquieu and Dicey on Separations of Powers and the Rule of Law' (2004) 4 *Macquarie Law Journal* 187, 198.
[48] Tamanaha (n 16) 55.
[49] Ibid 54.
[50] *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).
[51] Alexander Hamilton, *The Federalist Papers* (Palgrave Macmillan US, 2009) 119.
[52] Tamanaha (n 16) 63.
[53] Ada O Okoye, 'The Rule of Law and Sociopolitical Dynamics in Africa' in Paul Zeleza and Philip McConnaughay (eds), *Human Rights, the Rule of Law, and Development in Africa* (University of Pennsylvania Press, 2004) 71, 72.

constitution',[54] it has continued to influence the concept of the rule of law in the 21st century.[55] Dicey's definition of the rule of law has three essential elements:[56]

> in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power …; It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; lastly … the law of the constitution [is] … not the source but the consequence of the rights of individuals, as defined and enforced by the Courts;[57]

It should be noted that here Dicey was writing about the English Constitution, which is not a written document unlike most constitutions. The UK does not have constitutional judicial review in the same way as other countries with a written and supreme constitution do. As Dicey's conception of the rule of law is in line with the principle of parliamentary sovereignty, the courts take second place to the Parliament. They interpret and apply parliamentary Acts but cannot refuse to give them effect. According to Dicey, the courts apply the law equally against ordinary individuals and state officials and thus maintain its supremacy over arbitrary power.

The first two elements in Dicey's definition — supremacy of the law and equality before the law — are still at the centre of the modern conception of the rule of law. While Dicey's conception of the rule of law appears to emphasise procedural and institutional mechanisms, it is not devoid of substance. According to Dicey, rights of individuals including 'the right to express one's opinion' and 'the right to enjoy one's property' form part of 'the law of the land'.[58] He claims that 'Where … the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.'[59] Yet his conception lacks a concrete limit on the legislature.

Although the historical development of the rule of law featured some substantive values like freedom, security and public good from the time of Ancient Greece to Dicey (the late 19th century), the formal understanding of the concept was perhaps prevalent for some decades from the early 20th century. The human misery that occurred under the laws of authoritarian

[54] Yash Ghai, 'The Rule of Law, Legitimacy and Governance' in Yash Ghai, Robin Luckham and Francis G Snyder (eds), *The Political Economy of Law: A Third World Reader* (Oxford University Press, 1987) 253, 256.
[55] Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge University Press, 2013) 3.
[56] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, 1902) 198.
[57] Ibid 198–9.
[58] Ibid 197.
[59] Ibid.

and oppressive regimes in the first half of the 20th century revealed the risk associated with the substantively empty conception of the rule of law. Such misery would not have occurred utterly unabated had there been enforceable substantive constitutional limits in place and an independent mechanism to enforce these limits. The substantively empty conception of the rule of law was also used in the context of colonialism. Colonial rule, as a state-oriented project, was alien to substantive values like freedom. Yet, 'civilising law and order has been an important part of the justification of colonialism'.[60] However, as Okoye observes, 'Since the colonisation process was chiefly an economic adventure, even the legal superstructures established to legitimise the rudimentary, dependent capitalist structures could not operate equally in favour of all.'[61] Yet, according to them, the subjection of customary law in British African colonies 'to the test of natural justice, equity and good conscience' resulted in prohibition of what the British considered to be harmful traditional practices and helped the rule of law start gaining ground.[62] As Grenfell states, 'Practices such as polygamy and slavery were characterised as "uncivilised" and therefore unacceptable.'[63]

Although colonial powers claimed to bring a civilising law and order to their colonies, its implementation was flawed. Nor did colonial rule allow customary law to function in a meaningful way. Although customary law could function in British colonies, that was to the extent it was consistent with Western values 'supposedly representing civilisation'.[64] Colonialism has weakened customary laws and institutions by qualifying or disqualifying them. The decline of 'informal processes of resolving conflict',[65] coupled with state-oriented law, undermined access to justice. As law was used primarily as an instrument to achieve state objectives, there was a dearth of mechanisms through which individuals could use law to defend their rights.[66] For example, judicial independence was absent. In Kenya, for instance, the British Governor 'controlled the judges, who had no tenure and held their offices, like other civil servants at the pleasure of the Crown'.[67] According to Ojwang and

[60] Martin Chanock, 'The Law Market: The Legal Encounter in British East and Central Africa' in WJ Mommsen and JA De Moor (eds), *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Africa and Asia* (Bloomsbury, 1992) 279, 280.
[61] Okoye (n 53) 75.
[62] Ibid 76.
[63] Grenfell (n 55) 15.
[64] Ibid 16.
[65] Melissa Gang, 'Culture, Conflict Resolution and the Legacy of Colonialism' (MA thesis, American University, 2010) ii.
[66] Grenfell (n 55) 16.
[67] JB Ojwang and G Kamau Kuria, 'The Rule of Law in General and Kenyan Perspectives' (1975) 7–9 *Zamba Law Journal* 109, 117.

Kuria, 'administration' constituted the main facet of public life and 'The colonial judiciary was in many respects an auxiliary wing of the administration'.[68]

As Grenfell explains, colonialism did not employ the rule of law as its main state-shaping concept; the positivists used 'civilisation' in explaining the modern state as a source of law and 'civilised institutions' were considered necessary for a state to 'enjoy and assert sovereignty'.[69] Yet the concept of civilisation seems to have continued to influence the contemporary understanding of the rule of law.[70] The expressions 'civilised states', 'civilised nations', and 'general principles of law recognised by civilised nations' remain relevant in the 21st century[71] and are usually used to refer to a context where the rule of law is a governing ideal.

Colonialism has, on the other hand, left behind post-colonial political societies which are prone to anarchy. As Samuels states, colonialism has negatively affected the 'institutional capacity of African states'.[72] According to him, colonialism relied on a strong and centralised rule, 'in contrast to precolonial African states' use of local traditions and institutions to govern'.[73] The natural development of these traditions and institutions was disrupted and 'many African countries inherited a shell of the centralized system; the system was there, but capacity was not'.[74]

Although Ethiopia, the subject of my thesis, successfully defeated colonialism and maintained its state and traditional institutions until the second half of the 20th century, the military socialist regime, Dergue, which seized power by force in 1974, interrupted the natural development of its political system. The 1960–74 Ethiopian Student Movement and urban-based protests did not lead to a peaceful transition to democracy as they were hijacked by the military. The bumpy road to the rule of law and democracy in present-day Ethiopia can be attributed mainly to such use of military means for regime change. Ethiopia's current constitutional system is similarly an outcome of liberation fronts' military triumph over the

[68] Ibid.
[69] Grenfell (n 55) 16.
[70] Ibid 17.
[71] Ibid.
[72] Joel Samuels, 'The Legacy of Colonialism on the Rule of Law in Sub Saharan Africa' in American Society of International Law, *Proceedings of the ASIL Annual Meeting* (Cambridge University Press, 2019) 63, 64.
[73] Ibid.
[74] Ibid.

Dergue regime. I will explain this in detail in Chapter 3. It is still apt at this juncture to provide a brief sketch of Ethiopia's historical accounts of the rule of law.

2.2.2 Ethiopia's historical accounts of the rule of law

Ethiopia, as a non-colonised African state and one of the oldest civilisations in the world with a well-documented history of over three thousand years,[75] was able to retain its traditions and old institutions until the removal of King Haile Selassie I in 1974 by the Dergue. Since Christianity came to Ethiopia in the 1st century AD[76] during the Aksumite period, religion has, alongside tradition, played a crucial role in shaping the Ethiopian state and its law.[77] The 14th-century 'Kebra Nagast (Glory of Kings)' and the 17th-century 'Fetha Nagast (Legislation of Kings)', which was originally written in the 13th century, served as the basis of the country's law[78] until Ethiopia introduced its first modern Constitution in 1931.

While these documents never subjected the king to the law, they were important sources of authority without which the people would not have obeyed the law. The Kebra Nagast, as an 'authority for the descent of the kings of Ethiopia from Menilek I, son of Solomon and Makeda, Queen of "Sheba"', and the Fetha Nagast, as a compendium of religious and secular laws,[79] thus served as important sources of allegiance to the law. This can be seen as a positive contribution to the development, at least in form, of the rule of law in the country.

Ethiopian kings also took some actions that could serve the substantive aspects of the rule of law, such as human rights, albeit in a limited way for the kings had absolute power. Among the earlier contributions to the development of the rule of law in the country in this regard were the slave trade elimination decree of Emperor Theodros (1855–68), the imposition of severe sanctions against the slave trade by Emperor Menelik II (1889–1913), Ethiopia's admission to the League of Nations in 1923 with the stipulation that it 'makes particular

[75] Tsegaye Beru, 'Brief History of the Ethiopian Legal Systems — Past and Present' (2013) 41(3) *International Journal of Legal Information* 335, 335.
[76] Christianity was Ethiopia's official religion from the 4th century to the second half of the 20th century.
[77] Beru (n 75) 338.
[78] GWB Huntingford, 'The Constitutional History of Ethiopia' (1962) 3(2) *Journal of African History* 311, 311–15; Beru (n 75).
[79] Huntingford (n 78) 312.

efforts to ensure the suppression of slavery in all its forms', and the adoption of the 1931 Constitution.[80]

In the 1960s, which is usually referred to as the era of codification in Ethiopian legal history, the country introduced substantive and procedural codes, most of which are still in force. These codes aimed to create a modern and uniform legal system in the country. There was significant legal transplantation to that effect. Yet, the codification process was not ignorant of legal pluralism. The largest code in the country, the civil code, which is still in force, refers to local custom.[81] However, local custom has only a subsidiary or gap-filling role in the determination of the rights and duties established by the code. The code has remained the main source of substantive rights and duties hitherto despite the annulment of some of its chapters following constitutional changes. In addition to the substantive rights and duties, procedural safeguards which aim to ensure fair trials have also been introduced through the country's civil and criminal procedure codes. Although most of the procedural safeguards and substantive rights and duties were established in the 1960s, sovereign power remained in the king's hands and the legislative, executive and judicial branches were subject to him.

The violent overthrow of the imperial regime by the Dergue and the move from a monarchical to a socialist military regime and then to an ethnic-based federal system saw the introduction of a polarised political system which is defined by ethnicity. As will be explained in the coming chapters, this new political system has severely inhibited the development of the rule of law in the country, signifying a need for further transition.

Ethiopia's political system in general and its non-judicial constitutional review in particular raises the question of how the rule of law can be built/strengthened where ethnic diversity is a central organising element in constitutional arrangements. As indicated earlier, Ethiopia's over 80 ethnic groups are represented through the HoF, which is the constitutional review body in the country. Although Ethiopia's current Constitution was adopted late in the 20th

[80] Beru (n 75) 349.

[81] An introductory section in the country's largest code, the Civil Code, which is still in force, reads: 'No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice. In preparing the Civil Code, the Codification Commission … has constantly borne in mind the special requirements of Our Empire and of Our beloved subjects and has been inspired in its labours by the genius of Ethiopian legal traditions and institutions as revealed by the ancient and venerable Fetha Nagast.' Local custom is also recognised as a gap-filling instrument elsewhere in the code.

century in the post–Cold War era, which has witnessed a proliferation of courts with constitutional jurisdiction in Africa,[82] it introduced a non-judicial constitutional umpire.

As indicated before, the contemporary conception of the rule of law arose in the late 20th century and, like constitutional review, has been highly promoted ever since.[83] The rule of law has now become an important source of legitimacy in governance. As Grenfell observes, the rule of law is promoted 'as a universal good because it conveys a host of principles, such as constitutionalism, that are considered to have been instrumental in strengthening the developed world and its state institutions'.[84] The international community has also focused on the rule of law to tackle the multitude of problems faced by states undergoing transition.[85] Though the rule of law is identified as 'a key factor in development'[86] and has perhaps become a universally accepted concept cheered on both by the global north and south, the controversy over what it means exactly seems to remain unsettled, as elaborated in Section 2.3.

2.2.3 History of constitutional review

As indicated earlier, compared to the rule of law, constitutional review is a recent occurrence. Its development is tied to the evolution of constitutionalism. Constitutionalism is a political philosophy that emerged in England in the 17th century and was then embraced by North America and Western Europe[87] until it became a prominent governance doctrine worldwide since the second half of the 20th century. Since its inception, Western constitutionalism has aimed to '[limit] political power through the acquisition of three legal tools: i) the adoption of a written constitution, ii) … the separation of powers of the state, [and] iii) … individual rights'.[88] Most liberal democracies have a written constitution with a bill of rights. Unlike other liberal democracies with a written constitution, Australia has no a constitutional bill of rights; yet, its Constitution protects certain human rights through a few explicit rights it articulated

[82] Charles M Fombad, 'Introduction' in Charles M Fombad (ed), *Constitutional Adjudication in Africa* (Oxford University Press, 2017) 1, 1.
[83] Grenfell (n 55) 3.
[84] Ibid.
[85] Ibid.
[86] Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008) 12.
[87] Andrea Buratti, *Western Constitutionalism: History, Institutions, Comparative Law* (Springer International Publishing, 2nd ed, 2019) 2.
[88] Ibid.

and additional rights implied by its language and structure.[89] Be it explicit or implicit, individual rights form an integral part of a constitutional democracy. According to Buratti, constitutionalism is the by-product of natural law, contractarianism and liberalism.[90] As these underpinnings of constitutionalism aim to achieve substantive values[91] and because constitutionalism fosters the rule of law through, among other methods, enforcing individual rights via constitutional review, there is a clear connection between constitutionalism (and hence constitutional review) and the substantive or thick conception of the rule of law. I will further clarify this in the next section.

The modern conception of constitutional review was first proposed in 1803 in the US Supreme Court's landmark decision of *Marbury v Madison*.[92] The US Supreme Court held it had the power to invalidate legislation and this decision introduced a concrete protection for individuals from unconstitutional legislative Acts. Such a strong judicial review is not part of the UK constitutional system where the courts cannot invalidate Acts of Parliament due to the principle of parliamentary supremacy. As Smith states, the case of *Marbury v Madison* is 'America's contribution to the democracy of the world' and 'it for the first time protected the individual against the aggression, not only of the executive, but of the legislature'.[93] According to him, demagogues (populists) could have abused their power and affected the freedom and property of individuals had there not been such a controlling mechanism introduced by this decision.[94]

Since *Marbury v Madison*, constitutional review has become one of the hallmarks of the US constitutional system and, eventually, of most modern constitutional democracies. As Mandel puts it, 'What defines modern constitutionalism — what makes it "modern" is the transformation in the relations between courts and representative institutions'.[95] Representative institutions with unlimited sovereign power have been demoted to institutions constrained by

[89] George Williams and David Hume, *Human Rights Under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 112–6. Although the *Australian Constitution* explicitly recognises only a few and limited individual rights (the right to vote, property, a trial by jury, freedom of religion and protection against discrimination based on state of residency – see *Australian Constitution* ss 41, 51 (xxxi), 80, 116, and 117), the High Court of Australia has discerned additional rights implied by the language and structure of the Constitution.
[90] Buratti (n 87) 2.
[91] Ibid.
[92] F Dumont Smith, 'Decisive Battles of Constitutional Law: I. Marbury vs. Madison (1st Cranch, 137)' (1923) 9(2) *American Bar Association Journal* 109, 109–11.
[93] Ibid 111.
[94] Ibid.
[95] Michael Mandel, 'A Brief History of the New Constitutionalism, or "How We Changed Everything So That Everything Would Remain the Same"' (1998) 32(2) *Israel Law Review* 250, 251.

constitutional limits found in rigid compacts.[96] Such limits are enforced through courts and other tribunals which 'do not only enforce the law but actually determine it'.[97] Constitutional review by courts, constitutional courts or other quasi-judicial bodies is thus quite dissimilar to 'normal judicial business'[98] as it entails 'legalisation of politics' and hence 'moves the locus of political activity out of the parliaments and into the courts [or quasi-judicial bodies]'.[99]

Although the US Supreme Court was the first constitutional review body to protect an individual from an unconstitutional Act introduced by a legislature, unsuccessful attempts were made in France to impose limitations on law making through constitutional review long before *Marbury v Madison*. After exercising a power — of course subject to the sovereign power of the king — over royal acts from the 15th to 18th centuries and developing a culture of judicial review 'by invoking the protection of the monarchy's constitution', judges became insignificant in the aftermath of the French Revolution.[100] They were condemned for seizing 'the role of representing the nation, which — according to the revolutionary spirit of 1789 — solely lay with the legitimately constituted bodies'.[101] Following the revolution, judicial, administrative and legislative powers were clearly separated and judges were prohibited from impairing the 'exercise of administration in any way' and invalidating laws confirmed by the king.[102]

French constitutional history indicates that the courts have not always been understood as the only vehicle for constitutional review. Of note is the proposal made by Abbé Sieyès, during the deliberation on the French Constitution of 1795, to introduce a new and representative arbiter of 108 members, the '*Jurie constitutionnaire*', with the power to invalidate unconstitutional acts of the legislative, executive and judicial branches.[103] His rejected proposal aimed at establishing not only a supreme but also legitimate arbiter.[104] This body is similar, if not identical, to the current constitutional review body in Ethiopia, the House of Federation, and the largely dormant constitutional review mechanism in China. The Senates in France

[96] Ibid.
[97] Ibid.
[98] William Brennan, 'Constitutional Adjudication' (1964) 40 *Notre Dame Lawyer* 559, 559.
[99] Mandel (n 95) 251.
[100] Olivier Jouanjan, 'Constitutional Justice in France' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press, 2020) 223, 227–29.
[101] Ibid 229.
[102] Ibid.
[103] Ibid 230.
[104] Ibid.

(from the 19th century to the first half of the 20th century) and Brazil (1824–91) also served as constitutional review bodies.[105] Such bodies may in some sense appear democratically more legitimate than courts. However, if one considers democracy from the standpoint of not just majority rule but also people rule, as will be explained in the following chapters, majoritarianism is not the sole source of democratic legitimacy. Furthermore, as political bodies, majoritarian institutions lack independence, and their decisions may not guarantee substantive protection of the rights of minorities. This raises the question of their ability to realise the rule of law in the same manner as independent courts performing constitutional review.

While the modern conception of constitutional review was introduced over two hundred years ago by the US Supreme Court, it has been widely adopted by the international community only since the second half of the 20th century. The development of constitutional review in the post–World War II period can be linked to the democratisation process. Constitutionalism plays an important role in mitigating the excesses of majoritarian democracy and, viewed through the prism of people rule, constitutional review can be considered as a democratic exercise. The upsurge of anti-democratic forces in the 1930s and 1940s can be associated with lack of constitutional review and thus constitutionalism.[106] As Mandel explains, when Germany and Italy moved from Nazism and Fascism to representative democracy after World War II, under the victors' influence, 'they also incorporated "rigid" (legally binding, judicially enforceable) constitutions with Bills of Rights and judicial review'.[107] This helped constitutionalism develop in other European countries.[108]

Constitutional review has gained ground in Africa through post-colonial and post–Cold War constitutions.[109] After independence, most African states introduced constitutions which protect civil and political rights and/or socio-economic and cultural rights depending on their inclination to liberalism or socialism.[110] The end of the Cold War, which led to the demise of

[105] Belachew Girma, 'Constitutional Adjudication by Parliaments: Lessons from Comparative Experience' (2018) 12(1) *Mizan Law Review* 29, 29.
[106] Mandel (n 95) 258.
[107] Ibid 256.
[108] Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Central European University Press, 2002) 1.
[109] John Mbaku, 'Constitutional Engineering and the Transition to Democracy in Post–Cold War Africa' (1998) 2(4) *Independent Review* 501, 501–3.
[110] Okoye (n 53) 76.

apartheid in South Africa and the downfall of dictatorships in many African countries in the 1990s, opened the opportunity for the development of constitutionalism in Africa.[111]

While countries like South Africa have developed a strong constitutional review system since then, post–Cold War constitutions in countries like Ethiopia have failed to realise the same. Even though Ethiopia introduced its current Constitution in 1995 following the downfall of the socialist regime (Dergue) in 1991, group rights including the right to self-determination up to secession are at the centre of its federal system alongside civil, political and socio-economic rights. Although these group rights operate to enhance the autonomy of ethnic groups in the country, there are also risks associated with them. Since Ethiopia introduced its current ethnic federal system three decades ago, conflicts between ethnic groups and parties representing ethnic groups have become more common than before this system was introduced. Generally, constitutions are designed with the aim of preventing conflict. Ethiopia's constitutional structure seems to have serious limitations in this regard.

Although they differ in form, capacity, and the extent to which they transform state and society, constitutional review mechanisms have become globally prominent. Over 160 states have constitutional review mechanisms, of which 76 are constitutional courts.[112] Most of the remaining states use their ordinary courts, while Ethiopia has opted for a representative political body, the HoF. This indicates that there is no one constitutional review system that fits all contexts. Yet, due attention should be given to a comparative assessment of constitutional review systems to draw relevant lessons from successes and failures.

2.3 Formal and substantive conceptions of the rule of law

Although there is no universally agreed and single definition, the rule of law is considered in the 21st century one of the fundamental principles of governance.[113] It is a concept accepted, if not always adhered to, by liberal and authoritarian systems, developed and developing countries, and national and international decision-making bodies. The rule of law is also one of the top program areas of development agencies operating particularly in developing

[111] Mbaku (n 109) 501.
[112] Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber, 'Constitutional Adjudication in the European Legal Space' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law:* Volume III: Constitutional Adjudication: Institutions (Oxford University Press, 2020) 1, 2
[113] Christopher May and Adam Jeremiah Winchester, *Handbook on the Rule of Law* (Edward Elgar, 2018) 1.

countries. Its ever-growing acceptance and importance have not, however, led to consensus on its content.

The rule of law is understood in various ways. That has perhaps contributed to the worldwide acceptance of the concept, for authoritarian regimes would have hesitated to accept the rule of law had it been presented with all the substantive requirements associated with it. While there are various conceptions of the rule of law, theorists generally categorise them as formal and substantive (or 'thin' and 'thick') conceptions. In the 21st century, the rule of law seems to be getting thicker than ever before due to growing support for a broader understanding of the concept with a reference to civil, political and socio-economic rights. This section offers an overview of the formal and substantive understandings of the concept with a view to illustrate its ever-expanding scope.

2.3.1 The formal conception

The formal version of the rule of law does not judge the content of the law. As Craig explains, this version of the rule of law is concerned with 'the manner in which the law was promulgated …; the clarity of the ensuing norm …; and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.)'.[114] The formal version generally entails generality, prospectivity, stability and predictability of laws, equality before the law and no-one being above the law. Independent determination of the law by the courts is usually considered a key institutional instrument to realise the elements of the formal version. It should however be noted that this version has different forms that range from the thinnest understanding, which is perhaps less concerned with limiting government power and ensuring legal stability, to one which accommodates values like majoritarian democracy. The thinnest meaning of the formal version of the rule of law considers 'all utterances of the sovereign' as law.[115] This form of the formal version 'carries scant connotation of legal *limitations* on government' and the law in this case 'exists not to limit the state but to serve its power'.[116] That is why this thinnest form of the formal version is sometimes referred to as 'rule *by* law'.[117] As Tamanaha puts it, 'Understood in this way, the rule of law has no real meaning, for it collapses into the notion of rule by the government'.[118] While such understanding of the rule of law is arguably supported

[114] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467, 467.
[115] Tamanaha (n 16) 92.
[116] Ibid 92–3.
[117] Ibid 92.
[118] Ibid.

by some states like China,[119] the idea of limited government in its narrow sense (formal legality) remains integral to the formal conception of the rule of law. The contemporary formal conception of the rule of law seems to rely not only on formal legality but also democracy (at least in its procedural sense). Formal legality tends to rely on procedural democracy for its legitimacy and likewise procedural democracy needs formal legality for it can be easily thwarted otherwise.[120] By procedural democracy, I am referring to the conception of democracy that considers participatory majoritarianism superior and sufficient for governance to be legitimate, as will be further elaborated in Chapter 5.

Neither formal legality nor procedural democracy set substantive requirements though. As the formal understanding of the rule of law is utterly devoid of substantive requirements, it could perhaps allow oppression.[121] In this sense, the rule of law is a morally neutral instrument that can be used to advance good or evil ends. There are, however, claims that there is a moral good in the formal version of the rule of law and thus a regime of such rule of law merits support from its subjects. According to Fuller, formal rule of law 'enhances individual autonomy' and systems with the necessary 'formal characteristics will more likely also have laws with fair and just content'.[122] Waldron also states that 'there will be at least some values and principles in the official culture to which the citizen can appeal in his complaints about injustice'.[123] However, such a keen search for a moral good in the formal version of the rule of law seems to suggest that this conception is incomplete. As presented by its strong advocates like Raz, this conception of the rule of law draws its virtues from being morally neutral. According to Raz, 'like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put … The virtue of the instrument as instrument. For the law, this virtue is the rule of law.'[124]

For Raz, the essence of law lies in its ability to guide behaviour and not morality. 'A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behaviour.'[125] For him, the rule of law 'is not a moral virtue as such'.[126] He is concerned with the content of the law but insists that substantive justice and the rule of law should be dealt

[119] Ibid.
[120] Ibid 99.
[121] Noel B Reynolds, 'Grounding the Rule of Law' (1989) 2(1) *Ratio Juris* 1, 3.
[122] Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1977) 209–10, cited in Tamanaha (n 16) 95.
[123] Waldron (n 8) 93–4.
[124] Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law* (Oxford University Press, 1979) 210, 226.
[125] Ibid.
[126] Ibid.

with separately. He argues 'the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged'.[127] He further acknowledges that 'The law may … institute slavery without violating the rule of law'.[128] In presenting the rule of law as a morally neutral ideal, Raz argues that considering the rule of law as 'the rule of the good law' would mean denying it 'any useful function', for explaining its nature would require 'propounding a complete social philosophy'.[129] Raz's claim is that the rule of law should be treated independently and not be confused with other things which are good including justice, human rights and democracy.[130] According to him, non-democratic and oppressive regimes may adhere to the rule of law better than democratic legal systems.[131]

Strengthening Hayek's claim that the rule of law is 'end-independent' and morally neutral,[132] Raz emphasises formal legality.[133] According to him, the rule of law is not concerned with content but rather with form, including that the law should be 'prospective, open, clear, … relatively stable' and that there should be judicial independence.[134] He adds that 'the principles of natural justice [like fair hearing and absence of bias] must be observed'.[135] As a morally neutral concept, formal legality cannot avoid oppression through law. The formal understanding of the rule of law, as Reynolds puts it, 'is free from any ideological content and encompasses tyrannous as well as liberal and humanitarian orders'.[136] The debate over whether a regime with such a form of the rule of law merits support is, as Tamanaha puts it, not just conceptual as 'authoritarian regimes that adhere to formal legality have existed'.[137]

Although the formal conception is criticised for lacking content requirements and thus for embracing both liberal and authoritarian regimes, it is this lack of content requirements that makes the concept more appealing. This quality, according to Tamanaha, 'has been identified by theorists, and by the World Bank and other development agencies, as what renders it amenable to universal application'.[138] Compared to the ever-thickening substantive concept

[127] Ibid 211.
[128] Tamanaha (n 16) 93.
[129] Raz (n 124) 211.
[130] Ibid.
[131] Ibid.
[132] Friedrich A von Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy. Volume 1, Rules and Order. Volume 2, The Mirage of Social Justice. Volume 3, The Political Order of a Free People* (Routledge, 1998) 357.
[133] Raz (n 124) 214.
[134] Ibid 214–6.
[135] Ibid 217.
[136] Reynolds (n 121) 4.
[137] Tamanaha (n 16) 95.
[138] Ibid 94.

whose scope is opaque, the formal conception has less controversial elements. That makes the concept more functional.

However, given the growing reliance on the rule of law as a source of legitimacy,[139] the formal rule of law is appealing to authoritarian regimes, and it provides them with a veneer of legitimacy. As Tamanaha puts it, 'wily tyrants will find support … in arguments put forth by influential theorists to the effect that regimes with the rule of law, even if oppressive, should be obeyed since the alternative might be worse'.[140] Tamanaha alludes to the arguments put forth by leading theorist Waldron. Waldron sees value in 'an oppressive regime which does respect the rule of law' compared to worse scenarios.[141] He argues that a regime that is 'close to satisfying the ideal' has to be legitimised 'if there is a real danger that disobedience and protest against its (admitted) injustices and imperfections may precipitate a collapse into a type of regime that has no respect for legality whatsoever'.[142] However, as Tamanaha observes, such legitimisation through formal legality would allow an evil regime to 'use the rule of law to legitimate its tyranny by pointing out — ominously — that there are even more tyrannical possibilities'.[143]

According to Tamanaha, formal legality does not prevent repression through laws, and considering it 'as moral in itself' is dangerous.[144] An oppressive regime that derives its legitimacy from formal legality is close, if not similar, to rule by men/women as it allows the men/women who happen to be rulers to do whatever they wish by making or changing law. As Krygier states, although an oppressive regime that adheres to formal legality 'is perhaps less terrible than lawless repression, … it can be terrible all the same'.[145]

Tamanaha observes that the formal conception of the rule of law, as formulated by its contemporary theorists, embraces democracy (majoritarianism specifically) in addition to formal legality.[146] Jurgen Habermas, in explaining the relationship between democracy and formal legality, argues that '[t]he democratic process bears the entire burden of legitimation'.[147]

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[139] Ibid 95.
[140] Ibid 95–6.
[141] Waldron (n 8) 93.
[142] Ibid 94.
[143] Tamanaha (n 16) 96.
[144] Ibid.
[145] Martin Krygier, 'Marxism and the Rule of Law: Reflections after the Collapse of Communism' (1990) 15(4) *Law & Social Inquiry* 633, 641.
[146] Tamanaha (n 16) 99.
[147] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (John Wiley & Sons, 2015) 450.

According to him, 'the modern legal order can draw its legitimacy only from the idea of self-determination'.[148] While a general law made by an authoritarian regime and capable of guiding behaviour would satisfy formal legality, the contemporary formalist view seems to be somehow converging into the substantive conception by at least recognising citizens' right to self-determination (popular sovereignty). Accordingly, 'Law obtains its authority from the consent of the governed' and such making of law by citizens (through representatives) serves a moral purpose: 'freedom … to live under laws of one's own making' as opposed to laws imposed by oppressive regimes.[149] However, '[majoritarian] democracy is substantively empty in that it says nothing about what the content of the law must be'.[150]

2.3.2 The substantive conception

The substantive understanding of the rule of law accepts the elements of the formal conception and then adds content requirements. According to this conception, formal legality is essential to the rule of law but insufficient. The common version of this conception considers civil and political rights as an integral part of the rule of law.[151] That is why Dworkin calls it 'the "rights" conception'.[152] While the 'rulebook' (formal) conception requires only obedience to the rules 'set out in a public rule book' and thus says nothing about the substance of the rules, the substantive conception requires rules that 'capture and enforce moral rights'.[153]

As explained, the formal conception treats substantive justice as a separate ideal. There can be rule of law even if the law is substantively unjust. In contrast to this, the substantive conception incorporates substantive justice. Accordingly, the rules should, in addition to satisfying form requirements, be just. Such content requirement is usually expressed in terms of individual rights. Dworkin claims that this conception 'assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole'.[154] He argues 'compliance with the rule book' (formal rule of law) is necessary but 'not sufficient for justice'.[155] His concern is clear. A system that fully complies with formal rule of law has the potential to cause injustice so long as the rules to be observed are unjust.[156] He further claims

[148] Ibid 449.
[149] Tamanaha (n 16) 99.
[150] Ibid.
[151] Ibid 102.
[152] Ronald Dworkin, *Political Judges and the Rule of Law* (British Academy, 1979) 262.
[153] Ibid 261–2.
[154] Ibid 262.
[155] Ibid 263.
[156] Ibid.

that ‘A society that achieves a high rating on each of the dimensions of the rights conception is almost certainly a just society’.[157]

The substantive conception seems to be drawing more attention from scholars and the international community as it gets thicker. Although its scope lacks clarity, values ranging from human dignity to civil and political rights to social welfare rights are considered by its advocates as essential elements of the rule of law. Even Waldron, who is a strong opponent of enforceable constitutional limits on the legislature as will be elaborated in Chapter 5, argues that there is ‘no reason why the Rule of Law shouldn’t have several substantive dimensions’.[158] According to him, we could find a substantive tendency even in the formal elements of the rule of law.[159] He claims that the requirements of ‘generality’ and ‘prospectivity’, for example, ‘may point us in the direction of justice’ and ‘individual autonomy’ respectively.[160]

The World Justice Project — an international civil society organisation working to promote the rule of law — has adopted the thick version of the rule of law integrating the formal and substantive requirements. Its definition of the rule of law comprises ‘four universal principles’: ‘accountability, just law, open government and accessible justice’.[161] The just law principle requires that laws ‘protect fundamental rights, including the security of persons and contract, property, and human rights’.[162]

The thickest substantive conception arguably goes beyond incorporating the elements of the formal conception and civil and political rights, as it embraces an additional substantive component which can be, as Tamanaha puts it, ‘roughly categorised under the label “social welfare rights”’.[163] Fonseca, an advocate of this understanding of the rule of law, argues ‘[political] legitimacy cannot dispense with social rights as an essential element of a substantive rule of law’.[164] Once we start associating the rule of law with substantive justice, it may perhaps be difficult to include some rights and exclude others.

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[157] Ibid.
[158] Jeremy Waldron, ‘A Substantive Rule of Law?’ in Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) 42, 48.
[159] Ibid 51.
[160] Ibid.
[161] ‘What is the Rule of Law’, *World Justice Project* (Web Page) <https://worldjusticeproject.org/about-us/overview/what-rule-law>.
[162] Ibid.
[163] Tamanaha (n 16) 112.
[164] Rui Guerra da Fonseca, ‘Global Constitutionalism and Social Rights: A Few Notes on Human Rights in the Quest for a Substantive Rule of Law’ in Stefan Lorenzmeier and Vasilka Sancin (eds), *Contemporary Issues of Human Rights Protection in International and National Settings* (Nomos, 2018) 235, 237.

Although the thick version of the rule of law is accepted by influential international actors including the United Nations,[165] there are disagreements that revolve mostly around its scope. The development of the thickest version of the rule of law through inclusion of social welfare rights has made the substantive conception more controversial. As Grenfell observes, 'Within the group advocating this thick approach, there is a debate as to precisely which rights should be included; whether they should be confined to civil and political rights or extended to socio-economic rights.'[166] In contrast to Fonseca, Tamanaha opposes inclusion of socio-economic rights, arguing that 'There are already potential conflicts among civil and political rights and between rights and democracy; adding social welfare rights to the mix multiplies the potential clashes'.[167] He suggests a restricted substantive version, claiming that 'The classical liberal view, with its obsession on preventing government tyranny, had a negative thrust geared to setting limits on the government, freeing individuals to do as they please.'[168] According to him, incorporating social welfare rights into the rule of law would mean denying the concept 'any distinctive meaning'.[169]

Although its scope lacks clarity, the thickening conception of the rule of law is a move towards a more self-sufficient ideal. It should be noted that the substantive conception, whatever version it takes, is susceptible to objection. Dworkin, while opposing an understanding of the rule of law that is substantively empty, acknowledges that the substantive conception is complex and susceptible to criticism. As he puts it, 'The rights [substantive] conception … seems open to the objection that it presupposes a philosophical point of view which is itself controversial'.[170] There is thus a spectrum of rule of law conceptions with various thicknesses ranging from an arguably incomplete but simple conception represented by the thinnest version of the rule of law to a near complete, if complex, conception represented by the ever-thickening understanding of the rule of law.

There is a growing view that accepting civil and political rights as an integral part of the rule of law and precluding socio-economic rights, using complexity as a pretext, is untenable. Since the World Conference on Human Rights in Vienna in 1993, the United Nations has said that the two sets of rights are interdependent and indivisible. As the meaningful realisation of civil

[165] United Nations, *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools* (2011) v–vi.
[166] Grenfell (n 55) 68.
[167] Tamanaha (n 16) 113.
[168] Ibid.
[169] Ibid.
[170] Dworkin, *Political Judges and the Rule of-Law* (n 152) 264.

and political rights is dependent on implementation of socio-economic rights, limiting the rule of law to the former would mean it is not a self-sufficient ideal. That defeats the very purpose of the substantive conception — completing the insufficient formal conception. Letnar Černič argues that 'states have obligations to uphold the reasonable minimum core of socio-economic rights as part of their commitment to realising and implementing [the] rule of law'.[171] He observes that 'the socio-economic dimension of civil and political rights' necessitates that 'the minimum core of the socio-economic rights' be protected.[172]

Ngang argues that 'within the context of a constitutional democracy, the courts … have practically demonstrated potential, albeit marginally, to contribute to the achievement of envisaged social change'.[173] According to Klaasen, realisation of socio-economic rights is indispensable to ensure lasting rule of law. He claims 'the acknowledgement that the realisation of socio-economic rights forms part of the substantive component of the rule of law' is essential to strengthen the rule of law.[174] These assessments are influenced by the experience of South Africa's Constitutional Court in adjudicating constitutional social and economic rights within South Africa's rule of law framework. According to Klaasen, 'Socio-economic protests in South Africa are increasingly violent with citizens demanding their constitutionally guaranteed rights whilst ignoring the rule of law'.[175]

What can be understood from the debates surrounding the rule of law is that neither the formal nor the substantive conception has won. Perhaps neither will. A generally accepted understanding of the rule of law seems to be unachievable for no competing conception is free from shortcomings. The formal conception seems to be not self-sufficient while the ever-thickening substantive conception appears to be all-encompassing and limitless. Yet there is convergence between the two. The formal conception seems to have eventually embraced at least the majoritarian conception of democracy. It is thus moving towards a relatively thick understanding of the rule of law. However, understood narrowly, democracy cannot prevent

[171] Jernej Letnar Černič, 'The European Court of Human Rights, Rule of Law and Socio-Economic Rights in Times of Crises' (2016) 8(2) *Hague Journal on the Rule of Law* 227, 228.
[172] Ibid.
[173] Carol C Ngang, 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take "Other Measures": Focus: Twenty Years of the South African Constitution' (2014) 14(2) *African Human Rights Law Journal* 655, 656.
[174] Abraham Klaasen, 'The Quest for Socio-economic Rights: The Rule of Law and Violent Protest in South Africa' (2020) 28(3) *Sustainable Development* 478, 478.
[175] Ibid.

oppression by the majority and the formal conception may have to, therefore, still shift a bit further toward the substantive conception of the rule of law by embracing substantive justice.

As indicated, there is no doubt that the substantive conception invites disagreements due to the moral diversity of its potential elements. This does not however preclude the possibility of agreement on some substantive elements at least at their most abstract level. As I will explain in Chapter 5, an express or implied agreement of the people on fundamental substantive protections and principles of political organisation is central to legitimating governance through constitutional democracy. In the absence of such an agreement and its enforcement against those who may breach it, the idea of democracy or rule by the people is farfetched for, in this case, the ultimate source of authority will hardly be the people unless we misread a political majority or men and women who happen to be law makers to mean the people. While it may be impossible for the people to reach consensus on the particulars of substantive constitutional safeguards, such commitments can be 'stated at a sufficiently high level of abstraction to command universal or near universal assent — fairness, equality, liberty, and dignity, for example'.[176]

Because such commitments are highly abstract, there should be an institutional mechanism to determine controversies over the meaning of abstract rules. This is no doubt a difficult yet an important feature of constitutional democracy. As a constitutional provision, and any legal rule for that matter, rules controversies in the abstract, it cannot anticipate and address the particulars of all potential controversies. Yet, constitutional review bodies can, and should, interpret abstract provisions to establish judicially identifiable standards to determine a given controversy. If the nature of the controversy is such that standards cannot be established, then the issue involves questions of policy or politics and should thus be left for the political branches, or for the people to amend the constitution if necessary. Of course, the abstract nature of constitutional/legal rules means that drawing a fine line between justiciable and non-justiciable cases is at times hardly possible, for interpretational outcomes might depend on one's broad or narrow reading of the relevant rules. The continued controversy over the scope

[176] Michael C Dorf, 'Legal Indeterminacy and Institutional Design' (2003) 78(3) *New York University Law Review* 875, 906. See also Frank I Michelman, *Brennan and Democracy* (Princeton University Press, 2005) 56.

and application of the political question doctrine in the United States is a good example in this regard.[177]

The abstract nature of the law, and constitutional law in particular, should be acknowledged both as a virtue and as a problem that needs to be worked out. On the one hand it helps people reach agreement on issues of most importance which is necessary for constitutional democracy and on the other hand it is a source of indeterminacy. As Dorf observes, 'the very feature of law that allows it to operate at the wholesale rather than the retail level — its abstraction — limits its ability to guide concrete decisions taken in the law's name'.[178] If law/constitutional law is indeterminate by design because 'it is in the nature of language to be inexact'[179] or because discretionary power has to be left to the relevant body, 'or because consensus could not be secured on more specific language',[180] upholding the law/constitution entails minimising this indeterminacy through interpretation.

2.4 The relationship between constitutional review and the rule of law

In modern constitutional democracies, constitutionalism has become instrumental to the rule of law. Constitutional review mechanisms are key in the realisation of constitutionalism and hence the rule of law. Constitutional limits on political power are enforced through such mechanisms. Constitutionalism serves the rule of law by preventing governance based on the arbitrary whim of individuals or groups. It helps realise 'a government of laws' as opposed to 'a government of men'.[181] As Mansfield puts it, 'To put lawfulness over men requires that we believe in the sacredness or sanctity of certain laws.'[182] A rigid and supreme constitution cannot remain so in the absence of a constitutional review system that determines constitutional boundaries. Maintaining constitutional supremacy requires subjecting laws and decisions to review by a constitutional body to check their constitutionality.

Smerdel observes that 'the implementation of complex fundamental constitutional concepts, such as the rule of law and separation of powers, requires that citizens, governmental officials

[177] See, eg, Jesse H Choper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54(6) *Duke Law Journal* 1457; Louis Michael Seidman, 'The Secret Life of the Political Question Doctrine' (2004) 37(2) *John Marshall Law Review* 441.
[178] Dorf (n 176) 883.
[179] AE Dick Howard, 'The Indeterminacy of Constitutions' (1996) 31(2) *Wake Forest Law Review* 383, 390.
[180] Dorf (n 176) 884.
[181] Harvey C Mansfield Jr, 'Constitutionalism and the Rule of Law' (1985) 8(2) *Harvard Journal of Law & Public Policy* 323, 324.
[182] Ibid.

as well as commoners, take the constitution seriously'.[183] He further explains: 'this means a political process and a political struggle fought by constitutional means and within the constitutional framework which has to be enforced by an effective system of constitutional review'.[184] The robust relationship between the rule of law and a strong review system is also demonstrated by the series of judicial reforms introduced in transitioning states as part of promotion of the rule of law. According to Trebilcock and Daniels, the view 'That judicial reform is a necessary part of the rule of law reform has been emphasised by leading development theorists'.[185] According to them, this is also 'reflected prominently in international consensus'.[186]

A strong and independent constitutional review mechanism is necessitated by constitutionalism in democracies with a written constitution. A democratic state guided by popular will but devoid of a constitutional review mechanism that enforces sacred rules cannot maintain constitutional supremacy, as popular interests could lead to alteration of constitutional terms. Madison asserts in *Federalist Papers* no 49 that the idea of altering or correcting the Constitution through popular means is imprudent.[187] He states: 'the *passions*, therefore, not the *reason*, of the public would sit in judgment'.[188] According to Madison the people should be protected from 'their own temporary errors and delusions'.[189] In a democratic state guided by constitutionalism, such protection is provided through representatives whose power is subject to enforceable constitutional limits.

Among others, individual rights have become important sources of limits on political power. As Nelson, Haskins and Johnson put it, 'Rights are based on principles fundamental to a society which are unassailable by mere majoritarian will.'[190] Individuals or concerned minorities rely on such non-majoritarian values when a government institution 'amenable and often responding to the political will of the community poses a threat that cannot be met in a political

[183] Branko Smerdel, 'Central European Democratic Transition: The Paradigm of a Constitutional Revolution' (Conference Paper, Round Table of the International Association of Constitutional Law, 4 May 2012) 57.
[184] Ibid 58.
[185] Trebilcock and Daniels (n 86) 58.
[186] Ibid.
[187] Cited in Benjamin I Page and Robert Y Shapiro, 'Restraining the Whims and Passions of the Public' in Bernard Grofman and Donald Wittman (eds), *The Federalist Papers and the New Institutionalism* (Algora Publishing, 2007) 53, 54.
[188] Quoted in ibid.
[189] Quoted in ibid.
[190] William E Nelson, George L Haskins and Herbert A Johnson, 'Emulating the Marshall Court: The Applicability of the Rule of Law to Contemporary Constitutional Adjudication' (1982) 131(2) *University of Pennsylvania Law Review* 489, 493.

manner'.[191] Access to an impartial constitutional review mechanism, with a mandate to protect rights and fundamental constitutional principles through limiting politics, is thus necessary to meaningfully enforce constitutional constraints.

Here it should be noted that limited political power and substantive constitutional safeguards are concepts essential to the thick conception of the rule of law. Constitutional review, as a key instrument to control politics and protect constitutional values including individual rights, is therefore strongly linked to the rule of law. In modern constitutional democracies, the rule of law is maintained most importantly through upholding constitutional supremacy. As Narváez Medécigo puts it, in countries governed by constitutionalism, 'the rule of law is indeed in a substantial part a matter of individual access to courts [or other review mechanisms] that are able to enforce the principle of constitutional supremacy'.[192] Mansfield also asserts that the rule of law is best served through constitutionalism.[193] Government institutions including the law-making body are controlled through enforcing a constitution that 'establishes a law that is above law'.[194] According to him, neither the 'best man (realism)' nor the 'best law (legalism)' is a perfect solution and constitutionalism 'allows us to make law as the realists want, but requires us to make law lawfully as legalism desires'.[195]

Advocates of both the formal and substantive conceptions of the rule of law consider judicial review — a concept that includes constitutional review — a key instrument for the realisation of the rule of law. A prominent advocate of the formal conception of the rule of law, Raz, considers judicial review and judicial independence essential elements of the rule of law.[196] Dworkin, a strong supporter of the substantive conception of the rule of law, also asserts that recognising 'moral and political rights' and enforcing them via 'courts or other judicial institutions of the familiar type' is essential to the rule of law.[197] As explained earlier, among the core elements of the substantive conception of the rule of law are civil, political and perhaps socio-economic rights. Enforcing these rights by quashing legislative, executive, and judicial acts requires a supreme and impartial constitutional body with the mandate to oversee the constitutional order.

[191] Ibid.
[192] Alfredo Narváez Medécigo, *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (Springer International Publishing, 2016) 25.
[193] Mansfield (n 181) 324–6.
[194] Ibid 326.
[195] Ibid.
[196] Joseph Raz, 'The Politics of the Rule of Law' (1990) 3(3) *Ratio Juris* 331, 331.
[197] Dworkin, *Political Judges and the Rule of Law* (n 152) 262.

2.5 Different forms of constitutional review

As indicated in Section 2.2, constitutional review has become one of the salient features of constitutional democracies. Currently, over 160 states have a constitutional review mechanism of one form or another.[198] As constitutionalism cannot be achieved in a meaningful way in the absence of a constitutional review mechanism that invalidates laws and decisions that are found to be unconstitutional, the importance of this mechanism has kept growing. Vanberg observes: 'The commitment to this institution [constitutional review] has become so pervasive that it is now virtually unthinkable to draft a democratic constitution without providing for its inclusion.'[199]

Despite its near universal presence, the scope and form of constitutional review differs from jurisdiction to jurisdiction. The strength and weakness of such review mechanisms depends on, as Dixon puts it, 'a variety of factors, including the availability of formal mechanisms for legislative override or limiting courts' jurisdiction, the difficulty of constitutional amendment, the scope of judicial review …, and the actual practice of legislators and judges'.[200] A country may have a weak or strong form of judicial review across time based on the prevailing view regarding the relationship between the legislative and judicial branches. In strong form judicial review, an apex court's decision about the constitutionality of legislation is final and cannot be changed except through a constitutional amendment or the decision of the court itself.[201] The US represents such a form of review.

In contrast to this, a weak form of judicial review allows the legislature to override the interpretation of a constitutional clause by a court. In Canada, for example, 'the legislature can simply pass the law again "notwithstanding" the constitutional clause or the court's interpretation of the constitutional clause'.[202] Countries with a preference for the principle of parliamentary supremacy have a weak form of judicial review or lack judicial review of legislation for this principle makes the legislature superior to the remaining branches of government. The weak form of judicial review in Canada, the UK and New Zealand is the by-product of this principle. While the Canadian form of review is relatively strong compared to the UK's and New Zealand's, for it includes the idea of striking down legislation, the ultimate

[198] von Bogdandy, Grabenwarter and Huber (n 112) 2.
[199] Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, 2005) 1.
[200] Rosalind Dixon, 'The Forms, Functions, and Varieties of Weak(ened) Judicial Review' (2019) 17(3) *International Journal of Constitutional Law* 904, 904.
[201] Walter Sinnott-Armstrong, 'Weak and Strong Judicial Review' (2003) 22(3/4) *Law and Philosophy* 381, 381.
[202] Ibid. See also *Canadian Charter of Rights and Freedoms* s 33.

say on constitutional matters remains in the hands of the legislature. As McWhinney puts it, Canada's 'English constitutional heritage means, in formal terms, a much more dominant role for the legislature in relation to the courts than in the United States'.[203] While the strong form of judicial review in the US enables the judiciary to play an active role in politics by enforcing rights, the Canadian model is relatively weak as it allows the legislature to disregard constitutional decisions.[204]

Both strong and weak forms of judicial review have their own theoretical and practical merits and demerits. The weak form of review may appear more legitimate when it comes to morally contested issues. The strong form of review may likewise be preferred for protecting fundamental values of a polity including individual rights and principles of political organisation from unconstitutional legislative intrusion. Indeed, the design of a system of constitutional review reflects a compromise between multiple objectives including democracy, protection of constitutional rights and principles, efficiency, and flexibility. One can thus see different degrees of weakness and strength in each form of review as they are continuously shaped by varying judicial and political responses, and because they rely on constitutions with varying objectives and different degrees of rigidity. In this regard, Dixon's theory of 'responsive judicial review' is compelling, as it 'calls for courts to pay careful attention to both the legal and political context for constitutional constructional choice'.[205]

The wide spectrum of constitutional review mechanisms includes ordinary courts, constitutional courts and political bodies. Courts (including constitutional courts) are perhaps ideal counter-majoritarian mechanisms to ensure constitutionalism for they are non-partisan bodies composed of unelected judges.

As indicated, the vast majority of states use courts — ordinary courts or specialised constitutional courts — as their constitutional review mechanisms. The number of states that have established a specialised constitutional court has grown steadily, perhaps due to the nature of constitutional cases. Of all the states that have a constitutional review mechanism currently, nearly half (76 states) have specialised constitutional courts.[206] Most of the remaining states

[203] Edward McWhinney, 'Constitutional Review in Canada and the Commonwealth Countries' (1974) 35 *Ohio State Law Journal* 900, 900.
[204] Stephen L Newman, *Constitutional Politics in Canada and the United States* (State University of New York Press, 2004) 1.
[205] Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) 95.
[206] von Bogdandy, Grabenwarter and Huber (n 112) 2.

use their regular courts, while a handful of them have opted for their own unique constitutional review mechanisms. Constitutional review through a political body (second chamber) in Ethiopia and the Swiss model that combines constitutional review by the Federal Supreme Court with legislative referendums[207] are among the unique mechanisms. While the Swiss Federal Supreme Court can invalidate unconstitutional Cantonal (state) legislation, it does not have similar jurisdiction over federal legislation.[208] The validity of federal legislation is determined by the Swiss people through a referendum.[209] Determining the validity of laws through a referendum may appear the most legitimate form of review from the standpoint of the majoritarian conception of democracy. However, such an arrangement could be a threat to the substantive rule of law for, like the formal rule of law, majoritarian democracy does not set content requirements for law.

While the common law countries including the US and Australia have vested the final say on constitutional disputes in their apex courts, the civil law countries including Germany, Italy, Spain and Austria have introduced specialised constitutional courts. France's Conseil constitutionnel (Constitutional Council) has also evolved from a primarily political body to a constitutional-court-like umpire through its 1971 decision that incorporated the rights listed in the preamble of the 1946 Constitution into the Constitution of the Fifth Republic and its subsequent rejection of adopted statutes before their promulgation based on their inconsistency with these rights since 1979.[210] The Council's power has been further consolidated through constitutional amendment. The Council was not able to check the constitutionality of promulgated legislation until 2010. Since 2010, citizens have been allowed to challenge the constitutionality of a law applied in a given case.[211]

Constitutional review by specialised constitutional courts has become common throughout Europe and is usually referred to as the '"European model" of constitutional review'.[212] The European model of constitutional review 'is characterized by the centralized power — reserved

[207] Ronald L Watts, *Comparing Federal Systems* (McGill-Queen's University Press, 3rd ed, 2008) 158.
[208] Pascal Mahon, 'Judicial Federalism and Constitutional Review in the Swiss Judiciary' in Andreas Ladner et al (eds), *Swiss Public Administration: Making the State Work Successfully* (Springer International Publishing, 2018) 137, 146–50.
[209] Watts (n 207) 158–9.
[210] Alec Stone Sweet, 'The Politics of Constitutional Review in France and Europe' (2007) 5(1) *International Journal of Constitutional Law* 69, 80.
[211] 'General Overview', *Conseil Constitutionnel* (Web Page) <https://www.conseil-constitutionnel.fr/en/general-overview>.
[212] von Bogdandy, Grabenwarter and Huber (n 112) 12.

to one specific court — to review laws and decisions against constitutional standards'.[213] In contrast, the US represents the decentralised model in which ordinary courts at all levels exercise the power of constitutional review, the final say being in the hands of the federal Supreme Court. In the European model of constitutional review, a specialised constitutional court has jurisdiction over both abstract and concrete constitutional cases, whereas the US courts entertain only concrete cases.[214]

The post–Cold War African constitutions have embraced either the decentralised US model or the centralised European model.[215] According to Fombad, 'over two-thirds of modern African constitutions have adopted the centralized [European] model and the rest the decentralized [US] model, the only exception being Ethiopia'.[216] As indicated, Ethiopia does not belong to either model as it has vested this role in its second political chamber.

It should be noted that each country's constitutional review system, regardless of the model it follows, has its own unique features when it comes to the detailed review powers and decision-making procedures. These powers and procedures have been shaped over time as courts, constitutional courts or other constitutional review mechanisms strive to settle legal-political (constitutional) disputes in a legally and politically sound manner appropriate to their local context. The most challenging issue in constitutional review is striking the right balance between law and politics for constitutional law is a mix of both.

As Stone Sweet puts it, 'Constitutional courts — by the very nature of the norms they are required to interpret and enforce — are highly visible in, and unusually generative of, legislative politics'.[217] Cognisant of the political consequences of invalidating duly passed legislation, the Constitutional Court of Germany 'has in some cases developed other [short of nullifying] techniques to address the unconstitutionality of a law without fully invalidating it'.[218] The Constitutional Court has pioneered an approach called 'the constitutional incompatibility option' in which it 'engage[s] in a dialogue with the legislature by severing the unconstitutional portions of a statute while temporarily enjoining the decision's effect'.[219]

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[213] Ibid.
[214] Patricio Navia and Julio Ríos-Figueroa, 'The Constitutional Adjudication Mosaic of Latin America' (2005) 38(2) *Comparative Political Studies* 189, 192.
[215] Fombad (n 82) 1.
[216] Ibid 2.
[217] Stone Sweet (n 210) 73.
[218] Lothar Determann and Markus Heintzen, 'Constitutional Review of Statutes in Germany and the United States Compared' (2018) 28 *Journal of Transnational Law & Policy* 95, 96.
[219] Robert L Nightingale, 'How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes' (2015) 125 *Yale Law Journal* 1672, 1672.

According to Nightingale, this approach gives the legislature 'the opportunity to rewrite a partially unconstitutional omnibus law and would save courts from having to dismantle a massive legislative project on account of a minor constitutional blemish'.[220] Nightingale suggests such an approach could be useful in the US, indicating the Supreme Court's active role in politics.[221] As indicated, constitutional cases involve complex legal-political questions. According to Patapan, for example, in the constitutional jurisprudence of the Australian High Court, 'The tensions between the executive and the judiciary, especially in challenges to the principle of the separation of powers, is a recurring theme.'[222] He asserts: 'the way moral, ethical and political questions are posed as legal issues for review indicates the complex role of the judiciary in modern constitutionalism'.[223]

As will be further elaborated in the following chapters, constitutional review bodies have to strike the right balance between law and politics to manage their interaction with the political branches in handling cases with serious political implications. Specialised constitutional courts seem to be relatively attractive in this regard. According to Comella, there is usually a strong link between constitutional court judges and politics.[224] He observes: 'members of constitutional courts in Europe are typically selected through more politicized procedures than those generally followed to pick ordinary judges'.[225] In most jurisdictions, the tenure of members of a constitutional court is also for a limited period of time.[226] As constitutional judges are expected to solve cases involving a tension between law and politics, the politicised procedures of selection tend to favour candidates who have experience in (and are thus sensitive to) politics in addition to a background in law. The judges of the Constitutional Court of Germany can, for example, as Jäckle puts it, 'be seen as both judicial and political elites'.[227] According to him, 'Former politicians make up about 23 per cent of all FCC [Federal Constitution Court] judges' and 'Judges whose careers have been confined to the judicial arena have a much lower chance to advance to the president or vice president of the FCC'.[228]

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[220] Ibid.
[221] Ibid.
[222] Haig Patapan, 'High Court 2001: Politics, Legalism and the Gleeson Court' (2002) 37(2) *Australian Journal of Political Science* 241, 252.
[223] Ibid.
[224] Victor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 265, 270.
[225] Ibid.
[226] Ibid.
[227] Sebastian Jäckle, 'Pathways to Karlsruhe: A Sequence Analysis of the Careers of German Federal Constitutional Court Judges' (2016) 25(1) *German Politics* 25, 25.
[228] Ibid 42.

The techniques of constitutional interpretation employed by the FCC also demonstrate the role of political inputs in constitutional review in Germany. Constitutional review by the FCC involves a combination of factors drawn from both law and politics. According to Determann and Heintzen, 'Based on the so-called *canones*, developed by Friedrich Carl von Savigny, statutes in Germany are interpreted on the basis of grammatical, historical, systematic and teleological [purposive] arguments' and this technique is adopted by the FCC.[229] The US Supreme Court's techniques of interpretation also involve a combination of considerations including 'a literal reading of the text of the U.S. Constitution, contextual considerations, the framers' intent, precedents and policy considerations', which are intended to address the tension between law and politics.[230]

In the spectrum of constitutional review mechanisms, one also finds a model where a final say on constitutional matters is vested in politicians, and not judges. Ethiopia's HoF is a good example. From the vantage point of the majoritarian conception of democracy, the Ethiopian model — constitutional review by political representatives — could be considered a more democratic mechanism. Such a constitutional review system, however, suffers from an impartiality deficit for it is composed of partisan (political) representatives. These representatives are likely to give preference to political values over legal principles. Moreover, as indicated, the majority vote of representatives cannot guarantee substantive rule of law. Furthermore, Ethiopia follows a federal system. A strong and independent constitutional umpire is one of the salient features of federal systems.

In a federal system, the federal government and regional states are independent of each other. Neither creates the other. Both are created by a constitution which must remain supreme. As such a form of multilevel governance multiplies potential conflicts and because each level of government has to remain independent of the other, a strong and an impartial constitutional umpire is not a choice but a necessity. As Morton and Snow put it, 'For a federal division of legislative powers to be effective, there must be a mutually acceptable process for settling the inevitable disputes over where one government's jurisdiction ends and the other's begins'.[231] While there are political safeguards (like representation of states in federal second chambers) to maintain a federal system, there still needs to be a non-partisan umpire which can be used

[229] Determann and Heintzen (n 218) 103–4.
[230] Ibid 104.
[231] FL Morton and Dave Snow, 'Judicial Review and Federalism' in FL Morton and Dave Snow (eds), *Law, Politics, and the Judicial Process in Canada* (University of Calgary Press, 4th ed, 2018) 405, 405.

as a last resort in settling federalism cases. Baltes, in explaining the role of the US judiciary in maintaining the federal balance, argues: 'The Court, by design, is a key player — the last line of defense — in maintaining our federalism'.[232] The constitutional jurisprudence of the Australian High Court also suggests a strong link between an independent judiciary and federalism. In the leading case on the separation of powers, the *Boilermakers Case*, the High Court held that the federal nature of the *Australian Constitution* required the judiciary to be completely separate from the other branches of government so that it can adjudicate constitutional disputes independently.[233] It declared:

> The position and Constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed.[234]

Ethiopia's constitutional review mechanism has limitations in this regard for it is associated with the political branches, and parties to a federalism dispute may question its impartiality. Most federal systems use their supreme courts or constitutional courts as their 'neutral umpire'.[235] In the absence of such a neutral body, 'the equal status of both levels of government, a central principle of federalism', can hardly be maintained.[236] I will elaborate this in Chapter 3.

It should, however, be noted that constitutional review has the potential not only to maintain but also to influence federalism. It can change the shape of the federal system. Mitchell argues: 'judicial review poses a unique threat to federalism, because it enables the Supreme Court [of the US] to pre-empt state law and impose nationwide policies by a simple majority vote and without the assent of any other institution'.[237] He adds: 'Modern judicial interpretation of the [US] Constitution is rooted primarily in court-created doctrines and precedents rather than constitutional language'.[238] Like the US Supreme Court, the High Court of Australia has

[232] Alexa R Baltes, 'One Federalism and the Judicial Role: Enforcing the Limits of Article I' (2016) 92(1) *Notre Dame Law Review* 451, 478.
[233] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1955) 94 CLR 254, 276.
[234] Ibid.
[235] Morton and Snow (n 231) 406.
[236] Ibid.
[237] Jonathan F Mitchell, 'Judicial Review and the Future of Federalism' (2017) 49(3) *Arizona State Law Journal* 1091, 1091.
[238] Ibid.

augmented federal power through constitutional review and the states have lost many of their powers.[239]

What can be understood from such experiences is that a federal constitutional review mechanism needs to be not only strong and independent but also mandated with a clear constitutional jurisdiction so it will not undermine essential federal values. The scope of judicial constitutional jurisdiction is indeed obscure in many countries and that at times poses a challenge to values including democracy and federalism.

2.6 Conclusion

Although the historical and contemporary accounts of the rule of law and constitutional review reveal a strong interdependence between the two ideals, there is a dearth of scholarly works explaining their intersection with reference to various forms of constitutional review. Given these concepts are opaque and understood in different ways across time and place, explaining them requires a continuous debate with reference to different jurisdictions.

The exact meaning of the rule of law has remained opaque despite the notion's wide acceptance as an indispensable governance ideal. No specific conception of the rule of law has thus far won general acceptance. Perhaps, none will. Although the search for a complete and generally accepted conception of the rule of law is perhaps unachievable, a thorough and continued discussion of the concept would help politicians, adjudicators, academics, and individual citizens understand the nature of the competing conceptions.

Despite the lack of a generally accepted understanding of the concept, there seems to be a tendency towards convergence between its formal and substantive conceptions and growing interest in the substantive understanding of the concept. The contemporary formal conception of the rule of law recognises citizens' right to self-determination (democracy) and thus does not accept oppressive laws imposed by a tyrant. This has somewhat thickened the formal conception. The historical and contemporary accounts of the rule of law also associate the rule of law with substantive values and hence suggest a thick conception of the rule of law. This is further strengthened by the craving for a self-sufficient conception of the rule of law as

[239] Stephen Gageler, 'The Federal Balance' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 27, 27.

demonstrated by the broad definitions of this ideal adopted by powerful international organisations like the United Nations and development aid agencies.

The analysis in this chapter highlights the strong link between the substantive conception of the rule of law and constitutional review. Central to the formal conception of the rule of law is formal legality, which does not require anything more than compliance with a duly enacted law. In contrast, substantive rule of law requires that the law is not only enacted following procedural rules but also consistent with fundamental substantive values. Constitutional democracies use enforcement of such substantive values through constitutional review as a key instrument for the realisation of the rule of law. This thesis is thus concerned with such constitutional dimension of the rule of law or constitutionalism.

The model of constitutional review and rule of law that prevails in a state at a particular time is a product of the history and political context of that state. While one constitutional review mechanism cannot fit all jurisdictions, the presence of a strong and impartial constitutional review mechanism has become essential for constitutional democracies in general and federal systems more specifically. A federal structure recognises two or more orders of government independent of each other and such a principle cannot be maintained in the absence of a strong and impartial umpire.

The trend towards a convergent understanding of the rule of law and the growing interest in the substantive conception will guide the following chapters. The next chapter examines the HoF and its political and judicial roles to provide the necessary background for the detailed investigation into its role as a constitutional review body in Chapter 4 and the implications of this for the rule of law in Chapter 5.

Chapter 3: The House of Federation of Ethiopia: Unfit for federalism

3.1 Introduction

Constitutionalism in general, and federalism more specifically, entails a constitutional umpire. Most democracies have now embraced the institution of constitutional review. In these democracies, the power to assess the constitutionality of laws and decisions is conferred mostly on ordinary or specialised courts. Ethiopia is an exception to this rule as it has vested this role in its upper house. Ethiopia's upper house has a unique design defined by its ethnic federal system. It is known as the 'House of Federation' and represents the country's ethnic groups, which are constitutionally recognised as the building units of the federation. The mandate to maintain the federal balance is thus vested in the representatives of this house, which has broad political and adjudicative roles and decides all constitutional disputes but cannot make laws.

However, the question is, can the House of Federation maintain the federal balance? While this house may appear in some senses more democratically legitimate than the constitutional or ordinary courts, its design raises questions about its viability as the ultimate guardian of the federal system and its ability to ensure the peaceful resolution of disputes. This chapter accordingly explores the Ethiopian House of Federation through the lens of federalism and argues that, although it has the potential to nurture federalism given its broad powers, its overall design and the unique federal system in which it functions reveal serious institutional limitations that hinder its role as an instrument of federalism.

Ethiopia introduced its unique system of ethnic federalism three decades ago. It currently has 15 entities: 13 regional states whose administrative boundaries are drawn primarily along ethnic lines and two chartered cities. The four youngest regional states, Sidama, Southwest Ethiopia, South Ethiopia and Central Ethiopia, joined the federation in 2020, 2021 and 2023, while the remaining nine states were constituted by the *Constitution of the Federal Democratic Republic of Ethiopia* (the Constitution) in 1995.[1] The four new regional states were not established via formal constitutional amendment as the Constitution allows all ethnic groups to establish their own regional state.[2] Requests from various ethnic groups, including Sidama,

[1] *Constitution of the Federal Democratic Republic of Ethiopia* (1995) art 47 ('*FDRE Constitution*').
[2] Ibid.

to form new regional states in accordance with the rules of the Constitution were politically supressed for decades. However, after years of popular uprisings, a political leadership change in 2018 opened up the political space and resulted in a renewed interest in forming ethnic-based administrative units.

Immediately after Prime Minister Abiy Ahmed came to power, the Sidama people held a series of demonstrations calling for regional statehood, resulting in a separation from the then most diverse regional state of Ethiopia, the Southern Nations, Nationalities and Peoples Regional State (SNNPRS). In July 2018, the Sidama Zone Council, the then representative of Sidama as a third tier of government next to the regional state, approved their demand for statehood.[3] As per the Constitution, every ethnic group in Ethiopia has an unconditional right to secede from the federation or establish its own regional state within the federation.[4] The role of the federal and regional governments in the process is limited to facilitating a referendum.

Despite this, there was no political willingness from the federal government and SNNPRS to process Sidama's request. It should be noted that, along with the Sidama, several other ethnic groups that now form part of Southwest Ethiopia, South Ethiopia and Central Ethiopia had their own ethnic-based local governments within the SNNPRS. The same is currently true for many other ethnic groups across the country. When the Sidama demanded regional statehood, Ethiopia's government avoided addressing the matter in what appeared to be an effort to discourage other ethnic groups from requesting the same. According to Misikir, '[n]either the Southern Nations State Council, with the mandate to organise the referendum, nor the [National] Electoral Board, which was expected to administer it, made any substantive moves toward complying with the legal procedures'.[5] This silence sparked massive protests, which finally led to a referendum in November 2019 and then the official establishment of the new regional state in June 2020. As indicated, Ethiopia's Constitution grants absolute right to self-determination including secession to each ethnic group. Thus, this referendum was not a nation-wide vote. Only the Sidama people participated in the referendum. Likewise, only identified ethnic groups voted on the establishment of the remaining new regional states.

[3] Sidama Human Rights Activists, 'More Arrests in Sidama as Authorities Refuse to Hand Power to New Region', *Ethiopia Insight* (online, 8 May 2020) <ethiopia-insight.com/2020/05/08/more-arrests-in-sidama-as-authorities-refuse-to-hand-power-to-new-region/>, archived at <perma.cc/L6FH-VQGK>.
[4] *FDRE Constitution* arts 39, 47.
[5] Maya Misikir, 'Sidama's Statehood Quest, Beyond Recognition', *Ethiopia Insight* (online, 17 June 2021) <ethiopia-insight.com/2021/06/17/sidamas-statehood-quest-beyond-recognition/>, archived at <perma.cc/YKS2-8GUD>.

Ethiopia's Constitution recognises over 80 ethnic groups, which it calls 'Nations, Nationalities, and Peoples',[6] yet until this point only the major ethnic groups had their own regional states. Sidama's success thus opened up a Pandora's box of ethnic-based demands to establish new regional states. Fasil Nahum, one of the drafters of the Constitution, explains the significance of ethnicity in Ethiopia's federal system: 'The ethno-linguistic groupings and the nationality issue has historico-political and socio-economic significance beyond the cultural and linguistic expressions. Indeed "We the Nations, Nationalities and Peoples …" recognises Ethiopia as a Nation of Nations.'[7]

In Ethiopia's federal system, sovereignty is divided among these ethnic groups.[8] Each ethnic group is a sovereign entity and can unconditionally exercise its right to self-determination up to secession.[9] However, in practice, most of the country's ethnic groups live as minorities within the existing states. Immediately after the decision on Sidama's request for statehood, other ethnic groups — particularly groups from the then SNNPRS including Kaffa, Benchi, Sheko, Western Omo, Dawro, Sheka and Konta — pursued a similar agenda.[10] However, unlike the Sidama, these ethnic groups agreed to negotiate over a government proposal that clustered them into a single new regional state. After negotiating with the concerned bodies including the federal government and the House of Federation (HoF), they together consented to form one regional state named Southwest Ethiopia. It is likely this result was due to the relatively small sizes of each of these groups and the government's disinclination to agree to individual ethnic groups' requests for self-determination. Their combined request was resolved through the 2021 referendum, which ultimately led to the formal creation of Southwest Ethiopia.[11]

The tension between these ethnic groups' right to self-determination and the political interests of the central government raises constitutional questions. These questions could have been referred to the HoF. Instead, they were resolved through political means. The government employed the clustering approach — rather than constitutionally addressing the right to self-determination questions of each ethnic group through the HoF — to form the other two regional

[6] *FDRE Constitution* preamble.
[7] Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press, 1997) 51.
[8] *FDRE Constitution* art 8.
[9] Ibid preamble, arts 8, 39, 47.
[10] 'Five Zones in Ethiopia to Form New Regional State', *New Business Ethiopia* (online, 6 October 2020) <newbusinessethiopia.com/politics/five-zones-in-ethiopia-to-form-new-regional-state/>, archived at <perma.cc/X4SH-28LG>.
[11] 'Official Formation of Southwest Ethiopia Regional State Underway', *Ethiopian News Agency* (online, 23 November 2021) <https://www.ena.et/web/eng/w/en_30758>.

states out of the remaining diverse ethnic groups which formerly formed part of the SNNPRS. Three of Ethiopia's four newly formed regional states, the exception being Sidama, are thus still significantly heterogeneous. Ethnic groups including Wolayta, Gamo, Gofa and Gedeo now form one of the four new regional states, South Ethiopia.[12] Other ethnic groups including the Gurhage, Silte, Kambata, Hadya, Yem and Halaba have been clustered to form what is now known as Central Ethiopia.[13] The Gurhage people have objected to being clustered with these other ethnic groups, though, and are still demanding their own regional state, invoking the procedures set out in the Constitution.

Since its establishment, the HoF has remained inaccessible to those ethnic groups that invoke the procedures set out in the Constitution to exercise their right to self-determination. In the formation of the new four regional states, the main role has been played by the government and the HoF's role has been limited to officialising their establishment.

Ethiopia's smaller ethnic groups including those mentioned above may be easier to manage within the federal system as they are more likely to concede to federal government resolutions due to their less significant political leverage. However, the war with Tigray illustrates the threat that ethnic-based autonomous groups can pose to the central government. In brief, conflict erupted in November 2020 after simmering differences between the federal government and the politically sidelined Tigray People's Liberation Front (TPLF) were escalated by the HoF's decision to postpone the 2020 general elections both at the federal and regional levels. As will be explained later, the war continued for two years until the late 2022 Peace Accords were signed in Pretoria.

The ethnic-based federal system was adopted in Ethiopia with a view to accommodate diversity and to decentralise power.[14] As the division of governmental power through a supreme constitution is the main organising principle of federalism and because such division is usually hotly contested, the presence of an umpire that settles constitutional disputes is an essential feature of any federal system.[15] Courts, including constitutional courts, serve this purpose in

[12] 'Ethiopia Creates a 12th Regional "State"', *VOA* (online, 5 July 2023) <https://www.voaafrica.com/a/ethiopia-creates-a-12th-regional-state-/7168313.html>.
[13] Tsegaye Tilahun, 'Ethiopia: Central Ethiopia State Officially Formed', *AllAfrica* (online, 29 October 2023) <https://allafrica.com/stories/202310290169.html>. See also Samson Berhane, 'A Renewed Push for Statehood Raises More Questions than Answers', *The Reporter* (online, 6 August 2022) <thereporterethiopia.com/25590/>, archived at <perma.cc/F2Y9-8HU2>.
[14] A Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)' (2010) 1(1) *Mizan Law Review* 1, 1.
[15] Ibid.

most federations, but Ethiopia has unusually vested this role in its upper house (the HoF), which has non-legislative political and adjudicative roles. Among other things, the HoF is constitutionally authorised to handle intergovernmental issues, to interpret the Constitution, and to decide on nationalities' right to self-determination and even secession. It also allocates federal subsidies to the states,[16] and has the power to order federal intervention in states to protect the federal Constitution. Such broad roles allow the HoF to engage in legislative and executive politics, but it is not involved in parliamentary law making.

This chapter examines the HoF and examines whether it is based on a prudent design that will advance federalism, balancing the benefits of centralisation and decentralisation, or if it is merely an arrangement involving the ill-designed allocation of power. Addressing this question is important because Ethiopia follows a federal system and the HoF is designed to be the ultimate guardian of this system. As a form of government involving a constitutionally entrenched division of power between national and subnational governments, federalism is integral to Ethiopia's system of constitutionalism and the rule of law. Maintaining federalism — the balance of power between co-equal governments within a single political system — can be considered a rule of law project to the extent it involves subjecting these governments not to each other but to a supreme law, the constitution. As Lenaerts observes: 'As a system of divided powers, federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law'.[17] Federalism thus entails a neutral constitutional umpire. In this regard, Delaney's theory of 'the federal case for judicial review' offers a compelling perspective arguing that 'The federal apex court has a superior ability to acknowledge and balance multiple majorities without a systemic bias in favour of one'.[18]

Investigating the design and structure of the HoF in light of Ethiopia's constitutional commitment to federalism is thus an indispensable step in understanding the HoF's role in the realisation of the rule of law. Previous scholarly works on the HoF have generally focused on

[16] *FDRE Constitution* art 62.
[17] Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38(2) *American Journal of Comparative Law* 205, 205.
[18] Erin F. Delaney, 'The Federal Case for Judicial Review' (2022) 42(3) *Oxford Journal of Legal Studies* 733, 756.

its performance,[19] while the issue of the HoF's unique design and what this means for federalism has remained under-researched. Furthermore, examining the design of the HoF in relation to its impact on federalism is very topical due to, as indicated in Chapter 1, the Tigray war, the ongoing war in the Amhara Region, and the renewed ethnic-based demands for autonomy that have raised questions about the HoF's ability to ensure the peaceful resolution of constitutional disputes. This chapter therefore aims to conduct a thorough investigation into the institutional design of the HoF with reference to its political and adjudicative roles and the implications this design has for federalism.

To this end, this chapter firstly provides an analysis of Ethiopia's federal system. Secondly, the structure of the HoF is presented. Thirdly, the process of selection of members of the HoF is examined. Fourthly, the chapter analyses the role of the HoF with reference to its political and adjudicative roles. And finally, this chapter concludes that, although the HoF's broad powers give it the potential to nurture federalism, its overall design and the unique federal system in which it functions reveal serious institutional limitations that hinder its role as an umpire of federalism.

3.2 Federalism

3.2.1 Context

Given its diversity and relatively large territorial size, Ethiopia is essentially a federal polity. However, there is huge controversy over Ethiopia's ethnic federal system and what form it should take. Some consider the current structure a curse which is leading the country to disintegrate[20] through the erosion of cooperation,[21] while others present it as a panacea for all the political problems Ethiopia must grapple with.[22] Haile asserts that, 'instead of solving the problems facing the country such as tribalism, denial of human rights, and poverty, [Ethiopia's

[19] See Fiseha, 'Constitutional Adjudication in Ethiopia' (n 14); Tesfa Bihonegn, 'The House of Federation: The Practice and Limits of Federalism in Ethiopia's Second Federal Chamber' (2015) 9(3) *Journal of Eastern African Studies* 394; Mulu Beyene Kidanemariam, 'Assessing the Ethiopian House of Federation in the Light of the Exhaustion of the Local Remedies Rule under the African Charter' in Wolfgang Benedek et al (eds), *Implementation of International Human Rights Commitments and the Impact on Ongoing Legal Reforms in Ethiopia* (Brill Nijhoff, 2020) 326.

[20] Minasse Haile, 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development' (1997) 20(1) *Suffolk Transnational Law Review* 1, 3–7.

[21] Alemante G Selassie, 'Ethnic Federalism: Its Promise and Pitfalls for Africa' (2003) 28(1) *Yale Journal of International Law* 51, 86.

[22] Alemseged Abbay, 'Diversity and State-Building in Ethiopia' (2004) 103(413) *African Affairs* 593.

ethnic federal system] has exacerbated them'.[23] Selassie concurs with this, claiming that, instead of encouraging different groups to cooperate, 'ethnic federalism provides the leaders of each ethnic group with incentives to separate themselves from other groups' leaders and to separate their people from other ethnic groups'.[24] Eresso similarly indicts ethnic federalism for eroding Ethiopia's social cohesion.[25] According to critics Zegeye and Ganta, the federal system in Ethiopia 'contributes to a loose collection of semi-autonomous warring ethnic regions'.[26] The situation on the ground seems to corroborate these critiques to a great extent. In 2009 for example, an International Crisis Group study in Ethiopia observed that '[c]ommunal conflicts sparked by ethnic-based federalism have become common'.[27]

Supporters of Ethiopia's ethnic-based federal system consider the overall constitutional design acceptable (albeit with some exceptions) and attribute Ethiopia's political predicament to the poor implementation of this federal system.[28] Stronger advocates of the ethnic federal system in Ethiopia, such as Kymlicka and Gebissa, argue that institutionalisation of ethnic identities is the outcome of a liberal democratic process and that this undergirds its (democratic) legitimacy.[29] Similarly, Abay argues that 'it is the failure of state actors to acknowledge ethnic interests that engenders communal discord'.[30] Likewise, Gebreluel associates the political instability in Ethiopia with 'policies and practices that only serve to generate toxic xenophobic side-effects'.[31]

The debate over the feasibility of Ethiopia's ethnic federal system goes beyond the confines of academic discourse. The issues central to this debate are the primary dividing lines between

[23] Haile (n 20) 4.
[24] Selassie (n 21) 86.
[25] Muluneh Kassa Eresso, 'Challenges in Ethiopia's Post-1991 Ethnic Federalism Entwined with Ethnic-Based Political Parties' (2021) 15(2) *Mizan Law Review* 313, 313.
[26] Abebe Zegeye and Brightman Gebremichael Ganta, 'Preface to Special Issue on Ethiopia: Beyond Ethnic Federalism and the Statehood Solution' (2022) 38(4) *Journal of Developing Societies* 391, 391.
[27] International Crisis Group, *Ethiopia: Ethnic Federalism and its Discontents* (Africa Report No 153, 4 September 2009) 26 <icg-prod.s3.amazonaws.com/153-ethiopia-ethnic-federalism-and-its-discontents.pdf>, archived at <perma.cc/9PSK-QVYP>.
[28] Tsegaye Regassa, 'Issues of Federalism in Ethiopia: Towards an Inventory of Legal Issues' in Tsegaye Regassa (ed), *Issues of Federalism in Ethiopia: Towards an Inventory* (Addis Ababa University, 2009) 1, 25.
[29] See Will Kymlicka, *Multiculturalism: Success, Failure, and the Future* (Migration Policy Institute, February 2012) 6–8. <migrationpolicy.org/sites/default/files/publications/TCM-Multiculturalism-Web.pdf>, archived at <perma.cc/8H4M-LT8E>; Ezekiel Gebissa, 'Review: The Making, Unmaking and Remaking of Ethiopia' (2008) 49(2) *Journal of African History* 335, 337.
[30] Abbay (n 22) 614.
[31] Goitom Gebreluel, 'Should Ethiopia Stick with Ethnic Federalism?', *Aljazeera* (online, 5 April 2019) <aljazeera.com/opinions/2019/4/5/should-ethiopia-stick-with-ethnic-federalism>, archived at <perma.cc/D5LH-PWY9>.

Ethiopia's political parties.[32] Furthermore, there is also no consensus over this issue within the ruling Prosperity Party, which appears to favour non-ethnic politics, although its 'regional chapters are largely the same Oromo, Amhara, and southern party structures that made up the prior [ethnic-based] coalition'.[33]

The foregoing divergent views are manifestations of two contradictory visions for the Ethiopian federal system. One of these aims to maintain the current ethnic-based system and prefers strong states to a strong central government. Enthusiastic supporters of strong ethnic-based autonomy see proposals to reform the ethnic federal system as a return to the now defunct unitary system. Such a view seems anachronistic to anyone familiar with the current political context in the country. There are no political groups that advocate the revival of the old political system. Instead, the objection to ethnic federalism aims to bring about more decentralisation through non-ethnic-based federalism. It should be noted that the current ethnic-based regions in Ethiopia share features of unitary states. As the respective regional states are established only for the major ethnic groups, there is a prevalent lack of accommodation and empowerment of a range of minority ethnic groups across the country.

The second vision considers such ethnic states as threats to the federation and not amenable to genuine decentralisation of power, and thus favours more non-ethnic-based decentralisation to avert the threat larger regions pose to the centre. A compromise between these visions seems to be the key to Ethiopia's future.

While recognition of diversity is no doubt necessary to build a stable state in plural societies, marrying ethnicity with the state is open to risks. Ethiopia's experience suggests that ethnic federalism is prone to conflict. The recurring ethnic-based conflicts in the country have seriously undermined human rights and democracy. Ethiopia has to take lessons from failed and continued multicultural polities. For example, South Africa's quasi-federal system recognises the country's diverse groups but rejects ethnic-based self-government.[34] Furthermore, one of the most ethnically diverse federal systems in the world, India, has a strong

[32] Biruk Wondimu Chemere, 'The Creeping Fashion of Ethnicism in the Modern Ethiopian Politics: Its Creation, Process, and Consequences' (2022) 9(1) *Cogent Arts & Humanities* 2104797, 1.
[33] Ethiopia was ruled by an ethnic political coalition of four parties, the Ethiopian People's Revolutionary Democratic Front (EPRDF), from 1991 to 2018. Following a change in political leadership in 2018, the Prosperity Party was formed through an amalgamation of three of the EPRDF member parties. The Tigray People's Liberation Front, the party which dominated the EPRDF for three decades, objected to this change and eventually entered into a war with the central government in 2020. See Terrence Lyons, 'The Origins of the EPRDF and the Prospects for the Prosperity Party' (2021) 56(5) *Journal of Asian & African Studies* 985, 1052.
[34] Christophe Van der Beken, 'Ethnic Diversity and Federalism. Constitution Making in South Africa and Ethiopia. Yonatan Tesfaye Fessha' (2012) 25(1) *Afrika Focus* 108, 110.

central government. Its federal system is usually referred to as a quasi-federal system to indicate its centralising tendencies, which aim to prevent fragmentation. On this front, Rosenfeld emphasises 'the need to construct a common constitutional identity that is distinct from national, cultural, ethnic or religious identity'.[35] He further explains that 'internal strife and fragmentation within ethnically, religiously, linguistically, or culturally diverse polities, such as the former Yugoslavia, have underscored the fragility of constitutional democracies in heterogeneous and pluralistic settings'.[36]

Yet the state-building process in post-conflict, multicultural, developing countries with a volatile political environment cannot be oversimplified. In such states, the political transition and an all-encompassing dialogue that leads to consensus are key in building a stable constitutional system. As Grenfell states, post-conflict constitution making can 'assist in reconciling groups, providing stability and avenues of redress and in avoiding relapse into conflict'.[37]

In building a post-conflict constitutional system, the process of deciding the content and of making the constitution is very important. Ethiopia's return to conflict speaks volumes in this regard. Its current Constitution was the product of a non-participatory process that, as will be explained later, resulted in the public not accepting it. The Constitution is problematic content-wise as well. Indeed, it can be argued that the Constitution has been weakened by the freezing of divisions caused by the ethnic-based federal system, which has also resulted in a series of ethnic conflicts. More generally, the widespread discontent over both the process of the adoption of the Constitution and its substantive content has resulted in years of popular protests, which eventually led to a change in political leadership in 2018.

To contextualise these observations, some additional background is needed. Ethiopia's federal system was introduced after a significant centralisation process that took place across most of the 20th century. Following the removal of the socialist Dergue regime in 1991, various ethnic-based liberation fronts, the dominant front being the TPLF (Tigray People's Liberation Front), formed the Transitional Government of Ethiopia (TGE, 1991–95) through the adoption of the *Transitional Period Charter of Ethiopia* ('the Charter'). The Charter set out the right to self-determination (including the right to independence) of 'nations, nationalities and peoples' as

[35] Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010) i.
[36] Ibid 1.
[37] Laura Grenfell, *Promoting the Rule of Law in Post-conflict States* (Cambridge University Press, 2013) 8.

the main organising principle of social, economic and political life.[38] The Charter also dictated the establishment of regional administrations based on identity.[39] Accordingly, a proclamation was enacted by the TGE to establish transitional ethnic-based self-governing administrations.[40] This proclamation established 14 transitional regional self-governments and identified 64 nationalities capable of establishing their own regional administrations.[41]

Five of the transitional period regional self-governments[42] merged to form the SNNPRS, the region that dissolved recently because of the formation of Ethiopia's four new regional states from 2020 to 2023. The Constitution demoted the capital city Addis Ababa from a self-governing region to a chartered city, conceivably due to the incongruence between its over five million cosmopolitan population and the ethnic-based political arrangement in which they found themselves. In terms of its population size, Addis Ababa remains larger than seven of the current regional states in Ethiopia.[43]

As will be explained later, Ethiopia's Constitution adopts a primordial understanding of ethnicity. Accordingly, a region established in the name of an ethnic group might contain a minority of that ethnic group. For example, Harari State is the smallest state in the federation with less than a quarter of a million people. The Harari people constitute less than 10 per cent of the state's population, yet the region is established in the name of and administered by the Harari people — an arrangement that is arguably at odds with democratic ideals. The major ethnic groups in the region have accordingly shown discontent over this scheme since it was introduced, and attempts have been made to remedy this through party-based power-sharing arrangements between the Oromo, who constitute over half the region's population, and the Harari. However, this power-sharing arrangement is not inclusive of many other ethnic groups in the state, including the Amhara, who constitute over 22 per cent of the region's population.

Competition among ethnic groups over regional power and resources is just as prevalent in other regional states where a dominant ethnic group is lacking, including the newly formed

[38] Transitional Government of Ethiopia, *Transitional Period Charter of Ethiopia* (1991) preamble, art 2.
[39] Ibid art 13.
[40] *National/Regional Self-Governments Proclamation*, no 7/1992 (Ethiopia) art 3.
[41] Ibid art 3.
[42] Ibid. 48 ethnic groups in south Ethiopia were organised as Regions Seven, Eight, Nine, Ten and Eleven. Addis Ababa was named Region Fourteen.
[43] 'Ethiopia Administrative Regions, Cities and Population', *EthioVisit* (Web Page, 2023) <ethiovisit.com/ethiopia/ethiopia-regions-and-cities.html>, archived at <perma.cc/UN4U-L78F>.

regional states, Gambella and Benishangul Gumuz.[44] Interethnic conflicts are also common in the remaining regions due to the marginalisation of 'several dozen smaller ethnic groups … attached as minority ethnic groups to the bigger ethnic regions'.[45] In sharp contrast to the Nigerian federation, which started with three states and progressively reorganised itself into 36 states to avoid the negative congruence between state and ethnicity, Ethiopia institutionalised ethnicity and attempted to create a congruence between the two.

In the 1990s, the TPLF took the lead in reconstructing the Ethiopian state based on identity.[46] The Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), a coalition of four ethnic-based political parties including the TPLF, dominated the transition process and 'quickly institutionalised [the] TPLF's policy of peoples' rights to self-determination'.[47] Unfortunately, the constitution-making process that took place was characterised by 'little popular "conversation"'.[48] As Aalen observes, 'the process of drafting and ratifying the constitution was totally dominated by the ruling party, [the EPRDF] and hence, the federal project lost legitimacy'.[49] According to Stremlau, '[i]n rural contexts, concepts such as "federalism" were not clearly explained',[50] and 'there was simply no time to form a national consensus on the legitimacy of the new political system'.[51]

The constitution-making process was guided by the principles set out in the Charter, the most important principle being the right of nationalities to self-determination, including the right to external secession. A 25-member Constitutional Commission was established in August 1992 to draft a new constitution 'in conformity with the spirit of the Charter'.[52] The minutes of this Constitutional Commission reveal the emphasis given to the ethnic groups' rights to self-determination in the drafting process.[53] The Constitution was then adopted by a directly elected

[44] Asnake Kefale, *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study* (Routledge, 2013) 84–103. See also 'Allocation of Administrative Offices between Cities in Newly Established Cluster Regions in Southern Ethiopia Raises Discontent', *Addis Standard* (online, 9 August 2023) <https://addisstandard.com/news-allocation-of-administrative-offices-between-cities-in-newly-established-cluster-regions-in-southern-ethiopia-raises-discontent/>.
[45] Kefale (n 44) 84.
[46] Legesse Tigabu Mengie, 'Ethnic Federalism and Conflict in Ethiopia: What Lessons Can Other Jurisdictions Draw?' (2015) 23(3) *African Journal of International and Comparative Law* 462, 463.
[47] International Crisis Group (n 27) i.
[48] Regassa (n 28) 2.
[49] Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991–2000* (Chr Michelsen Institute, Report 2002:2, 2002) vi.
[50] Nicole Stremlau, 'Media, Participation and Constitution-Making in Ethiopia' (2014) 58 *Journal of African Law* 231, 237.
[51] John Markakis, 'Federalism and Constitutionalism in the Horn of Africa' in *Constitutionalism and Human Security in the Horn of Africa* (Inter-Africa Group, 2007) 49, 49, cited in Stremlau (n 50) 237.
[52] *Constitutional Commission Establishment Proclamation*, no 24/1992 (Ethiopia) art 4.
[53] Transitional Government of Ethiopia, *Constitutional Commission Minutes*, vol 2, no 000126 (1993).

547-member Constituent Assembly. The members of the assembly were meant to represent the nationalities, but the overwhelming majority were members of the EPRDF. Yet, the EPRDF, the party that had the upper hand in the constitution-making process, was a coalition of ethnic-based groups as indicated above.

The influence of ethnic-based forces in the constitution-making process was reinforced by the sidelining of groups that opposed the idea of reconstructing Ethiopia based on ethnic identity. Hessebon observes that 'the dominance of the EPRDF (which [was] itself dominated by [the] TPLF) in the constitution-making process was largely based on its military triumph over the Dergue',[54] and was 'used … to exclude from the process political parties that had a different constitutional vision'.[55] Today, the disagreement over Ethiopia's federal system is primarily around the institutionalisation of ethnicity, which stemmed from the EPRDF's dominance of the constitution-making process. This system allows nationalities to secede unconditionally, recognises them as sovereign entities, organises regional states primarily along ethnic lines, and establishes an ethnic-based second chamber, the HoF, with political and adjudicative roles.[56]

Overall, then, there has been a great deal of discussion about the virtues and pitfalls of Ethiopia's federal system in general.[57] Whatever its merits, the existing system's demonstrated failure to secure political stability means that constitutional reform now seems to be inevitable. Thus, it is high time to ponder whether Ethiopia should reconsider or maintain its ethnically defined institutions in general and the HoF, the ultimate guardian of its federal system, in particular. The question that the remainder of this chapter confronts is accordingly whether the HoF is a prudent choice for managing federalism and resolving constitutional disputes in Ethiopia.

[54] Gedion T Hessebon, 'The Precarious Future of the Ethiopian Constitution' (2013) 57(2) *Journal of African Law* 215, 219.
[55] Ibid.
[56] *FDRE Constitution* arts 8, 39, 47, 61.
[57] See, eg, Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Routledge, 2011); Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet' (2012) 22(4) *Regional & Federal Studies* 435; Assefa Mehretu, 'Ethnic Federalism and Its Potential to Dismember the Ethiopian State' (2012) 12(2–3) *Progress in Development Studies* 113; Kefale (n 44); Bayu (n 3).

3.2.2 Why the House of Federation?

While federal second chambers have emerged in diverse ways and exercise a range of different powers, their major role is representing the interests of subunits in law making at a federal level.[58] As the subjects of a given federation are both individuals and subunits, its bicameral legislature would usually represent people proportionally through a lower house and subunits on a territorial basis through an upper house. Ethiopia is an exception to this. The HoF has no legislative roles nor do its members represent regional states. Rather, the HoF is composed of members who are representatives of nations, nationalities, and peoples.

The primary role of the HoF is constitutional interpretation,[59] while its additional political roles include handling intergovernmental issues, allocating subsidies, and ordering federal intervention 'if any State, in violation of [the] Constitution, endangers the constitutional order'.[60] It also has a say on matters relating to constitutional amendments.

Among the approximately 25 federal systems in the world,[61] the HoF is the only non-legislative second chamber whose primary role is constitutional adjudication. Why, then, did the architects of the Constitution of Ethiopia opt for such a unique second chamber? Though there is no straightforward answer to this question, what should be stressed from the outset is that the justifications used for the establishment of the HoF are linked to the institutionalisation of ethnicity in Ethiopia.

The first justification has to do with constitutional authorship. The architects of the Constitution recognised ethnic groups as the authors of the Constitution, with the Constitutional Commission and the Constituent Assembly laying special emphasis on this point.[62] The Constituent Assembly in particular considered the Constitution a 'political contract' between the nationalities,[63] which is reflected in the constitutional preamble's attribution of authorship to 'the Nations, Nationalities and Peoples of Ethiopia',[64] and in the fact that the Constitution vests sovereign power in these entities.[65] Whether these entities had the capacity to consent is

[58] Anna Gamper, 'Legislative Functions of Second Chambers in Federal Systems' (2018) 10(2) *Perspectives on Federalism* 117, 119.
[59] *FDRE Constitution* arts 62, 83.
[60] Ibid arts 62(6)–62(9).
[61] Ronald L Watts, *Comparing Federal Systems* (McGill-Queen's University Press, 3rd ed, 2008) 12.
[62] See Transitional Government of Ethiopia, *Constitutional Commission Minutes*, vol 2 (1993) no 000125; Transitional Government of Ethiopia, *Constituent Assembly Minutes*, vol 5 (1994) no 000006 ['*Minutes No 6, 1994*'].
[63] *Minutes No 6, 1994* (n 62).
[64] *FDRE Constitution* preamble.
[65] Ibid art 8.

questionable as the federation emerged from a unitary state and these entities were not organised along identity lines pre-federation.

Leaving this aside, the next question is who should interpret the Constitution. The federation's founders believed the Constitution should be interpreted by its authors — the nations, nationalities and peoples — as it is a result of their consent. Accordingly, the representative of the authors, the HoF, is vested with this power.

The second justification for the design of the HoF relates to the nature of the Constitution. The argument here is that the Constitution is primarily a political document not amenable to courts. This debate is of course not peculiar to Ethiopia. It is evident in this regard that constitutions are both legal and political documents, and that constitutional questions thus involve testing legal-political issues. In deciding how to resolve this legal-political dilemma, majority members of the Constituent Assembly believed that the rights of the nations, nationalities and peoples would be compromised in the guise of protecting human and democratic rights if the role of resolving constitutional questions is given to courts.[66] It especially emphasised its concern that judges would give preference to their own values and thus undermine the interests guaranteed by the Constitution to the nationalities.[67]

The third justification has to do with the perceived counter-majoritarian difficulty with judicial review. The Constituent Assembly emphasised the alleged legitimacy deficit when courts entertain matters involving the interests of nations, nationalities and peoples. It underlined that judges lack the legitimacy to determine the rights of the nationalities.[68] The argument here is that unelected judges should not be allowed to interpret the Constitution as that would be undemocratic. Based on the aforementioned justifications, the founders decided to distance courts from constitutional adjudication. Accordingly, vesting this role in a political body (the HoF) supported by an advisory body (the Council of Constitutional Inquiry, CCI) was deemed the best institutional choice.

There is no doubt that the foregoing justifications are appealing. A constitutional adjudication body like the HoF is in some senses democratically more legitimate than courts staffed by unelected judges. Such a body could also appear apt to handle constitutional disputes involving politically sensitive issues. Yet, the way the HoF is designed and the range of powers vested in

[66] Transitional Government of Ethiopia, *Constituent Assembly Minutes*, vol 5 (1994) no 000007.
[67] Ibid.
[68] *Minutes No 6, 1994* (n 61).

it raise concerns about its impartiality and effectiveness in upholding the federal system. Some members of the Constituent Assembly indeed raised these particular concerns during the constitution-making process, alluding to the accumulation of political and adjudicative powers in the same hands.[69] They argued in favour of (constitutional) courts, claiming that the way the HoF is designed violates the principle of the separation of powers.[70]

The arguments in favour of the HoF, then, are not as strong as they may first appear. As indicated above, it is difficult to consider nations, nationalities and peoples as the authors of the Constitution. The autonomy of these entities is not antecedent to the current federal system as Ethiopia emerged from a unitary state. These entities, therefore, did not have the capacity to consent to the country's unique federal arrangements, as evidenced by the domination of the constitution-making process by the EPRDF.

The claim that the Constitution is primarily a political document is not incontrovertible either. There is no doubt that a constitution is a body of legal-political rules. Yet it is also a translation of political ideas into legal rules and is therefore, one may argue, a substantially legal instrument. There is accordingly a risk that interpreting the constitution through a political body could undermine constitutionalism, an ideal whose very purpose is controlling political power.

Moreover, the counter-majoritarian nature of judicial constitutional review could be considered a virtue and not a vice if everyone, including the government, is to be subjected to the constitution. Lemieux and Watkins assert that 'the counter majoritarian nature of the courts is a good thing, because courts are uniquely well situated to protect the rights of individuals or disadvantaged groups against an excessively powerful majority'.[71] More importantly, the legitimacy of judicial review is less controversial in contemporary constitutional democracies. Judicial review is usually legitimated by the will of the people expressed in a constitution, or through the 'ongoing acceptance of, and support for, judicial review as a mechanism to constrain the public's immediate preferences', as one can see from constitutional jurisprudence in the United States.[72] This does not of course mean that judicial review is always infallible. A constitutional review body may at times come up with controversial decisions that impact its

[69] Transitional Government of Ethiopia, *Constituent Assembly Minutes*, vol 5 (1994) no 000006-8.
[70] Ibid.
[71] Scott E Lemieux and David J Watkins, 'Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory' (2009) 41(1) *Polity* 30, 32.
[72] Or Bassok and Yoav Dotan, 'Solving the Countermajoritarian Difficulty?' (2013) 11(1) *International Journal of Constitutional Law* 13, 13.

ongoing acceptance. A good example of this is the US Supreme Court's *Dobbs v Jackson* decision in which the Court overturned *Roe v Wade*.[73]

It should also be noted that sitting senior politicians, including federal ministers and regional executive heads, are not precluded from being members of the HoF. Its impartiality is thus questionable. Furthermore, while the HoF exercises a range of political powers in addition to its adjudicative role, it does not have law-making power. This also raises questions about the effective representation of the building blocks of the federation at the federal level.

All of this is to say that the legitimacy of the HoF as the guardian of the Ethiopian Constitution is far from secure. In light of this recognition, the following sections examine the specific design and powers and functions of the HoF and their implications for federalism.

3.3 Structure of the federal upper house

3.3.1 Seat allocation

A bicameral parliament with lower and upper houses having commensurable legislative roles is common in federal systems. As indicated earlier, in law making, the people are represented by a lower house while regional interests are commonly represented by an upper house. In addition to legislative powers, federal upper houses often also have a say, although the scope varies, on extra-legislative matters including executive decisions that affect regional states or the national interest. Federal upper houses are thus meant to facilitate shared rule — representing the interests of the constituent units at a federal level — and this is what basically determines their structure. Yet there is a wide spectrum of upper house composition models among the world's federations. In this spectrum of federal upper house composition models, one finds seats allocated on a territorial basis in countries such as the United States, Australia, Switzerland, Brazil and South Africa.[74] In contrast to this, Austria's second chamber is composed purely on the basis of population size, a model which is used with some modifications in other federations including Belgium, India, Spain and the subject of my thesis,

[73] For a critical analysis of the implications of the US Supreme Court *Dobbs* decision that overturned *Roe v Wade*, see Emily Ottley, Karolina Szopa and Jamie Fletcher, 'Dobbs v Jackson Women's Health Organization (2022): Consequences One Year On' (2023) 31(3) *Medical Law Review* 457; Richard Johnson, 'Dobbs v. Jackson and the Revival of the States' Rights Constitution' (2022) 93(4) *Political Quarterly* 612.

[74] Trevor J Allen and Rein Taagepera, 'Seat Allocation in Federal Second Chambers: Logical Models in Canada and Germany' (2017) 87 *Mathematical Social Sciences* 22, 22. It should be noted here that South Africa is not officially a federal state, but its Constitution embraces features of federalism. South Africa is thus a quasi-federal state.

Ethiopia.[75] Germany and Canada have adopted a composition model where 'both per capita and territorial norms are significantly determinative of seat allocation in the second chamber'.[76]

Whichever the composition model, almost all federal upper houses are composed of representatives of regional states. As Gamper observes, the very reason that upper houses exist in federal systems is 'in order to allow the constituent units to exercise shared rule'.[77] The Ethiopian case is atypical in this regard. Ethiopia's parliament comprises a 153-seat non-legislative upper house[78] and a 547-seat lower house. Unlike most upper houses, the HoF represents ethnic groups and not regional states.[79] While there is a threshold that allows each ethnic group to have at least one representative in the HoF regardless of its size, there is no upper limit that prevents large ethnic groups from dominating the house.[80] Indeed, although Ethiopia is home to over 80 ethnic groups, the two largest ethnic groups, the Amhara and Oromo, who together constitute over 62 per cent of Ethiopia's population, could eventually control the house, particularly as their population sizes grow. That makes the HoF more or less similar to the lower house in terms of composition.

As representation on a territorial basis is missing in Ethiopia, the regions' participation in shared rule at the federal level is blurred. Yet, ethnicity and regional-state status somewhat coincide. Some of the regional states are self-administered units established for and controlled by a single and dominant ethnicity in the respective states. Representation of an ethnic group may thus mean, at least in some cases, representation of a regional state that is dominated by one ethnic group. Regional states also have a role in the selection of members of the HoF, as will be discussed later. Whether members of the HoF represent ethnic groups or regional states is therefore not entirely clear.

Federal upper houses are commonly designed to counter-balance majoritarian interests represented by the lower house to accommodate differing regional state views. As upper houses often make decisions based on a majority vote, regional states cannot 'veto decisions single-handedly even in symmetric systems'.[81] Yet, if the composition method is territory-based, it allows states with differing views to come together and challenge decisions of the majoritarian

[75] Ibid.
[76] Ibid 24.
[77] Anna Gamper, 'Second Chambers in Federal States', *50 Shades of Federalism* (Web Page, 2020) <50shadesoffederalism.com/theory/1045/>, archived at <perma.cc/YQ9A-JJQP>; *FDRE Constitution* art 61.
[78] *FDRE Constitution* art 61. The number of seats in the non-legislative upper house is still subject to change.
[79] Ibid art 61.
[80] This can be contrasted with the German model, which sets both lower and upper limits.
[81] Gamper, 'Second Chambers in Federal States' (n 77).

lower house. Composing a federal upper house primarily based on population, as in the case of Ethiopia's HoF, makes it structurally similar to the lower house, which in turn weakens the notion of regional states' participation in shared rule.

3.3.2 Internal organisational structure

The Constitution empowers the HoF to establish permanent and ad hoc committees and to organise the constitutionally established advisory body, the CCI.[82] Thus far, the HoF has established three standing committees. Each committee, which consists of 15 HoF members, entertains matters submitted to it and submits reports and recommendations to the HoF for a final decision.[83]

Constitutional disputes in particular are first submitted to the CCI and pass through a court-like adjudication process. If the CCI finds a need for constitutional interpretation, it submits its recommendation to the HoF.[84] If not, it declares its decision to the concerned party who, if dissatisfied, can submit the case directly to the HoF.[85] Upon submission of a recommendation or an appeal to the HoF, the Constitutional and Identity Issues Standing Committee considers the issue and submits its recommendation to the HoF. The HoF decides the issue based on this recommendation.

The HoF holds two regular sessions a year to make decisions by a majority vote.[86] Each session usually lasts one day. The HoF rarely calls its members, most of whom live in regional states, for extraordinary meetings. Most of its day-to-day activities and coordination work are thus handled by the three standing committees, its Speaker, and the Secretariat.

The CCI exists as a separate assisting body, although the HoF is empowered to organise it. Both the CCI and the HoF are established by the Constitution, which lists their powers and functions.[87] In this regard, the Constitution seems to have envisioned the CCI as an independent advisory body.[88] Even if the CCI does not make binding decisions, it conducts constitutional inquiry independently when constitutional disputes are 'submitted to it by any court or

[82] *FDRE Constitution* art 62.
[83] 'About Standing Committees', *House of Federation* (Web Page, 2023) <hofethiopia.gov.et/en_US/web/guest/committee>.
[84] *FDRE Constitution* art 84.
[85] Ibid art 84.
[86] Ibid arts 64(1), 67(1)
[87] Ibid arts 62, 82, 84.
[88] Ibid arts 82(1), 84.

interested party'.[89] It is also constitutionally authorised to determine its own internal organisational structure.[90]

Perhaps tellingly, the Constitution places the provisions that set out the powers, functions and structure of the CCI in chapter 9, which is dedicated to the judiciary.[91] Although the overall design is far from perfect, its architects have attempted to incorporate both constitutionalism and democracy into the constitutional adjudication system by involving the CCI and the HoF.

The CCI is an eleven-member advisory body composed of the President and Vice President of the Federal Supreme Court, six legal experts appointed by the President of the country for six years, and three HoF members.[92] Compared to the HoF, it is a relatively impartial body, though its jurisdiction is limited to inquiring as to whether a case submitted to it involves a constitutional question and then submitting a recommendation to the HoF. It is not mandatory for the CCI to conduct oral hearings. It conducts such hearings only when it deems necessary. While the CCI's structure allows concerned parties to submit their complaints at any time and the CCI's members meet relatively frequently (currently on a monthly basis) to investigate these complaints,[93] cases referred to the HoF for a final decision cannot be decided expeditiously due to the institutional limitations of this house, including the fact that it does not regularly meet to adjudicate constitutional disputes. For this reason, a case normally needs to wait to be heard until the twice-yearly meetings of the HoF, for extraordinary meetings are rare.

3.4 Selection

There is a wide spectrum of methods for selecting the members of upper houses in federal systems.[94] A given federal system adopts one selection method or another based upon the purpose for which its second chamber is designed. Protection of the interests of constituent units from encroachment by the federal government, protection of the interests of small constituent units, and limiting the excesses of popular government through countering the

[89] Ibid art 84.
[90] Ibid art 82(3).
[91] See ibid arts 78–84 (ch 9). The title of chapter 9 is 'Structure and Powers of Courts', and this chapter establishes the CCI.
[92] Ibid art 82(2). See also *Council of Constitutional Inquiry Proclamation*, no 798/2013 (Ethiopia) arts 15, 17.
[93] *Council of Constitutional Inquiry Proclamation*, no 798/2013 (Ethiopia) art 23.
[94] Watts (n 61) 149–50.

decisions of the majoritarian lower house are among the common purposes served by upper houses.

As I elaborated, Ethiopia's Constitution considers ethnic groups (nations, nationalities and peoples), but not states, as the building blocks of the federation. The Constitution thus does not talk about representation of regional states in the HoF. The HoF is thus the representative of neither Ethiopia's regional states nor the people of the respective regional states. It rather represents ethnic groups at the federal level. There is, however, an inconsistency here that is problematic. While the HoF represents ethnic groups, the powers granted to it largely involve the interests of states. As indicated, it is the HoF that settles disputes between states, allocates federal subsidies to the states, and orders the federal government to intervene in state affairs. Furthermore, the method of selection of the members of the HoF raises the question as to whose interest is actually represented by the house. The Constitution leaves the choice to the states to select the members through their legislatures or direct election. Since the Constitution was adopted three decades ago, the members of the HoF have been selected through state legislatures. The HoF communicates to the states the number of seats assigned to each ethnic group and the state legislatures select members and send their list to the HoF.[95] State legislatures usually select party members, particularly sitting politicians, as HoF members.[96] The growing public support for democratic ideals may eventually lead states to switch to the second option (direct election). As the country is currently in transition, constitutional revision may also alter the natural evolution of the HoF. Leaving these possibilities aside, this chapter now explains what this selection method means to Ethiopia's federalism.

In Ethiopia, the regional and national legislatures have been controlled by a single party for the last three decades: between 1994 and 2019 by the EPRDF, and from 2019 to present by the Prosperity Party. Except for the TPLF, which rejected the EPRDF's transformation into the Prosperity Party, no opposition party has led a regional state since the federal system was introduced. As the federal system has been functioning primarily through a party system, appreciating the institutional features of the federation is thus a little bit challenging.

So far, all states have selected HoF members through their respective legislatures. However, in recent years, there has been growing support for measures to strengthen Ethiopia's democracy,

[95] *House of Federation Proclamation*, no 251/2001 (Ethiopia) art 47.
[96] As indicated in Chapter 1, federal and regional senior politicians including the heads of the regional state governments are members of the House of Federation.

as demonstrated by the nation-wide protests between 2014 and 2018, which ultimately led to a change of government. The rising demand for stronger democracy and protection of regional interests and the corresponding support for ethnic-based opposition parties, if currently invisible due to the division of votes among Ethiopia's over 40 parties, may thus eventually change the status quo and allow opposition parties to control at least some of the regional states. The HoF may thus evolve from a single party–controlled body to a representative of the interests of regional states as reflected by their legislative bodies. This could improve the states' role in shared rule at the federal level.

Indirect election by state legislatures is not, however, a risk-free selection method, particularly in countries like Ethiopia where ethnicity is institutionalised. Coupled with the primarily population-based composition method, indirect selection through state legislatures could eventually allow a few ethnic-based factions to weaken the central government through the HoF. What makes the HoF less threatening in this regard is that it does not have any legislative role, as elaborated below.

Although no state has yet shown any sign of moving to the second constitutional selection method, direct election, the growing support for democracy in Ethiopia may change the situation. Support for democratic ideals has resulted in the adoption of direct election as a selection method in countries like Australia (1900), the US (1913), Switzerland (progressively through cantons' choice), and many other federations.[97] While a move to direct election may weaken the linkage between state governments and the HoF, it would arguably strengthen the legitimacy and independence of the house.

The current selection method, which involves indirect elections by state legislatures, allows the states to select HoF members on behalf of the nationalities. The complication, though, is that state legislatures represent the whole population of the respective states and not the individual ethnic groups or nationalities in the states. Almost all the regional states lack a second chamber and diversity is thus left unrepresented at the regional state level. Before it fell apart and became four regional states (namely Sidama, Southwest Ethiopia, South Ethiopia and Central Ethiopia),[98] the SNNPRS had a HoF-like second chamber that represented ethnic groups in the

[97] Ronald L Watts, *Federal Second Chambers Compared* (Canadian Electronic Library, 2008) 6.
[98] As indicated earlier, these regional states were established recently following ethnic-based demands for regional statehood. The youngest regional state, Central Ethiopia Regional State, was established on 19 August 2023. 'Endashaw Tassew Appointed Deputy Chief Administrator of Central Ethiopia Region', *Fana Broadcasting Corporate* (online, 19 August 2023) <https://www.fanabc.com/english/endashaw-tassew-appointed-deputy-chief-administrator-of-central-ethiopia-region/>.

state. Yet, members of the HoF to represent the ethnic groups in this state were selected by the lower house. Hence, one may question if the Ethiopian case can even be considered an indirect election because the entities the HoF supposedly represent, namely ethnic groups, do not elect HoF members through their representatives. Given the states' control over the selection of the members of the HoF, it is therefore unclear if the members are representatives of the interests of the states or of the over 80 ethnic groups. Furthermore, it goes without saying that the single and dominant party system makes the representation of ethnic groups through the HoF less than effective. In addition, as elaborated next, one may also question whether this non-legislative house has the power to meaningfully nurture the federal project and protect the interests of the nationalities.

3.5 Roles

While composing a federal upper house and selecting its members in a way that nurtures federalism is no doubt indispensable to a successful federation, such a house cannot effectively serve this organisational principle without corresponding powers. That is why most federal upper houses have absolute veto power or a combination of absolute and suspensive veto power over most federal legislation. Upper houses that are fully or partially filled with members appointed by state or provincial executives in federations, such as in Germany and South Africa, play crucial roles in intergovernmental relations. While most federal upper houses are principally legislative bodies, the primary function of Ethiopia's upper house is constitutional adjudication, although it also has political roles that impact legislation and intergovernmental relations. This section analyses these political and adjudicative roles to illuminate the range of powers vested in the HoF and their implications for the federal system.

3.5.1 Political powers

While there are variations across the world when it comes to the details, all federal second chambers except Ethiopia's HoF have legislative power. Upper houses in federations like the US and Switzerland have co-equal legislative power with the lower house. In Australia, while the Senate has absolute veto power over federal legislation except supply bills, this is on the condition that any deadlock may be resolved through the dissolution of the two houses and a joint session of parliament.[99] The German Bundesrat and the South African National Council

[99] See *Australian Constitution* ss 53, 57.

of Provinces, meanwhile, have absolute veto power over legislation impacting administration by the Länder and the provinces, respectively, and suspensive veto power over legislation covering all remaining matters.[100]

Unlike its counterparts in other federations, the HoF does not deliberate or vote on legislation. It thus has no direct legislative power. Yet, it has political powers that can affect legislation. For example, it is the HoF that determines whether a particular civil matter needs to be addressed through federal legislation.[101] In principle, civil matters including contract, property, family, inheritance, and land administration are left for the regional states in Ethiopia's federal system.[102] Thus, the federal lower house cannot legislate on such matters unless the HoF allows it. While the HoF has not thus far made such a determination on its own initiative, the lower house has requested its assessment of the constitutionality of draft federal bills on civil matters concerning family and land where the HoF held that the federal legislature could enact laws on such matters.[103]

Crucially, the Constitution requires the lower house to 'enact civil laws which the [HoF] deems necessary to establish and sustain one economic community'.[104] If employed properly, such a general constitutional clause could enable the HoF to play a vital role in strengthening the coordinative role of the central government, in the same way that the US Supreme Court has strengthened the regulatory power of the federal government through its interpretations of the Commerce Clause and the Necessary and Proper Clause.[105]

The other political role of the HoF that is related to law making is its involvement in constitutional amendment. There are two categories of constitutional amendment in Ethiopia.[106] The first category relates to amending the chapter of the Constitution on fundamental rights and freedoms and those provisions that set out the Constitution's amendment procedures. These types of changes require a two-thirds majority vote from each house and consent from all states.[107] By contrast, the second category, which includes all

[100] Watts, *Comparing Federal Systems* (n 61) 148.
[101] *FDRE Constitution* art 62(8).
[102] Ibid arts 51 and 52.
[103] Legesse Mengie, 'COVID-19 and Elections in Ethiopia: Exploring Constitutional Interpretation by the House of the Federation as An Exit Strategy' (2021) 25 *Law, Democracy & Development* 78–79.
[104] *FDRE Constitution* art 55(6).
[105] Greg Taylor, 'The Commerce Clause — Commonwealth Comparisons' (2001) 24(2) *Boston College International and Comparative Law Review* 235. See also David Fellman, 'Federalism and the Commerce Clause, 1937–1947' (1948) 10(1) *Journal of Politics* 155, 156.
[106] *FDRE Constitution* art 105.
[107] Ibid art 105(1).

remaining provisions, requires a two-thirds majority vote of the two houses in a joint session and consent from two-thirds of the states.[108] There is thus strong representation of regional and other diverse elements in the process of constitutional amendment. When it comes to the provisions concerning rights including ethnic groups' right to self-determination, and amendment procedures, the Constitution is more rigid because a single state can effectively prevent amendment. Perhaps due to such rigidity, no formal amendment has been introduced since the Constitution was adopted, which means that the actual interaction between the states and the two federal houses in this regard is yet to be seen.

In addition, the HoF has other key political roles which are linked to intergovernmental relations. For example, it is the HoF that decides on boundary disputes between states, as well as disputes related to the right to self-determination and secession. Furthermore, the HoF 'determine[s] the division of revenues derived from joint Federal and State tax sources' and allocates federal subsidies to the states.[109] This is an important power for the HoF, given the significant vertical and horizontal fiscal imbalance in Ethiopia. That is, over 80 per cent of the revenue sources are reserved for the federal government and there are significant variations — such as population size and access to resources — between regional states.[110] In an effort to address this imbalance, the HoF has frequently changed its subsidy-distribution formula considering different factors including smaller states' dissatisfaction over the weight given to population size.[111]

The HoF also has the power to order federal intervention if a given member state endangers the constitutional order. The HoF is thus empowered to handle a range of intergovernmental issues that are potential sources of constitutional conflict. However, there is a paradox here, because if such political and fiscal decisions of the HoF are questioned as unconstitutional, they will become adjudicative issues falling again under its jurisdiction, which is to say that the political and adjudicative roles are effectively both in the same hands.

Ethiopia's federal system has experienced relatively high tension between the centrifugal and centripetal forces due to a multitude of factors including the institutionalisation of ethnicity and the centralisation of power through a single and dominant party. Given such tensions and the

[108] Ibid art 105(2).
[109] Ibid art 62(7).
[110] Abu Girma Moges, 'An Economic Analysis of Fiscal Federalism in Ethiopia' (2003) 10(2) *Northeast African Studies* 111, 123–138.
[111] Ibid.

risk of conflict between ethnically organised states, there is a huge potential for the HoF to emerge as an indispensable institution for the management of intergovernmental disputes. However, its success or failure in performing this function could negatively impact its adjudicative role, since the constitutional cases that have serious implications for the federal system arise primarily from intergovernmental disputes.

3.5.2 Adjudicative powers

As an adjudicative body, the HoF has jurisdiction over 'all constitutional disputes',[112] which it adjudicates with the assistance of the CCI. The role of the CCI is limited to submitting recommendations to the HoF for a final decision. The HoF makes decisions on constitutional disputes by a majority vote and is required to make such decisions within thirty days of the CCI's submission.[113] However, because the HoF normally meets twice a year and calls extraordinary sessions only when it has to decide on politically urgent cases, private party complaints usually take longer than the Constitution prescribes.

Constitutional adjudication no doubt plays a central role in maintaining the balance between centralisation and devolution of power in federal systems. In federations where the constituent units pre-date the central government, the powers of the latter have often been progressively strengthened through constitutional interpretation, as in the US and Australia.[114] Failure to strengthen the coordinative roles of the central government in federations could indeed pose a challenge to their integrity. As both unity and regional autonomy (diversity) should be served by federalism and strengthening one of these values at the substantial expense of the other is unsafe, constitutional review must aim at maintaining and fine-tuning the balance. This is not to say that constitutional review is the exclusive means through which the federal balance is fine-tuned.

Federalism is not a purely legalistic concept as it involves interaction between political forces. Federal constitutions therefore leave space for the federal balance 'to be determined from time to time through the interplay of political forces'.[115] As a general rule, federations formed by

[112] *FDRE Constitution* art 83(1).
[113] Ibid art 83(2).
[114] See, eg, Robert French, 'The Incredible Shrinking Federation: Voyage to a Singular State?' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 39, 58.
[115] Stephen Gageler, 'The Federal Balance' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 27, 28.

pre-existing constituent units (coming together federations) initially have a weak central government, while those which emerge from a unitary state (holding together federations) have weak constituent units. These power relationships then change over time as political, social, and economic ideologies evolve.

Constitutionally, Ethiopia is presented as a coming together federation[116] formed with the free consent of the nationalities. However, it is doubtful if these entities had the capacity to consent to the federal project as indicated earlier. These entities did not have pre-federation autonomous existence but, due to the institutionalisation of ethnicity and the Constitution's emphasis on regional autonomy, the states have now been empowered to the point where one may argue that they have become threats to the stability of the federal system. Here, one can ask what role constitutional adjudication by the HoF might play in bolstering such stability.

While settling constitutional disputes through a representative body like the HoF could in some senses appear democratically more legitimate than judicial constitutional review, it could also be problematic. In this regard, one significant challenge is that the HoF has been primarily following the dominant party's line, so that the majority's vote on a constitutional dispute in the HoF is generally in line with the dominant party's intention.

The partisan nature of the HoF is demonstrated by several politically relevant cases. For example, the HoF has responsibility for managing the Wolkait and Raya administrative boundary and identity issues,[117] but has avoided dealing with them. In particular, during the TPLF-EPRDF years rule, the HoF shirked addressing these issues because they could have involved taking these contested areas from the TPLF-led Tigray Region and giving them to the Amhara Region. The Wolkait and Raya populations petitioned, through their respective boundary and identity issues committees, to be identified with the Amhara Regional State, but neither the HoF nor the then TPLF-led government dealt with these issues. What is worse, the government responded by intimidating the committee members. In 2016, for instance, 'the Wolkait Committee members had been arrested and tortured for petitioning for identity recognition of the W[o]lkait Amhara population'.[118]

[116] Fiseha, 'Ethiopia's Experiment in Accommodating Diversity' (n 57) 445.
[117] The areas of Wolkait and Raya were incorporated into the Tigray Region during the TPLF-led EPRDF rule. These areas were part of the pre-1991 Gondar and Wollo provinces, which now form part of the Amhara Region. There is contestation over both the Wolkait and Raya areas between the Amhara and Tigray regions, resulting in animosity between the people and states of these two historically and socially intermingled regions.
[118] Sonja John, 'The Potential of Democratisation in Ethiopia: The Welkait Question as a Litmus Test' (2021) 56(5) *Journal of Asian and African Studies* 1007, 1007.

In 2024, the Wolkait and Raya issues remain a litmus test for the HoF's performance and impartiality. The Amhara Region actively supported the federal government in its war against the TPLF and has now managed to exercise control over the Wolkait and Raya areas. However, the contestation over these areas is not yet legally resolved despite the federal government and the TPLF signing an African Union–brokered agreement in 2022 in Pretoria, which lacks clarity on how this contestation will be resolved.[119] The relevant article in the agreement reads: 'The Parties commit to resolving issues of contested areas in accordance with the Constitution'.[120] This stipulation could perhaps bring these issues back to the HoF unless the concerned parties reach an agreement through political dialogue. While the HoF has not as of early 2024 proposed any solutions, Ethiopia's Prime Minister indicated in his November 2023 televised speech that his government had decided the Wolkait and Raya issues will be resolved through a referendum.[121] As the HoF is strongly linked to, and therefore works in harmony with, the incumbent, it is highly likely that it will follow the government's preference.

Furthermore, the HoF was not responsive to the regional statehood and ethnic identity questions raised by different ethnic groups over the last three decades until the 2018 change in political leadership. As elaborated earlier, it was only when this change in power occurred at the top that Sidama was able to demand its separation from the SNNPRS. While the HoF appears to be becoming more responsive than it previously was by facilitating negotiations on creation of new regional states, it has continued to align its position with the government's preferences. As explained in Section 3.1, the government has, for example, shown more interest in clustering several ethnic groups into one region than addressing the constitutional right to self-determination questions of individual ethnic groups. The HoF has supported this policy by facilitating negotiations among the concerned ethnic groups willing to be clustered while ignoring those, like the Guraghe, who have stood alone to claim their own region.[122]

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[119] African Union, *Agreement for Lasting Peace Through a Permanent Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Tigray People's Liberation Front* (2 November 2022) ['*Agreement*'] art 10(4).
[120] *Agreement* (n 118) art 10(4).
[121] 'Referendum in Ethiopia: More Chance for Broader Military Conflict', *Robert Lansing Institute* (Web Page, 8 November 2023) <https://lansinginstitute.org/2023/11/08/referendum-in-ethiopia-more-chance-for-broader-military-conflict/>.
[122] 'SNNP Council Submits Zonal, Special Woredas Restructuring to House of Federation; Bu'i City in Gurage Zone Establishes Command Post', *Addis Standard* (online, 5 August 2022) <addisstandard.com/news-snnp-council-submits-zonal-special-woredas-restructuring-to-house-of-federation-bui-city-in-gurage-zone-establishes-command-post/>, archived at <perma.cc/SC2N-XHC6>.

The design-related limitations within the HoF could eventually undermine its role as the ultimate guardian of the Constitution and the federal system. There are two institutional limitations in this regard, which are considered in the remainder of this section.

First, there is a possibility that the HoF could be controlled by regional groups with secessionist tendencies. Although it may not be fully discernible at the moment due to the division of votes among Ethiopia's over 40 parties, the support for ethnic-based opposition parties appears to be growing.[123] An example of this is the TPLF's split from its parent party, the EPRDF, following the latter's transformation into the pro-federal Prosperity Party, and the subsequent public support the TPLF has drawn in Tigray before and during the Tigray War.

There has been a simmering political disagreement between the TPLF and the central government since the former lost its control over the previous ruling coalition in 2018. In this context, the HoF postponed the 2020 general elections, at both the federal and regional levels, due to the COVID-19 pandemic, but the TPLF-led Tigray government disregarded this decision and proceeded with its election. In response, the HoF rejected the Tigray election and suspended all federal subsidies due to go to Tigray until a legitimate administration was established.[124] The federal government then severed its relationship with the TPLF-led government, which ultimately escalated into war. Following an attack by the TPLF forces on the Northern Command of the federal army on 4 November 2020,[125] the HoF ordered the federal government to militarily intervene in Tigray.

The federal government subsequently waged war against the TPLF, removed it from power, and established a provisional administration that lasted eight months. In June 2021, the federal government declared a unilateral ceasefire and withdrew its forces from Tigray. The TPLF regained control of Tigray and fought with federal and regional forces in different areas including in the Amhara and Afar regions until it was pushed back to Mekelle, Tigray's capital, and its surrounding areas in October 2022. The Ethiopian government and the TPLF signed the AU-brokered *Cessation of Hostilities Agreement* on 2 November 2022. According to this

[123] See, eg. Biruk Chemere, 'The Creeping Fashion of Ethnicism in the Modern Ethiopian Politics: Its Creation, Process, and Consequences' (2022) 9(1) *Cogent Arts & Humanities* 1, 4.
[124] 'HoF Votes Unanimously to Reject Tigray Election', *Ethiopia News Agency* (online, 5 September 2020) <ena.et/en/?p=16723>, archived at <perma.cc/MLN8-JHKC>.
[125] Cara Anna, 'Diplomats: Rockets Fired at Eritrea Amid Ethiopian Conflict', *AP News* (online, 15 November 2020) <apnews.com/article/race-and-ethnicity-sudan-africa-ethiopia-kenya-205738f7adfea3178e5f2150e6dff14e>, archived at <perma.cc/QZT3-GNCT>. See also Dimtsi Wayne Television, 'Implications of the Successful Completion of the First Phase, November 04/2013' (YouTube, 13 November 2020) <youtube.com/watch?v=H1yThWjhYYo>, archived at <perma.cc/DAD7-VBPE>.

agreement, the TPLF would disarm, and a provisional administration would be established in Tigray until an election could be held.[126] The TPLF has thus submitted to the federal government's claim that the 2020 general elections were indeed constitutionally postponed by the HoF and has consequently accepted that the election held in Tigray at the time was against the HoF's decision and was thus null and void. This happened in the wake of the federal government's military triumph over Tigray's forces and hence does not in any way attest to the acceptability of constitutional review by the HoF as a legitimate means of resolving contested issues. Indeed, Tigray conducted its 2020 election after it officially disapproved of the HoF's decision to postpone the 2020 general elections, as the Tigray government considered it merely a rubber-stamp of the ruling party's intention.

A few weeks before the controversial Tigray election was held in defiance of the HoF's decision, the Tigray Democratic Party (TDP), an opposition party in Tigray, constitutionally challenged the Tigray government's decision to hold its election in the middle of the COVID-19 pandemic.[127] The CCI, whose recommendation was approved by the HoF, found a constitutional violation.[128] According to the Constitution, there is only one electoral board, the National Electoral Board of Ethiopia, which administers national and regional elections,[129] and the federal government has exclusive jurisdiction to enact electoral laws.[130] Based on these requirements and the HoF's previous decision, the CCI and HoF declared Tigray's election null and void.

Most likely due to the domination of the HoF by the Prosperity Party, the TPLF has not sought any solutions through constitutional review. Since its inception, such party domination has indeed undermined the HoF's impartiality. Although the federal government has been able to pursue its goals through dominating the HoF, the TPLF's opposition to the whole process underlines a serious flaw in the HoF's design. It is highly probable that state-appointed HoF members would support regional/ethnic group interests when voting on constitutional disputes in the absence of a single and dominant party, and such interests could include threatening issues like invoking the constitutionally recognised right to secession.

[126] See *Agreement* (n 119) arts 6, 10.
[127] *Tigray Democratic Party v Tigray Regional State* (HoF, 2020).
[128] Ibid.
[129] *FDRE Constitution* art 51(15).
[130] Ibid art 102.

Secondly, the other design feature of the HoF that could undermine its role as guardian of the Constitution is its ability to review its own political decisions. In the worst-case scenario, the HoF could also sit in its own cases, as demonstrated by its decision on the postponement of the 2020 general elections that extended the terms of the federal and regional parliaments (including the HoF itself).[131]

As indicated above, all constitutional disputes are decided by the HoF, and the Constitution's supremacy is thus primarily maintained through the HoF's adjudicative powers. As per the Constitution, 'any law, customary practice or a decision of an organ of state or a public official' is invalid if it contravenes the Constitution.[132] The problem is that, by empowering the HoF to decide when a law, practice or decision crosses this threshold, the house could end up reviewing decisions that it made in its capacity as an intergovernmental political body. Just as the decisions of any state organs at federal and regional levels are subject to constitutional adjudication, so too are the political decisions of the HoF. Concerned parties could, for example, challenge the constitutionality of the HoF's decisions regarding allocation of legislative roles, distribution of federal subsidies and settlement of boundary disputes. Neither the federal government nor the states have yet submitted a complaint to challenge the constitutionality of such decisions of the HoF, though — perhaps due to the party system of which the HoF is a part or perhaps because such a challenge would be futile.

However, a change in the dominant party system could result in a proliferation of disputes over the decisions made by the HoF in its capacity as an intergovernmental body. As discussed above, the HoF manages key intergovernmental issues that are potential sources of disputes. There is therefore a huge risk that the HoF's decisions on such issues could turn into full-blown constitutional disputes and return to the HoF through the CCI. This is perhaps one of the most serious institutional limitations with Ethiopia's constitutional review system and could worsen the partiality inherent in the HoF.

In summary, the HoF could in some senses be considered a democratically legitimate body to interpret the Constitution and has the potential to maintain the federal balance through constitutional review given its broad powers. However, the states' control over the selection of the members of the HoF, the institutionalisation of ethnicity, and the HoF's ability to review its own decisions could eventually impede its role in maintaining the federal balance. These

[131] Mengie, 'COVID-19 and Elections in Ethiopia' (n 103) 68.
[132] *FDRE Constitution* art 9(1).

institutional factors may well exacerbate its partiality as a political body and could make it an instrument that serves certain political interests at the expense of the federation as a whole.

3.6 Conclusion

The HoF has broad political and adjudicative powers that could make it an important instrument of federalism. Seen from the standpoint of the scope of its constitutional powers, it appears to have a huge potential to maintain the federal balance as an intergovernmental body and a constitutional umpire. In some senses, it could also be viewed as democratically more legitimate than the courts to exercise the power of constitutional review. Although it currently functions primarily in accordance with the party system, it could eventually become the representative of states or ethnic groups.

Despite all these appealing opportunities, the overall design of the HoF and the context in which it functions reveal inherent institutional limitations that hinder its role as an instrument of federalism. Its failure to amicably resolve constitutional issues, such as the dispute between the Tigray Region and the federal government; the Wolkait and Raya boundary and identity issues; and regional statehood questions in south Ethiopia, all attest that the HoF is struggling to fulfil its role as a constitutional umpire within the federation.

The design of the HoF combined with the ethnic federal system makes it vulnerable to centrifugal forces. That is, the unusual political role the Constitution confers to ethnic groups, the primarily population-based composition method and the states' control over the selection of members could eventually allow a few dominant factions to control the HoF. The HoF's exclusion from law making appears positive in this regard as it tempers this risk, but this could affect federalism negatively. Federalism is supposed to foster two values simultaneously: unity and diversity. The latter is not represented in law making in Ethiopia, as the HoF, which is supposed to represent the nation's diversity, does not have legislative power. As far as any legislation is concerned, the HoF therefore cannot effectively counter the excesses of the democratic majority. This in turn affects the constituent units' role in shared rule. It also affects the legitimacy of federal legislation, since the subjects of federal systems are not only the people but also the constituent units. In this regard, making the HoF a primarily adjudicative body and denying it legislative power seems to be a misallocation of power. Simply adding legislative power to the HoF would not solve the problem as that would mean allowing the HoF to review the constitutionality of legislation it has passed. In fact, there is an accumulation

of political and adjudicative powers in the HoF which undermines the principle of the separation of powers and exacerbates the partiality inherent in it as a political body. Adding legislative power to this mix without shifting the HoF's adjudicative role would indeed make the situation worse.

The HoF also has limitations in its capacity to nurture federalism through constitutional review. Constitutional review is supposed to bolster the values of constitutionalism (including federalism in federal systems) by subjecting political decisions to review by an impartial body. The HoF, however, is a primarily majoritarian body. Deciding constitutional cases through a majority vote in the HoF no doubt serves majoritarian democracy, then, but does not guarantee constitutionalism nor federalism. Although the Constitution has attempted to incorporate both constitutionalism and representative democracy by engaging the CCI and the HoF, more emphasis is given to the latter due to the recognition of the entities represented by the HoF as sovereign. While the CCI is a relatively impartial constitutional body with a vast potential to serve constitutionalism and its values, it has remained insignificant as its role is limited to submitting recommendations to the HoF.

To conclude, the design limitations within the HoF suggest that its role should be reconsidered. If its goal is to both effectively and meaningfully represent diversity in decision-making at the federal level, conferring legislative power on it would be indispensable. Allocating such powers to the HoF, though, would of course require assigning its adjudicative role to another organ. With modifications to its composition and selection methods, the HoF could also nurture federalism as an intergovernmental body.

In relation to constitutional review, a number of options present themselves, including transforming the CCI into a fully-fledged constitutional review body; conferring this power on a constitutional court; or conferring it on the regular judicial system. If ethnic federalism survives the current transition in Ethiopia, and if the political role the Constitution confers on the so-called sovereign entities remains unchanged, then such radical changes seem unlikely. In this case, making changes to the HoF's selection and composition methods, and allowing the CCI to adjudicate constitutional cases that do not involve the constitutional privileges of the nations, nationalities and peoples, are feasible alterations that could be made to advance constitutionalism and hence federalism in Ethiopia.

Chapter 4: Access to constitutional justice: Institutional design as an impediment

4.1 Introduction

A study on the efficacy of a constitutional review system in upholding the rule of law would be incomplete without an investigation into its accessibility. The theme of this chapter is thus access to constitutional justice. As Chapter 2 explained, enforcing constitutional rights and principles through constitutional review has become the core of modern constitutional democracies' rule of law dispensation. Effective constitutional enforcement presupposes access. Access to constitutional justice, understood as access to constitutional adjudication,[1] is one of the globally promoted and yet practically constrained principles. Broadly speaking, limitations originate either from rules regulating access gates or constitutional/institutional circumstances surrounding the application of these rules.

While there is a great deal of research on access to constitutional justice, the focus is almost entirely on rules that directly regulate access gates (standing and justiciability) and related extra-institutional factors like cost. But whose gates are we talking about? Courts? Constitutional courts? Non-judicial constitutional review bodies? There is conspicuous support for liberal access rules in constitutional justice literature, which I agree with. Keyzer, for example, calls for open access to constitutional justice, asserting that 'an application for the judicial review of legislative action can be characterised as an exercise of freedom to discuss political and governmental affairs'.[2] Constitutional review bodies have become important deliberative institutions[3] and making their gates open would no doubt advance democratic ideals. But can we get the gates of differently designed constitutional adjudicators opened as wide as we expect if the same rules of access apply? If not, how are the rules of access impacted by institutional designs? Such important questions are overlooked by most scholarship on access to constitutional justice, which assumes independent and impartial courts (including constitutional courts) and focuses on access rules.[4]

[1] Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010) 4. See also Anthony Mason, 'Access to Constitutional Justice: Opening Address' (2010) 22(3) *Bond Law Review* 1, 1.
[2] Keyzer (n 1) 123.
[3] Conrado Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013) 4.
[4] See, eg, Keyzer (n 1); Mason (n 1); European Commission for Democracy through Law, *Study on Individual Access to Constitutional Justice* (CDL-AD (2010) 039 rev, 27 January 2011); Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22(3) *Bond Law Review* 126.

Some works go beyond this and explain institutional factors that condition access rules. For example, Epp's *The Rights Revolution*,[5] Wilson's 'Institutional Reform and Rights Revolutions in Latin America'[6] and Grenfell's 'Realising Rights in Timor-Leste'[7] evaluate the constitutional and extra-constitutional conditions necessary to tap the potential of constitutional justice to transform society. Yet, all these studies are conducted with judicial constitutional review in mind. Access to constitutional justice in the context of non-judicial constitutional review, a model notably represented by Ethiopia's House of Federation (HoF), has thus drawn less attention due partly to its failure to produce a consequential constitutional jurisprudence. However, examining access to constitutional justice in such a constitutional review system is important in understanding the implications of institutional differences for access to constitutional justice.

Abebe and Tadesse have addressed some aspects of access to constitutional justice in Ethiopia. In his study on 'Access to Constitutional Justice in Ethiopia', Abebe identifies three minimum requirements for successful access to constitutional justice: substantive constitutional guarantees, an independent and impartial constitutional adjudicator, and litigants with the necessary resources.[8] He then evaluates constitutional justice in Ethiopia against these elements. According to him, the latter two elements are missing in Ethiopia. Tadesse's article 'Constitutional Rights without Effective and Enforceable Constitutional Remedies: The Case of Ethiopia' identifies a lack of clear procedures and redress as the main reasons for the poor enforcement of the 'bill of rights' through constitutional review in Ethiopia.[9] This chapter aims to complement these works and Keyzer's liberal approach to access to constitutional justice through a focused investigation into how the design of a constitutional review system impacts access. I do so by assessing Ethiopia's constitutional justice system. To this end, the normative and institutional framework of constitutional justice in Ethiopia, HoF's practice, the judiciary's standpoint and relevant legislation are examined with a reference to some key cases.

[5] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998).
[6] Bruce M Wilson, 'Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia' (2009) 1(2) *Journal of Politics in Latin America* 59.
[7] Laura Grenfell, 'Realising Rights in Timor-Leste' (2015) 39(2) *Asian Studies Review* 266.
[8] Adem Abebe, 'Access to Constitutional Justice in Ethiopia' in PS Toggia, TF Geraghty and KW Jemaneh (eds), *Access to Justice in Ethiopia: Towards an Inventory of Issues* (Center for Human Rights, Addis Ababa University, 2014) 41, 47-55.
[9] Mizanie A Tadesse, 'Constitutional Rights without Effective and Enforceable Constitutional Remedies: The Case of Ethiopia' (2021) 19(2) *Northwestern University Journal of International Human Rights* 79, 79.

4.2 Institutional design and access to constitutional justice

Establishing organs of state and determining their roles and functions in administering the state is one of the basic functions of any constitution.[10] A constitution that embraces the notion of limited political power must go one step further and introduce a mechanism that upholds constitutionalism. As elaborated in Chapter 2, there are different constitutional approaches to upholding constitutionalism. In jurisdictions with a written and supreme constitution, constitutionalism is maintained primarily through constitutional adjudication. This mechanism is usually referred to as judicial review or constitutional review. Access to constitutional justice requires the presence of such a mechanism and entrenched rights and principles. While having a constitutional review mechanism with the mandate to protect entrenched rights and principles is an important step in the right direction, it may not always be sufficient to democratise access to constitutional justice. Epp, for example, observes that, while 'constitutional guarantees of individual rights, judicial leadership and rights consciousness' are important to what he calls '*the rights revolution*' or '*democratisation of access to justice*', what has been essential in the realisation of the rights revolution particularly in the US is 'the support structure for legal mobilisation (SSLM), consisting of rights advocacy organisations, rights advocacy lawyers and sources of financing'.[11] Wilson claims, based on evidence from Costa Rica and Colombia, that 'the need for such support structures is largely removed by the Superior Courts' abandonment of high levels of judicial formality, the adoption of broad definitions of standing, the removal of many barriers to access and the relatively quick resolution of their cases'.[12]

Both Epp's and Wilson's views point to how the level of the need for the SSLM in the realisation of access to constitutional justice varies based on the degree of formality involved in constitutional review. Epp emphasises the importance of the SSLM with the highly formalised US judicial system in mind. Yet, such a support structure is essential for the democratisation of access to constitutional justice in virtually all circumstances. Constitutions are more general by their nature than other laws. Their interpretation and meaningful enforcement thus require the participation of not only ordinary citizens but also supporting structures with the necessary resources and expertise. As Grenfell explains based on her assessment of Timor-Leste's experience, 'while Wilson's focus on institutional design is

[10] Markus Böckenförde, *A Practical Guide to Constitution Building: The Design of the Legislature* (International Institute for Democracy and Electoral Assistance, 2011) iii.
[11] Epp (n 5) 2–5.
[12] Wilson (n 6) 61.

compelling, it does not dispel the need for a strong civil society along the lines argued by Epp'.[13]

This chapter, therefore, starts with the assumption that a multitude of conditions including institutional design, SSLM and political culture are essential in explaining the presence or absence of open access to constitutional justice. The focus, however, is on the first condition, institutional design, considering an unusual constitutional review system, the Ethiopian model. I do this for two reasons. First, Ethiopia's constitutional review system is unique, and its exploration offers new perspectives to our understanding of the implications of different institutional designs for constitutional justice. Second, even Wilson's work, which entirely focuses on institutional design, does not offer much about the implications of adjudicating constitutional cases through different institutions (courts, constitutional courts, and other forms of review systems) for access to constitutional justice. His work is a case study of two jurisdictions and cannot thus be expected to provide such a comprehensive assessment. Nor do I offer such an assessment in this chapter as it is a case study of Ethiopia. Rather, acknowledging the importance of both constitutional and extra-constitutional factors in explaining access to constitutional justice, I aim to expand on Wilson's institutional-design-based explanation.

Wilson is clear about how the changes in the modus operandi of superior courts in Costa Rica and Colombia 'largely removed' the need for the support structure proposed by Epp. But why have the superior courts abandoned their 'high levels of judicial formality'? Has transferring constitutional jurisdiction from the ordinary judiciary to the Constitutional Court in Colombia and the Constitutional Chamber in Costa Rica contributed to this change? If the reform had not included establishment of specialised constitutional review bodies, would the rights revolution have occurred in these countries regardless of a support structure? To put it straightforwardly, what does adjudicating constitutional cases via courts, constitutional courts or non-judicial bodies mean for democratising access to constitutional justice? These are some of the questions left unanswered by Wilson's institutional-design-based explanation of the rights revolution. As a case study focusing on one of the different types of constitutional review systems, this chapter does not address all these questions either. Yet it aims to shed light on the implications of institutional differences for open access to constitutional justice by considering Ethiopia's

[13] Grenfell (n 7) 266.

constitutional review body, the House of Federation (HoF). This, I hope, will trigger more comprehensive and comparative research on the subject.

Ethiopia has a rights-rich or thick constitution. About a third of its Constitution is dedicated to fundamental and democratic rights. The Constitution also proclaims the 'right of access to justice' as one of its fundamental values and allows individuals, associations and groups to 'bring a justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power'.[14] In addition, 'any law, customary practice or a decision of an organ of state or a public official which contravenes' the Constitution is subject to invalidation.[15] On the surface, the Constitution thus appears to be committed to open access to constitutional justice. However, peaceful resolution of constitutional disputes through the HoF has remained minimal and conflicts which are attributable to the institutionalisation of ethnicity by the Constitution have become common. The following section provides a thumbnail sketch of the state of access to constitutional justice in Ethiopia. Then follows a thorough analysis of the accessibility of constitutional justice in the country with a reference to the language and structure of the Constitution, the HoF's design and the practice.

4.3 A brief sketch of the state of access to constitutional justice in Ethiopia

Ethiopia has a proud yet complex history spanning tens of centuries. It has successfully thwarted foreign invasions and is Africa's oldest independent state. Its over 80 ethnic groups share this history in common. Despite such a long history of statehood, it has not yet successfully transitioned to democracy. With the seemingly insurmountable challenges including tears in the social fabric because of the Tigray War, the ongoing war in the Amhara region and tensions between ethnic groups, it is still undergoing a long transition from military rule and a former-Yugoslavia-like ethnic-based state structure and civil war to constitutional democracy. Ethiopia's performance in terms of realising access to constitutional justice cannot be understood without this historical and political context. Of particular interest in this regard is constitutional interpretation through a body that represents ethnic groups, the HoF, whose institutional features were explained in Chapter 3.

As far as access to constitutional justice is concerned, Ethiopia's Constitution exhibits a paradox. On the one hand, it appears committed to this notion as it incorporates a long list of

[14] *FDRE Constitution* art 37.
[15] Ibid art 9.

individual and group rights and enshrines the right to access to justice. On the other hand, it leaves the substantive constitutional guarantees at the mercy of a political body which represents, and is thus influenced by, ethnic groups. This raises the question: how does such an institutional design impact the modus operandi of constitutional review and thus access to constitutional justice? Before I move to this question, let me present a brief sketch of the state of access to constitutional justice in Ethiopia.

4.3.1 Unacceptably poor access

It will not be an exaggeration if I say at the outset that access to constitutional justice in Ethiopia is among the poorest in the world. Let alone constitutional justice which is, in the Ethiopian context, availed through approaching a political body which does not adjudicate disputes full-time, as indicated in Chapter 3, access to justice in general is strikingly low in the country. According to the World Justice Project 2022 Rule of Law Index, Ethiopia ranks 123rd out of 140 countries in terms of accessibility and affordability of civil justice.[16] It also ranks poorly in factors key to the promotion of access to justice including 'absence of corruption', 'open government' and 'order and security'.[17] Research conducted in 2020 by the Hague Institute for Innovation of Law in collaboration with Ethiopia's Attorney General and Justice and Legal Research Institute indicates a glaring gap in Ethiopia's justice dispensation.[18]

The state of access to constitutional justice is even worse. Ethiopia is a country where ethnic-based discrimination and denial of constitutional rights has become rife chiefly due to the ethnic-based state structure. In 2018, for example, the widespread ethnic-based conflicts claimed the lives of many and displaced over three million Ethiopians.[19] These conflicts have undermined the constitutionally proclaimed fundamental rights including freedom of movement and the right to choose one's residence. With this context in mind, one would expect a very busy constitutional review system in the country. That is not the case, however, and the practice shows quite the opposite. As explained later in this chapter based on some key cases, non-judicial review (politicised constitutional review) has significantly constrained access to constitutional justice in Ethiopia. Ordinary courts arguably have jurisdiction to determine some

[16] 'Ethiopia', Rule of Law Index, *World Justice Project* (Web Page, 2022) <https://worldjusticeproject.org/rule-of-law-index/country/2022/Ethiopia>.
[17] Ibid.
[18] Hague Institute for Innovation of Law, *Justice Needs and Satisfaction in Ethiopia 2020: Legal Problems in Daily Life* (Report, 2020) <https://www.hiil.org/wp-content/uploads/2019/09/JNS_Ethiopa_2020-1.pdf>.
[19] International Organization for Migration, *Ethiopia National Displacement Report 7: Site Assessment Round 24 and Village Assessment Survey Round 7: December 2020 – January 2021* (April 2021) i.

constitutional cases, but in practice they have utterly distanced themselves from such cases, as will be illustrated later, primarily due to the language of the Constitution and some apparently unconstitutional legislative restrictions.

It should be noted here that access to constitutional justice in Ethiopia is further critically constrained by extra-constitutional factors which are not covered by the constitutional/institutional-design-based analysis in this chapter. The level of constitutional awareness in Ethiopia, like many other emerging democracies, is very low.[20] Despite this, the HoF and its advisory body, the Council of Constitutional Inquiry (CCI), have done little to raise constitutional awareness and have remained not sufficiently transparent for most of the three decades since their inception. These institutions have a poor record of publishing their decisions and recommendations. To access unpublished decisions and recommendations, one has to physically appear before these bodies and formally request them. One of the biggest challenges I have encountered in undertaking this research is indeed accessing data about the decisions, internal rules and procedures of the HoF and CCI.

There seems to be no strong SSLM that provides the necessary expertise and resources to make constitutional justice accessible. Let alone extending support for individual constitutional litigants, civil society organisations (CSOs) have not attempted to challenge legislation that, apparently unconstitutionally, restricts their activities. This can be contrasted with the remarkable presence of CSOs in constitutional litigation in post-apartheid South Africa, for example.[21] Until 2019, Ethiopia had highly repressive CSO legislation, the *Charities and Societies Proclamation*, no 621/2009, which substantially removed the potential gap-filling role of SSLM. Under this law, international non-government organisations (NGOs) were banned from working on human rights issues[22] and Ethiopian charities and societies were prohibited from 'receiving more than ten percent of their funds … from foreign sources'.[23]

This legislation has had a significant impact on Ethiopia's SSLM. Just a couple of years after it was introduced, 'the number of federally registered local and international NGOs dropped by 45% from 3800 in 2009, to 2059 in 2011'[24] and 'at least 17 organisations, including some

[20] Abebe (n 8) 64.
[21] 'The Role of NGOs in the Courts', *Judges Matter* (Web Page, 26 February 2018) <https://www.judgesmatter.co.za/opinions/the-role-of-ngos-in-the-courts/>.
[22] *Charities and Societies Proclamation*, no 621/2009 (Ethiopia) art 14(5).
[23] Ibid art 2(2).
[24] Kendra E Dupuy, James Ron and Aseem Prakash, 'Who Survived? Ethiopia's Regulatory Crackdown on Foreign-Funded NGOs' (2015) 22(2) *Review of International Political Economy* 419, 432.

of Ethiopia's leading human rights organisations, have changed their mandate to no longer work on human rights' due to the restrictions on funding.[25] In 2019, the country introduced a relatively liberal CSO law[26] which allows organisations to determine the scope of their activities including human rights with however some limits on the activities of international organisations. The role of CSOs, or what Epp calls the 'support structure for legal mobilisation',[27] in the realisation of access to constitutional justice in Ethiopia thus remains uncertain and needs a separate study.

The abovementioned constitutional/institutional and extra-constitutional factors, along with other political, social and economic conditions, have resulted in poor constitutional justice in Ethiopia. The HoF's and CCI's practice suggests that the state of access to constitutional justice in Ethiopia is nowhere near an acceptable level. While many potential constitutional cases do not come to the constitutional review system for extra-institutional reasons explained above, the rate of rejection of cases by this review system speaks volumes about the institutional hindrances to democratisation of access to constitutional justice in Ethiopia. In a press conference the CCI held on 15 May 2020, the then CCI Chairwoman, Justice Meaza Ashenafi, who was also the President of the Federal Supreme Court, stated that over 6000 constitutional cases had been submitted to the CCI since it was established 1995.[28] According to the latest available CCI data, the total number of cases in which it has not found a need for constitutional interpretation is 2645[29]; and the total number of cases that it found to be justiciable and for which recommendations have been submitted to the HoF for a final decision is 104.[30] The remaining over 3000 cases are either languishing in the constitutional adjudication system or routinely rejected by the CCI for procedural reasons. There is a lack of clear documentation in this regard.

These figures suggest that Ethiopia's non-judicial review is far behind other constitutional review systems of a comparable age. For example, both post-apartheid South Africa and

[25] Amnesty International, *Ethiopia: The 2009 Charities and Societies Proclamation as a Serious Obstacle to the Promotion and Protection of Human Rights in Ethiopia: Amnesty International's Written Statement to the 20th Session of the UN Human Rights Council (18 June – 6 July 2012)* (11 June 2012) 2.
[26] See *Civil Societies Proclamation*, no 1113/2019 (Ethiopia).
[27] Epp (n 5).
[28] Fana Television, 'CCI Press Conference' (YouTube, 15 May 2020), from 0:50 <https://www.youtube.com/watch?v=LNVhMLJmoDk>.
[29] 'Cases rejected by the Council of Constitutional Inquiry', (the Council of Constitutional Inquiry of Ethiopia, 2022) <http://surl.li/bblpk.>
[30] 'Cases referred to the House of Federation by the Council of Constitutional Inquiry', (the Council of Constitutional Inquiry of Ethiopia, 2022) <https://www.cci.gov.et/wp-content/uploads/2021/06/editted.pdf.>

Ethiopia introduced their constitutional review systems in the 1990s. However, the number of cases the South African Constitutional Court decides annually is roughly half[31] of the total number of cases decided by the HoF over the last three decades. HoF's insignificant constitutional jurisprudence is indeed inconsistent with Ethiopia's vast potential to generate constitutional cases as a home to an enormously diverse population, and Africa's second largest population, which is roughly double South Africa's.

The nature and gravity of this problem suggest an inhibitive institutional design in addition to the extra-constitutional factors including minimal CSO involvement. Broadly speaking, the institutional design of a constitutional review system involves a set of rules that determine access to constitutional justice by defining institutional structures and jurisdictions, substantive guarantees, and access. The following sections, therefore, examine the nature, scope and application of such rules in Ethiopia and their implication for promotion of open access to constitutional justice.

4.4 Rules governing access to constitutional justice

The conventional view of the rules governing access to constitutional justice is centred around standing (who can seek constitutional justice) and justiciability (whether an issue is adjudicable). Yet, these two access rules are a subset of a large system of rules that determine the scope and nature of access to constitutional justice. With the risk of overgeneralisation, I categorise this large system of rules into three clusters: a) rules that set out substantive constitutional guarantees; b) rules that determine the structure, powers and functions of a constitutional adjudication system; and c) access rules that guide constitutional adjudication bodies by providing answers to questions like: Who can seek constitutional justice? How? When? What can be raised before a constitutional adjudication body? The rules that directly regulate access including standing and justiciability fall within the third of these clusters.

These three categories of rules are interlinked in serving access to constitutional justice. A rights-rich constitution with a long catalogue of fundamental and democratic rights cannot succeed in achieving constitutional justice in general and protecting individuals from legislative intrusion in particular in the absence of an independent adjudicating body with the necessary structure and jurisdiction, and permissive standing and justiciability rules. By the

[31] '2021 South Africa: Constitutional Court Decisions', *South African Legal Information Institute* (Web Page) <http://www.saflii.org/za/cases/ZACC/2021/>.

same token, a well-designed constitutional review body and permissive access rules alone cannot ensure open access to constitutional justice as constitutional litigation must be based on a substantive constitutional guarantee.[32] Many modern written constitutions contain a bill of rights which can assist access to constitutional justice. However, poor access to constitutional justice cannot automatically be associated with a constitution's lack of an express bill of rights. Australia's Constitution, for example, contains very few explicit protections of rights.[33] Yet the language of the constitution has enabled the High Court to come up with implied rights, indicating the key role both a constitution and its interpretation by a constitutional review body play in defining substantive guarantees. In a nutshell, a constitutional system that embraces the abovementioned three categories of rules is well positioned to succeed in delivering constitutional justice.

There should be a big caveat here though. As indicated, while a well-designed constitution and constitutional review system can greatly contribute to access to constitutional justice as Wilson asserts,[34] the legal-political and opaque nature of constitutional cases and political, economic and social conditions still usually necessitate a support structure for activation and meaningful enforcement of constitutional guarantees.[35] Institutional design and supporting structures thus in virtually all cases depend on each other in realising open access to constitutional justice. It is clear that supporting structures cannot be effective in realising access to constitutional justice in the absence of substantive constitutional guarantees. Their efforts could also be thwarted by inhibitive access rules and/or a constitutional review body's lack of the necessary jurisdiction or structure. As my work concerns constitutional/institutional design and involves the Ethiopian case, I dedicate the next sections to analysing the nature and application of the three categories of rules governing access to constitutional justice in Ethiopia. I do so with a view to illuminate the implications of constitutional/institutional design for open access to constitutional justice.

4.4.1 Substantive constitutional guarantees

Seeking access to constitutional justice presupposes substantive constitutional guarantees. The scope and nature of such constitutional guarantees determines, of course along with other

[32] Epp (n 5) 5.
[33] George Williams, 'Australia's Constitutional Design and the Protection of Human Rights' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *Legal Protection of Rights in Australia* (Hart Publishing, 2019) 19.
[34] Wilson (n 6) 61.
[35] Grenfell (n 7) 281.

factors, the breadth and depth of access to constitutional justice. Whatever goal a constitutional complainant wants to achieve, the entry points are constitutional guarantees. Even Epp, who considers SSLM the primary triggering factor of the rights revolution in the US, admits the key role constitutional guarantees play in the democratisation of access to constitutional justice. He observes that such guarantees serve as 'rallying symbols for social movements' and offer 'footholds for lawyers' arguments and foundations for judicial decisions'.[36]

Substantive guarantees in the Constitution of Ethiopia

Ethiopia has a rights-rich yet arguably a rights-unfriendly constitution. The Constitution appears to be committed to fundamental rights and freedoms. It includes a long catalogue of human and democratic rights. The Constitution has 106 articles. About a third of it (arts 13–44) is dedicated to the fundamental rights and freedoms which are categorised in chapter 3 into human and democratic rights. According to the Constitution, the scope of human and democratic rights is not limited to what is set out in chapter 3. 'All international agreements ratified by Ethiopia are an integral part of the law of the land' per article 9(4) of the Constitution. It should be noted here that Ethiopia has ratified several international and regional human rights instruments including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *African Charter on Human and Peoples' Rights*, the *Convention on the Rights of the Child* and the *Convention on Elimination of All Forms of Discrimination against Women*.[37] The Constitution also requires the fundamental rights and freedoms enumerated in chapter 3 to be interpreted in conformity with these instruments.[38] Therefore, taken at face value, it is perhaps one of the thickest constitutions in the world. This normative framework gives the impression that Ethiopia's Constitution has created a conducive environment for protection of fundamental rights and freedoms. This seemingly rights-protective constitutional framework has indeed led some to associate the enduring crisis in Ethiopia primarily with the lack of a democratic culture.[39]

The lack of a democratic culture no doubt has a visible impact on constitutional justice in the country. Yet the main and lasting problem seems to lie in the constitutional language and

[36] Epp (n 5) 5.
[37] International Justice Resource Center, *Ethiopia* (Country Factsheet Series, 2017) <https://ijrcenter.org/wp-content/uploads/2017/11/Ethiopia.pdf>.
[38] Art 13(2) reads: 'The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.'
[39] Alemseged Abbay, 'Diversity and State-Building in Ethiopia' (2004) 103(413) *African Affairs* 593, 614.

architecture. A close reading of Ethiopia's Constitution reveals two glaring and related limitations on the protection of fundamental rights and freedoms. The first has to do with the pre-eminence of group rights over individual rights. The second relates to the institutional mechanisms of enforcement. Let me begin by explaining the first limitation here and then elaborate on the second.

Ethiopia's Constitution recognises the country's ethnic groups, and not a collection of individuals usually referred to as 'people' or 'citizens', as its authors. As indicated in Chapter 3, the main organising principle underlying Ethiopia's ethnic federal system is ethnic groups' right to self-determination including secession from the federation. This unique federal system does not attempt to build a common constitutional identity. It rather recognises Ethiopia as a collection of sovereign entities called nations, nationalities and peoples. In this regard, the Constitution resembles a treaty among independent states. Constitutionally speaking (see art 39), these entities can claim their right to secession and leave the federation unconditionally.

This federal system diverges from the social constructivist theory of ethnicity[40] which views ethnic identity as flexible and alterable. The Constitution adopts a primordial approach to ethnicity by considering Ethiopia's diverse groups as territorially identifiable, fixed and ancient, despite the long history of intercultural marriage and social interaction among diverse groups.[41] In what would appear to be unusual in a modern constitutional democracy, Ethiopia's Constitution groups the whole population into distinct nations as if everyone identifies himself/herself with one ethnic group or another. This unusual political arrangement does not only solidify differences among ethnic groups but also leaves no space for those individuals with a mixed ethnic identity or non-ethnic preferences.

The Constitution has ignored Ethiopia's 'large ethnically mixed populations'.[42] Intercultural marriage is common in Ethiopia and the country's 'history is characterised by large-scale migrations'.[43] In contrast to this background, the Constitution does not recognise an individual with multiple ethnic identities. For the last three decades individual ID cards in Ethiopia have featured the ethnic identity of each card holder, irrespective of the individual's choice. One

[40] Dodeye Uduak Williams, 'How Useful Are the Main Existing Theories of Ethnic Conflict?' (2015) 4(1) *Academic Journal of Interdisciplinary Studies* 147, 149.
[41] Lovise Aalen, 'Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: The Case of Ethiopia' (2006) 13(2–3) *International Journal on Minority and Group Rights* 243, 247.
[42] Ibid.
[43] Eva Poluha, 'Ethnicity and Democracy — A Viable Alliance?' in Mohamed A Salih and John Markakis (eds), *Ethnicity and the State in Eastern Africa* (Nordiska Afrikainstitutet, 1998) 30, 36.

gets an ID card with the ethnic group they want to associate with, and a card will not be issued until the ethnic group to be named on the card is chosen. Such identity cards have contributed to discriminatory practices in the country and are even used to commit massacres of minorities. For example, following the killing of an ethnic Oromo singer, Hachalu Hundessa, by unknown people in the capital Addis Ababa, hundreds of innocent people living in different parts of Oromia were killed simply for being non-Oromos. Ethnic Oromos in places like Shashemene 'were going home to home checking identity cards and targeting Amhara residents'.[44] Indeed, we saw in the 1994 Rwandan conflict how dangerous such ethnic categorisations can be.[45] The government has recently initiated a new policy to remove ethnicity from ID cards. While this is a step in the right direction, it cannot tackle the challenge posed by the overall constitutional language and structure which left the fate of the country and protection of individuals at the mercy of constitutionally privileged ethnic groups.

Ethiopia's federal system thus resembles a confederation, for its very existence depends on the sovereign will of its entities and it does not recognise or attempt to build a single political society. Coupled with the lack of a democratic culture, this constitutional design thus has the potential to dismember Ethiopia. The former USSR and Yugoslavia demonstrated the risk associated with ethnic-based federalism, particularly when it lacks democracy. Aalen, in one of her works on the Ethiopian ethnic federal system, observes that, 'without the idea of common citizenship, self-determination for ethnic groups is likely turned into claims of secession and finally leads to disintegration of federal states'.[46] Since Ethiopia's Constitution does not recognise individuals as the owners of the federation, their fundamental rights and freedoms languish under an overarching system which is owned by and designed primarily to serve ethnic groups. What does this mean in practice? This constitutional language has many consequences for the rights and freedoms of individuals, two of which are relevant here. First, it engenders a rights-unfriendly political environment and second it legalises ethnic-based discrimination.

[44] Elias Meseret, 'Ethiopia's Week of Unrest Sees 239 Dead, 3,500 Arrested', *The Washington Post* (online, 8 July 2020) <https://www.washingtonpost.com/world/africa/ethiopias-week-of-unrest-sees-239-dead-3500-arrested/2020/07/08/8eb30952-c100-11ea-8908-68a2b9eae9e0_story.html>.
[45] Jim Fussell, 'Group Classification on National ID Cards as a Factor in Genocide and Ethnic Cleansing' (Seminar Paper, Seminar Series of the Yale University Genocide Studies Program, 15 November 2001) <http://www.preventgenocide.org/prevent/removing-facilitating-factors/IDcards/>.
[46] Aalen (n 41) 244.

Rights-unfriendly political environment

First, the emphasis on ethnic groups in the Constitution generates the impression among the constitutionally empowered ethnic-based political actors that group rights in general, and the right to self-determination specifically, are more important than individual rights. The constitutional institutionalisation of ethnicity has created ethnic-oriented regional states which are zealous about serving their ethnic group's interest at the expense of other, particularly nontitular, ethnic groups.[47] This has resulted in a corresponding neglect of and at times assault on individuals in the regional states where they do not belong to a ruling ethnic group. In many states in Ethiopia, members of intra-state minority ethnic groups, particularly Amharas who are perceived to have been politically dominant in pre-1991 Ethiopia, have experienced systematic exclusion and even ethnic cleansing.[48]

Individual rights and freedoms are vulnerable not only to ethnic-oriented discriminatory state practices but also to large-scale conflicts engendered by competition between ethnic-based political groups over the power at the centre, as demonstrated by the devastating Tigray War. Following the political change in 2018 (see Chapter 3), the government has attempted to soften the tensions between ethnic groups by amending electoral laws and transforming the ruling front, which was a coalition of four ethnic-based parties, into a single national party. Such measures have reduced the unnecessarily high number of political parties (which was over 100)[49] to less than 50. Yet escalation of tensions between Ethiopia's major ethnic groups remains untempered and the ostensibly single ruling party functions through regional branches named after the respective ethnic groups. This is so because the constitutional arrangement has already generated a significant ethnic consciousness which demands ethnic-based self-rule.

The unwarranted prominence given to ethnic-based self-rule has produced regional administrations that condone ethnic-based discrimination and attacks against individuals that do not belong to a ruling ethnic group.[50] It is in this context that fundamental individual rights enshrined in the Constitution including the right to life (art 15), the right to the security of

[47] 'Minority Rights Dilemma', *Ethiopia Insight* (online, 11 March 2023) < https://www.ethiopia-insight.com/2023/03/11/minority-rights-dilemma-exemplifies-ethiopias-brutal-identity-crisis/ >.
[48] See, eg, Bekalu Atnafu, 'Ethnic Cleansing in Ethiopia' (2018) 50(1) *Peace Research* 77.
[49] Until 2019, Ethiopia had over 100 parties and most of them were organised along ethnic lines. Following the signing of a new Code of Conduct between the ruling and opposition parties, and amendment of electoral laws in 2019, the number of parties that can operate within the new rules dropped to 47. '100+ Ethiopian Parties Join PM to Sign New Code of Conduct', *Netherlands Institute for Multiparty Democracy* (Web Page, 19 March 2019) <https://nimd.org/100-ethiopian-parties-join-pm-to-sign-new-code-of-conduct/>.
[50] Ethiopian Human Rights Council, *Report Submitted to the Committee on Racial Discrimination* (2009) 25.

person (art 16), the right to liberty (art 17), the right to equality (art 25) and the right to liberty of movement and freedom to choose one's residence (art 32) have been frequently trampled upon by state and non-state actors. Ethnic-based attacks and interethnic and inter-state conflicts, for example, displaced nearly 3.2 million people in Ethiopia in 2018 alone, which was the third highest worldwide during that year.[51] Ethnically motivated killings are also common. A remark by an ethnic figure can unleash youth mobs who have no other purpose than killing people who do not belong to their ethnicity. In 2019, for example, up to 78 people were killed by the supporters of Jawar Mohammed, an ethnic Oromo opposition leader, after he alleged in his Facebook post that federal 'security forces were plotting an attack against him'.[52]

All these facts suggest that Ethiopia's Constitution has instituted a political system which is not hospitable for fundamental rights and freedoms of individuals. Evidently, this has a negative impact on access to constitutional justice. The substantial disregard for individual fundamental rights and freedoms impairs public trust in the constitutional system and that in turn discourages individuals from utilising constitutional mechanisms to defend their rights. The prevalence of protests and violent conflicts in the country perhaps indicates a low level of reliance on the constitutional system.

Ethnic-based constitutional discrimination

The second consequence of the Constitution's language and structure is that it authorises ethnic-based discrimination, if not explicitly. Its primordial understanding of ethnicity has led to the classification of people in the respective regions as 'indigenes' and 'non-indigenes', each having different political status. The Constitution attempts to create a congruence between the indigenes and the regional administration boundaries. The right to self-determination is an exclusive privilege given to the indigenes who own and administer the respective regional states. The Constitution's overt preference to the primordial approach to ethnicity and resultant ethnic-based discrimination is demonstrated by its establishment of regional states like Harari where, as indicated in Chapter 3, the indigenes (Harari), who constitute less than 10 per cent of the region's population are the exclusive owners and administrators of the region. This has

[51] International Organization for Migration, *Ethiopia National Displacement Report 9: Site Assessment Round 26 and Village Assessment Survey Round 9: June–July 2021* (24 September 2021) i <https://reliefweb.int/report/ethiopia/ethiopia-national-displacement-report-9-round-26-june-july-2021>.
[52] Salem Solomon, 'Ethiopia Government: Up to 78 Killed in Ethnically-Motivated Violence', *VOA* (online, 1 November 2019) <https://www.voanews.com/a/africa_ethiopia-government-78-killed-ethnically-motivated-violence/6178658.html>.

caused friction among the region's ethnic groups and led to party-based power-sharing arrangements at least with one ethnic group (Oromo). Other ethnic groups in the region are still left behind.

Ethnic-based discrimination is further reinforced by the constitutions of regional states. Most of the regional constitutions single out ethnic groups who have the right to self-determination and in whom 'supreme regional power' is vested. This is despite the fact that all the regional states are multicultural. Let me illustrate this. The Constitution of Oromia Regional State, for example, recognises only ethnic Oromos as its authors and vests the right to self-determination and the region's supreme power in them.[53] The regional state, as an instrument of this ethnic group's sovereign right to self-determination, is constituted of only Oromos. Other ethnic groups may vote but not contest in the region's election. This excludes over five million people who belong to other ethnic groups, which constitute over 15 per cent of the region's population.[54] The constitutions of the regional states of Afar, Harari and Somali have similar clauses which privilege the Afar, Harari and Somali ethnic groups respectively.[55]

Regional states that lack a single majority ethnic group like Benishangul-Gumuz and Gambella have constitutions that categorise their inhabitants as indigenes and non-indigenes and recognise only indigenes as owners of the respective states. According to the Benishangul-Gumuz Constitution, 'the nations and nationalities that own the region are Berta, Gumuz, Shinasha, Mao, and Komo'.[56] Only these ethnic groups have the right to self-determination within the region.[57] While ethnic groups as small as Komo (0.96%) and Mao (1.90%) are owners of the region because they are identified as indigenes, ethnic groups as large as Amhara and Oromo, which constitute 21 per cent and 13 per cent of the region's population respectively,[58] and many other ethnic groups are denied such a status. The Constitution of Gambella, similarly, lists five ethnic groups as owners of the state and excludes others.[59]

[53] See *Oromia Regional State Revised Constitution* (2001) preamble, arts 9, 39.
[54] UNHCR, 'Oromia Regional State' (Factsheet, 2021) <https://static.help.unhcr.org/wp-content/uploads/sites/29/2021/06/17062713/Oromia-Region_InformationBrochure.pdf>.
[55] See *Revised Constitution of Afar* (2001) arts 8, 37; *Revised Constitution of Somali* (2001) arts 9, 39; *Revised Constitution of Harari* (2001) arts 8, 39.
[56] *Benishangul-Gumuz Regional State Revised Constitution* (2002), art 2.
[57] Ibid art 39.
[58] Central Statistical Agency of Ethiopia, *Population and Housing Census Result* (2007). Ethiopia's Constitution requires the country's Population Census Commission to conduct a population and housing census every 10 years, but the Parliament delayed the 2017 census due to widespread ethnic conflicts.
[59] *Revised Constitution of Gambella* (2002) art 46.

Indeed, the terminology that best captures Ethiopia's existing political system is *ethnocracy*,[60] not democracy, for it is the *ethnos* and not the *demos* that exercises the right to self-rule. Anderson defines ethnocracy as 'government or rule by a particular ethnic group or *ethnos*, and more precisely rule by a particular *ethnos* in a multi-ethnic situation where there is at least one other significant ethnic group'.[61] This form of governance can be contrasted with liberal democracy.[62] Liberal democracy emphasises the autonomy and equality of individuals, while ethnocracy gives prominence to group membership. Ethiopia has embraced the latter. Its Constitution proclaims a democratic republic, prescribes periodic elections and recognises a catalogue of human and democratic rights. This could tempt one to say that the Constitution has envisioned a democratic rather than an ethnocratic system. This would be a misapprehension, however. As explained above, the Constitution does not recognise a countrywide or regional demos. Because the Constitution sets out ethnic self-rule as the main principle of political organisation, group membership is central to political participation in Ethiopia. Therefore, Ethiopia's Constitution, unlike other constitutions that embrace liberal democracy, does not ensure equal opportunity for all Ethiopians to access positions of power through an ethnic-free competitive process. As Howard aptly explains, ethnocracy 'guarantees ethnic — rather than countrywide — winners in all elections and in top state positions'.[63]

Ethiopia's existing ethnocracy is not just incompatible with democracy but also one of the most unstable regimes, for none of the ethnic groups in the country constitutes a majority. Unlike the form of ethnocracy that has emerged in countries like India[64] and Sri Lanka[65] as majority ethnic groups manipulate democracy to favour their identity over others, Ethiopia has constitutionally entrenched ethnocracy and thus frozen the cleavages amongst its ethnic groups. As there is neither a countrywide single demos nor an ethnic group that forms a majority at the national level, the Ethiopian state has remained unstable. While a strong commitment to the institution of constitutional review might be the right solution to salvage democracy from

[60] For more on ethnocracy, see James Anderson, 'Ethnocracy: Exploring and Extending the Concept' (2016) 8(3) *Cosmopolitan Civil Societies* 1; Lise Morjé Howard, 'The Ethnocracy Trap' (2012) 23(4) *Journal of Democracy* 155; Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (University of Pennsylvania Press, 2006).
[61] Anderson (n 60) 1.
[62] Ibid.
[63] Howard (n 60) 156.
[64] See Christophe Jaffrelot, 'From Hindu Rashtra to Hindu Raj? A de Facto or a de Jure Ethnic Democracy?' in Sten Widmalm (ed), *Routledge Handbook of Autocratization in South Asia* (Routledge, 2022) 127. See also Indrajit Roy, 'India: From the World's Largest Democracy to an Ethnocracy', *The India Forum* (online, 17 August 2021) <https://www.theindiaforum.in/article/india-world-s-largest-democracy-ethnocracy>.
[65] See Neil DeVotta, 'Sri Lanka: The Return to Ethnocracy' (2021) 32(1) *Journal of Democracy* 96.

degenerating into ethnocracy in democracies like India, Ethiopia has not truly embraced democracy in the first place, as I will elaborate in Chapter 5.

In general, the constitutionally entrenched ethnic-based discrimination narrows the ostensibly broadly defined rights and freedoms in the Constitution of Ethiopia. By privileging certain ethnic groups over others in the respective regions, Ethiopia's constitutional system reinforces ethnic-based discrimination, which is perhaps the most noticeable contemporary source of anarchy and violation of human and democratic rights in the country. Although the substantive guarantees in the Constitution of Ethiopia appear to be extensive, they are constrained by the constitutional language and structure.

Cognisant of the challenges the ethnic-based political system poses to individual rights, a sizable number of Ethiopians seem to be more interested in changing the Constitution than seeking justice through it. The 2005 election, which is widely considered the most democratic election in the country's history, at least up to the vote counting stage, is a good example here, despite its miserable aftermath. In this election, an opposition party, the Coalition for Unity and Democracy (CUD), proposed to revise the Constitution's ethnic federal system and won 137 of 138 Addis Ababa City Council seats and many more seats for national and regional parliaments across major cities and towns in the country.[66] The then ruling party, EPRDF, claimed it won enough seats to form a government at the federal level, but this claim was rejected by the CUD. Following this election, the government took a series of measures including a total ban on demonstrations for a month to curb mass protests over election irregularities in rural areas and places far from Addis Ababa. The constitutionality of a government decree that banned demonstrations was unsuccessfully challenged by the CUD. As I will elaborate later, the CUD lodged this case in the Federal First Instance Court in what appeared to be an attempt to avoid adjudication by a political body, the HoF, but the Court referred the matter to the HoF's advisory body, the CCI. This indicates the limitations of the rules governing the structure and powers of the constitutional review system, as explained below.

[66] 'Opposition in Walkout as Meles Appoints City Caretaker Authority', *The New Humanitarian* (online, 10 May 2006) <https://www.thenewhumanitarian.org/report/58976/ethiopia-opposition-walkout-meles-appoints-city-caretaker-authority>.

4.4.2 Rules governing the structure and powers of the constitutional review system

The second category of rules that determine access to constitutional justice is, as indicated, the rules governing the structure and powers of the constitutional review system. Such rules may establish one or another form of constitutional review and introduce broad or narrow constitutional jurisdiction. A broad constitutional jurisdiction is evidently central to liberalising access to constitutional justice. An ostensibly broad jurisdiction may, however, fall short of meeting a given society's access to constitutional justice expectations due, among other factors, to constraints inherent in the institutional structure. This section elaborates these constraints by dissecting Ethiopia's constitutional review system.

Institutional differences in constitutional adjudication impact access in different ways. Allocating constitutional jurisdiction to ordinary courts, for example, could make constitutional litigation highly formalistic like in the US and that in turn may become a barrier to access. Facilitating access in this case, as Epp explains it, requires a support structure.[67] There are limitations with specialised courts as well. Most countries with such specialised courts follow a centralised constitutional adjudication system except those in Latin America which have a mixed system that combines the centralised and decentralised models.[68] In practice, the centralised model means the centralised constitutional review bodies become overloaded, which tempts them to adopt a restraining approach towards access to constitutional justice. Dugard, for example, observes that 'the South African Constitutional Court has interpreted its direct access mandate conservatively, seeking to restrict rather than to expand direct access'.[69]

The conventional dichotomy of constitutional review systems between ordinary courts and specialised ones or decentralised and centralised constitutional review does not capture Ethiopia's HoF for it is, as explained in Chapter 3, a political body with adjudicative and political roles. While it somewhat resembles specialised courts as a centralised body, its unique design impacts access to constitutional justice in more intricate ways than specialised or ordinary courts. I will now explain the constitutional jurisdiction of the HoF, the CCI and the judiciary in Ethiopia and the implications for access to constitutional justice.

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[67] Epp (n 5) 3.

[68] Many Latin American countries have a combination of centralised (European) and decentralised (US) models of constitutional adjudication. See Samantha Lalisan, 'Classifying Systems of Constitutional Review: A Context-Specific Analysis' (2020) 5 *Indiana Journal of Constitutional Design* 1.

[69] Jackie Dugard, 'Closing the Doors of Justice: An Examination of the Constitutional Court's Approach to Direct Access, 1995–2013' (2015) 31(1) *South African Journal on Human Rights* 112, 112.

4.5 The HoF, the CCI and the judiciary

Ethiopia's Constitution lacks clarity on whether the HoF has exclusive jurisdiction over constitutional disputes. Reading the English version of the relevant provisions and looking into the minutes of the Constituent Assembly, one can convincingly argue that the power of constitutional review in Ethiopia exclusively belongs to the HoF. It is the HoF that is expressly empowered to interpret the Constitution.[70] According to the English version of the Constitution, 'all constitutional disputes shall be decided by the [HoF]'.[71] This is consistent with the views maintained by the majority of the members of the party-controlled Constituent Assembly during the deliberations on the draft constitution. The majority rejected constitutional interpretation by the courts, as explained in Chapter 3. The prominence given to group rights over individual rights in the constitutional drafting process[72] and the drafters' view of the Constitution as a political contract between the bearers of group rights, the nationalities, led them to bestow the power of constitutional review in a representative political body. In his excellent and comprehensive study on this subject, Assefa, drawing on the relevant constitutional provisions and the intention of the constitution makers, asserts that 'the makers did intend that the HoF commands all the powers to interpret the Constitution or decide on all constitutional disputes'.[73]

The Constitution does not explicitly authorise the courts to engage in constitutional review. It broadly defines the HoF's power to interpret the Constitution, as explained below. Because the founders of the Constitution viewed judicial constitutional review as a threat to democracy — including each ethnic groups' unconditional right to self-determination in the Ethiopian context — there is no doubt that the constitutional dispensation aims to fundamentally depart from viewing courts as the main instruments of constitutionalism.

Yet, a closer look at the Constitution, subsidiary legislation and practice reveals a perplexing constitutional jurisdiction. To begin with, constitutional complainants do not normally have

[70] *FDRE Constitution* art 62.
[71] Ibid art 83(1).
[72] In the wake of ethnic liberation fronts' military triumph over the then military regime in 1991, the Transitional Government of Ethiopia (1991–94), which was constituted mostly of ethnic-based parties, institutionalised its policy of peoples' right to self-determination through a transitional charter and other laws. This policy guided the constitutional drafting process. The prominence of group rights in post-1991 Ethiopia is in line with perceived 'African values' — Africa uniquely has a Charter of Human and *Peoples'* Rights that emphasises group rights to a level not matched by other regional human rights instruments. Organization of African Unity, *African Charter on Human and Peoples' Rights*, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) (27 June 1981)
[73] Getachew Assefa, 'All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 *Journal of Ethiopian Law* 139, 169.

direct access to the HoF. The CCI plays a gatekeeper role. The CCI has the power not only to investigate constitutional disputes and submit its recommendations to the HoF but also to decide that there is 'no need for constitutional interpretation'.[74] As indicated, the CCI has indeed decided so in 2645 of the cases submitted to it between 2005 and 2022 and referred only 104 cases to the HoF. This suggests that the CCI is playing its gatekeeper role to drastically limit the number of cases reaching the HoF, which normally meets twice a year to make decisions.

The CCI cannot of course be indifferent to the views of the HoF in investigating constitutional cases. In addition to the President and Vice President of the Federal Supreme Court and six legal experts appointed by the President of the Republic, it comprises three members of the HoF. Complainants can appeal to the HoF if they are dissatisfied by a decision made by the CCI. Although there is no publicly available data indicating the number of CCI decisions appealed to the HoF, the very low number of cases decided by the HoF (see Chapter 5 Section 5.5) over the last three decades indicates that most decisions are either not appealed to the HoF or such appeals are rejected.

Leaving such anomalies aside, the CCI's advisory and gatekeeper role begs the question: what types of cases need to be referred by the CCI to the HoF? A related question is: how are the powers of the CCI and HoF aligned in this regard? If we rely on the English version of art 83(1) of the Constitution, the answers to these questions are straightforward. The HoF would have exclusive jurisdiction over 'all constitutional disputes' and the CCI would always refer constitutional disputes to the HoF so long as there is a need for constitutional interpretation. However, there is a discrepancy between the Amharic version, which has 'final legal authority',[75] and the English version of art 83(1). The word 'all' is missing in the Amharic version, making exceptions to constitutional review by the HoF possible.[76] This seems to be consistent with art 62(1) which reads in English, without any discrepancy with its Amharic version, 'the House [of Federation] has the power to interpret the Constitution'.[77] This provision confers such power on the HoF without explicitly excluding courts. Art 83(2) also intermingles the powers of the CCI and the HoF. According to this provision, the HoF determines constitutional disputes that are referred to it after they have been investigated by

[74] *FDRE Constitution* art 84(1), (3).
[75] Ibid art 106.
[76] Ibid art 83(1) (Amharic version).
[77] Ibid art 62(1).

the CCI according to art 84. This raises the question: what does art 84 say about the constitutional cases that need to be referred to the HoF? Answering this question requires a thorough analysis of all the relevant constitutional provisions. The cumulative reading of these provisions of the Constitution, as elaborated below, suggests that there is a subsidiary power of constitutional review left for courts under the Constitution. The courts have, however, found it difficult to defend this power.

According to art 13 of the Constitution, 'all Federal and State legislative, executive and judicial organs at all levels' are required to 'respect and enforce' the fundamental rights and freedoms under chapter 3 of the Constitution. Enforcing chapter 3 of the Constitution through judicial organs at the federal and state levels would undoubtedly involve interpretation of the relevant provisions by the courts.

Art 84(2) of the Amharic version[78] of the Constitution also impliedly allocates constitutional jurisdiction to the judiciary. The English version of this provision reads 'where *any Federal or State law* is contested as being unconstitutional …, the Council shall consider the matter and submit it to the House of the Federation for a final decision'.[79] The Amharic version qualifies this terminology and requires referral to the HoF for a final decision when the question of constitutionality regards laws made by federal and state *legislative* bodies.[80] Who does entertain cases involving the constitutionality of administrative laws and decisions then? As 'judicial powers, both at Federal and State levels, are vested in the courts',[81] it would be legitimate for the judiciary to entertain cases involving the constitutionality of administrative laws and decisions. In this sense, the courts are not entirely precluded from interpreting the Constitution but have limited power for the Constitution embraces a notion of parliamentary sovereignty both at federal and state levels which makes legislative bodies superior to the judiciary and the executive.[82]

It should be noted here, however, that Ethiopia's notion of parliamentary sovereignty is unique for it is subject to another sovereignty, the sovereignty of nationalities. Sovereign power is vested in the nationalities and the 'Constitution is an expression of their sovereignty'.[83]

[78] The Amharic version of the Constitution prevails when there is discrepancy between the Amharic and English versions per ibid art 106.
[79] Ibid art 84(2) (English version).
[80] Ibid art 84(2) (Amharic version).
[81] Ibid art 79(1).
[82] Ibid art 50(3).
[83] Ibid art 8.

Parliamentary Acts are thus subject to review only by the representative of these sovereign entities, the HoF.

The argument that Ethiopian courts are not categorically excluded from entertaining constitutional cases is also supported by the nature of the expressly stated powers of the HoF. The provisions that define the powers and functions of the HoF, art 62, and art 84(2) empower the HoF to adjudicate the issues that are most politically important including the constitutionality of primary legislation, questions related to nationalities' right to self-determination including secession, and intergovernmental disputes. These provisions are silent particularly about constitutional complaints related to human and democratic rights short of disputing the constitutionality of primary legislation.

What can thus be understood from a closer look at the Constitution is that the judiciary has implied constitutional jurisdiction over individual complaints related to fundamental rights and freedoms so long as the question is about the constitutionality of laws and decisions of the executive branch. This understanding of constitutional jurisdiction in Ethiopia would decentralise constitutional adjudication and make constitutional justice more accessible through a hybrid constitutional review system. This accessible and non-partisan constitutional review system would be very important to strengthen the accountability of the executive branch. Because of compelling practical reasons including legislative bodies' limited time and technicalities, delegating legislative power is an essential element of modern governance. As Lupia observes, 'Governments great and small use delegation to increase the range of services that they can provide'.[84] Ethiopia is no exception. In virtually all cases, its primary legislation is complemented by executive regulations and directives. Thus, the volume of laws made by executive bodies in Ethiopia, like in most modern states, is by far greater than legislation enacted by the country's legislative bodies. To enhance the legitimacy of delegated legislation, laws made by executive bodies should be controlled by different mechanisms including parliamentary scrutiny and judicial review. In this regard, the implied constitutional jurisdiction of Ethiopia's judiciary over delegated legislation would help improve the control over the executive. However, as the following section illustrates using key cases, the judiciary has relinquished this important jurisdiction and refers all cases that involve a constitutional issue to the CCI.

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[84] Arthur Lupia, 'Delegation and Its Perils', in Kaare Strom, Wolfgang Muller and Torbjorn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, 2003) 33.

4.5.1 What holds the judiciary back from exercising constitutional jurisdiction?

There are two possible explanations for the judiciary's arguably unconstitutional deference to the HoF. The first has to do with the Constitution itself which is a treaty-like political contract between the nationalities. This very nature of the Constitution has perhaps led the judiciary to believe that the representative of the nationalities, the HoF, is the only legitimate body to authoritatively determine constitutional issues. This does not need further explanation as I have elaborated the nature of the Constitution earlier. The second relates to other laws that further define the powers and functions of the HoF and CCI in a manner that further obfuscates constitutional jurisdiction. Let me clarify this.

In 2001, Ethiopia's unicameral legislator, the House of Peoples' Representatives (HPR), passed two important proclamations that apparently shift the judiciary's limited implied constitutional jurisdiction to the HoF. These proclamations (*CCI Proclamation*, no 250/2001 and *HoF Proclamation*, no 251/2001) re-define the powers and functions of the CCI and HoF. From the outset, it is not clear whether the HPR has a constitutional mandate to re-define the powers and functions of these constitutional bodies. These proclamations do not regulate constitutional jurisdiction left for legislative determination. Rather they redefine constitutionally defined CCI/HoF powers as if these constitutional bodies were created by the legislature. Under the Constitution, neither the CCI nor HoF has additional, exceptionable, or appellate jurisdiction subject to legislative determination. However, it is not uncommon for a legislature to have at least some power of this kind.[85]

The HPR invoked art 55(1) of the Constitution as its source of authority to enact those laws. This provision reads 'the House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction'.[86] But the CCI and HoF exercise the power of constitutional review based on the Constitution and not legislation. Their powers, functions and structures are defined by the Constitution. The Constitution also empowers them to adopt their own rules of procedure.[87] Moreover, subjecting the constitutional jurisdiction of the CCI and HoF to legislative determination has the potential to compromise

[85] In Australia, for example, s 76 of the *Constitution* gives the Parliament power to confer additional jurisdiction on the High Court (including in constitutional matters). In both Australia and the US, the legislature has power to prescribe exceptions and regulations to the apex court's appellate jurisdiction (*US Constitution* art III.2; *Australian Constitution* s 73). But s 75(v) of the *Constitution of Australia*, which is key in maintaining the rule of law under the Australian legal structure, prevents the Australian Parliament from removing the High Court's power of judicial review.
[86] *FDRE Constitution* art 55(1).
[87] Ibid arts 62(11) and 84(4).

the independence of these institutions. However, there is no evidence the CCI and HoF have ever formally questioned such laws and they are functioning through them.

In what appears to contradict the implied constitutional jurisdiction left to the courts, the two proclamations require all constitutional complaints involving any law (regardless of who makes it) or decision to be submitted to the HoF.[88] Particularly, Proclamation no 250/2001 is unequivocal in this regard. The relevant provision in this proclamation confers exclusive jurisdiction on the HoF over complaints involving the constitutionality of 'any law or decision given by any government organ or official'.[89] The result is that the judiciary lost its constitutional jurisdiction through legislation which amasses power in the hands of the HoF. The constitutional validity of parliamentary Acts is beyond the reach of the judiciary, and it is the HoF, the very institution whose power is expanded through legislation, that can review such accumulation of power in its hands.

The judiciary's tolerance for the proclamations that undermine its constitutional jurisdiction is perhaps unwise. Although it cannot review these parliamentary Acts itself, it or concerned parties whose access to courts is thwarted by such legislation should have at least attempted to have them reviewed through the HoF. It should be noted here that Ethiopia's judiciary is not strong. Despite being formally established under art 78 of the Constitution as an independent judiciary, executive interference and 'politicisation of the role and function of judges' are notable challenges the judiciary has been grappling with.[90] The judiciary is indeed weak from the outset. As indicated in Chapter 3, this weakness was a deliberate design of the constitutional drafters who did not want to see the powers of elected bodies challenged by unelected officials such as judges. The drafters introduced a political body as the main constitutional umpire and distanced the judiciary accordingly. This can be contrasted with the South African constitution-making process where the African National Congress (ANC) mulled over whether to include a justiciable bill of rights because it could give power to an unelected body.[91] International bodies sought to influence the ANC to convince them to adopt a justiciable bill of rights.[92] Without

[88] See *HoF Proclamation*, no 251/2001 (Ethiopia) art 2(2); *CCI Proclamation*, no 250/2001 (Ethiopia) art 17(2).
[89] See *CCI Proclamation*, no 250/2001 (Ethiopia) arts 17(2), 23(1).
[90] Alemayehu G Mariam, 'Human Rights Matters in the New Millennium: The Critical Need for an Independent Judiciary in Ethiopia' (2008) 3(2) *International Journal of Ethiopian Studies* 123, 123.
[91] Jeremy Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 176, 177–83.
[92] Ibid.

international influence, it is possible that South Africa would have turned in the same direction as Ethiopia.[93]

The language of Ethiopia's Constitution and the way the HoF is designed, including its association with the ruling party, have perhaps discouraged the judiciary and other parties from challenging the apparently expanded jurisdiction of the HoF. This is a big loss for constitutional complainants who seek to avoid a politicised adjudication by the HoF. As explained in Chapter 3, the HoF is a political body whose members are indirectly elected by a ruling party. It is worth returning to the 2005 *CUD Case* and also to a more recent 2021 case in this regard.

In 2005, the late Prime Minister Meles Zenawi issued a decree that outlawed all public gatherings and demonstrations for a month in a bid to discourage post-election protests over election irregularities. The CUD, the then major opposition party, submitted a case to the Federal First Instance Court to challenge the constitutionality of this executive decree.[94] Leaving the proclamations that expanded the jurisdiction of the HoF aside, this constitutional issue apparently falls under the jurisdiction of the Court for it involves enforcement of chapter 3 of the Constitution, the right to assembly to be more specific, and as the questioned Act was not produced by a legislative body. Had the Court entertained this case, it would have changed Ethiopia's access to constitutional justice regime and introduced a full-time and neutral constitutional justice mechanism alongside the HoF. It should still be noted that there is nothing in the Constitution that prevents the HoF, the ultimate and primary guardian of the Constitution (see arts 8, 9, 62 and 83), from reviewing the constitutionality of judicial rulings.

Unfortunately, the Federal First Instance Court, relying on the above-mentioned proclamations, referred the matter to the CCI, ruling that it had no jurisdiction because the case involved a constitutional issue. In what appeared to be an attempt to avoid politicised adjudication, the CUD appealed this decision to the Federal High Court, claiming that the case fell under the judiciary's constitutional responsibility to enforce fundamental rights and freedoms. Meanwhile, the CCI returned the case to the First Instance Court, ruling that it did not require constitutional interpretation because the decree fell within the broad constitutional authority of the Prime Minister. Then the High Court aligned its position with the CCI by rejecting the

[93] For more on the international influence on the South African constitution-making process in the 1990s, see DM Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience' (2003) 1(2) *International Journal of Constitutional Law* 181, 187.
[94] *Coalition for Unity and Democracy v Prime Minister Meles Zenawi* (Fed First Inst Ct, File No 54024, 2005).

appeal. The CUD did not appeal the CCI's ruling to the HoF, conceivably due to the latter's affiliation with the ruling party.

From the standpoint of access to constitutional justice, the *CUD Case* was pivotal. The fundamental question left unanswered in the *CUD Case* is not whether the Prime Minister's decree was constitutional. The most important question that the Federal First Instance Court failed to frame and submit to the CCI is whether the exclusion of courts from constitutional interpretation through the two proclamations is constitutional. The judiciary's unconditional deference to the CCI and the HoF has perhaps contributed to its marginalisation. Its utter silence over the two apparently unconstitutional proclamations seems to have encouraged the HPR to be insensitive to what the Constitution has left, if not explicitly, for the courts. The powers and functions of the CCI and the HoF were effectively redefined by the HPR in 2013 and 2021.[95] However, these legislative changes did not attempt to involve the courts in constitutional adjudication; like the previous proclamations, they grant exclusive constitutional jurisdiction to the CCI and the HoF.[96]

In what seems to be a subtle departure from the judiciary's usual practice of referring constitution-related questions to the CCI, in 2021 the Federal Supreme Court entertained an electoral dispute that involved a constitutional issue.[97] However, it did so without claiming jurisdiction over questions of constitutionality. Since the introduction of the ethnic federal system, Hararis living elsewhere, regardless of their residence status, have been voting in the Harari National Council election based on the region's Constitution and a transitional period parliamentary decision the region proposed and secured. The Hararis have been using such preferential treatment to make up for their numeric minority status in their own region. In 2021, the National Electoral Board of Ethiopia (NEBE) refused to register non-resident ethnic Hararis as eligible voters for the Harari National Council stating that such preferential treatment violates the federal Constitution.[98]

[95] The HPR amended the previous CCI and HoF proclamations by *Council of Constitutional Inquiry Proclamation*, no 798/2013 (Ethiopia) and *House of Federation Proclamation*, no 1261/2021 (Ethiopia) respectively.
[96] See *Council of Constitutional Inquiry Proclamation*, no 798/2013 (Ethiopia) art 3(1); *House of Federation Proclamation*, no 1261/2021 (Ethiopia) art 5(2).
[97] *Harari National Council v National Electoral Board of Ethiopia* (Cass File No 207036, 2021).
[98] The NEBE referred, in its decision, to *FDRE Constitution* arts 25 (the right to equality and prohibition of discrimination) and 50. The latter declares that '[the State Council] is responsible to the People of the State'.

The Harari National Council petitioned this decision to the Federal Supreme Court.[99] The NEBE claimed that the Court had no jurisdiction because the case entailed determining constitutional issues.[100] It also claimed that its decision was constitutional for acting otherwise would be in violation of the constitutional right to equality, the federal government's exclusive jurisdiction over electoral laws and the constitutional notion that regional councils are responsible to the people in the respective regions.[101] The Court established its jurisdiction not based on the Constitution but on electoral legislation that subjects the NEBE's decisions to review by the Supreme Court and quashed the NEBE's decision. It ruled that the courts are not prohibited from applying the Constitution; that there is no need for constitutional interpretation because the federal Constitution does not preclude what the region's constitution and the parliamentary decision allowed; and that the NEBE's decision violated existing rules.[102] Interestingly, it is evident here that constitutional interpretation was required to reach this conclusion. The Supreme Court Cassation Division, a special bench of the Supreme Court, to which the NEBE petitioned affirmed this ruling.[103]

By ruling that there was no need for constitutional interpretation, the Supreme Court evaded the intricate task of entertaining the constitutionality question. Although reviewing the regional Constitution and the transitional period parliamentary decision would undoubtedly fall under the jurisdiction of the CCI and the HoF, entertaining the constitutionality of the NEBE's decision would have invited the question of who has jurisdiction over it. That would in turn have raised questions about the allocation of constitutional jurisdiction under the Constitution and the aforementioned proclamations. By failing to frame such a question and refer it to the CCI, the Supreme Court repeated the mistake of the First Instance Court in the *CUD Case*. The judiciary's role in constitutional cases has thus become nothing more than referring them to the CCI when it believes that there is a need for constitutional interpretation. This has resulted in a concentration of constitutional cases in the CCI and the HoF, whose design is not cogently responsive to the Constitution's seemingly liberal access rules.

[99] *Harari National Council v National Electoral Board of Ethiopia*, (n 96).
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.

4.5.2 Access rules and their application

Ethiopia seems to have permissive rules of access to constitutional justice, although they operate under inhibitive institutional circumstances. The constitutional stipulation that 'any law, customary practice or a decision of an organ of state or a public official which contravenes [the] Constitution shall be of no effect'[104] cannot of course be meaningfully enforced in the absence of liberal access rules. The Constitution envisages broad access by granting everyone 'the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power'.[105] This right is extended to associations and groups.[106] In what seems to match the HoF's jurisdiction over disputes which are inevitably political in nature,[107] concerned parties (federal and state legislative and executive bodies in particular) are also allowed, through legislation, to submit '[issues of] constitutional interpretation on any *unjusticiable* matter'.[108] In this sense, the notion of constitutional justice in Ethiopia is broader than in most other jurisdictions for it attempts to make virtually all constitution-related controversies judicable.

In addition to such broadly defined rules on standing and justiciability, the Constitution also requires the CCI and HoF to operate in an expeditious manner. It requires the CCI to 'establish [an] organizational structure which can ensure expeditious execution of its responsibilities',[109] and HoF to 'decide a constitutional dispute submitted to it by the Council of Constitutional Inquiry within thirty days of receipt'.[110] Interestingly, constitutional litigation is also exempted from fees.[111] There is no high level of formality since complainants are merely required to submit a short written application indicating their constitutional question, the law or decision they dispute, and other basic information including names and addresses.[112] There is also an online application form on the CCI website dedicated for this purpose. Therefore, on the surface, Ethiopia appears to have access rules that promote constitutional justice. The actual

[104] *FDRE Constitution* art 9(1).
[105] Ibid art 37(1).
[106] Ibid art 37(2).
[107] See ibid art 62.
[108] *CCI Proclamation*, no 798/2013 (Ethiopia) art 3(2(c)). See also *HoF Proclamation*, no 1261/2021 (Ethiopia) art 6(7).
[109] *FDRE Constitution* art 82(3).
[110] Ibid art 83(2).
[111] *CCI Proclamation* art 14.
[112] *CCI Directive*, no 1/2020 (Ethiopia) arts 13, 14.

application of these rules is, however, conditioned by the constitutional and institutional design explained in the foregoing sections.

There are multiple factors that can explain Ethiopia's poor access to constitutional justice despite its liberally defined access rules. From a constitutional/institutional standpoint, the most visible ones are, as indicated, the Constitution's distinctive elevation of group rights and the institutional limitations of the CCI and the HoF. The Constitution's language has tempted the HoF to apply it in a manner that discourages complaints related to individual rights and freedoms, particularly when they involve group interests. The 2003 *Benishangul Gumuz Case*[113] is a good example here. In the run up to Ethiopia's 2000 election, the NEBE prohibited members of the Amhara, Oromo, Tigray and other ethnic groups from contesting the election of members of Benishangul Gumuz State Council based on a proclamation[114] that required knowledge of an indigenous language of a region to participate in such elections. A complaint was lodged to challenge the constitutionality of this proclamation and the NEBE's decision.[115] The CCI, in its recommendation submitted to the HoF, stated that both the proclamation and the NEBE's decision were unconstitutional because they stood against art 38 of the Constitution which grants citizens the right to 'vote and to be elected at periodic elections to any office at any level of government … without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status'.[116] Individuals' right to equality under art 25 also prohibits discrimination based on similar grounds.[117]

In the face of these clear constitutional stipulations, the HoF failed to invalidate the proclamation and justified it based on ethnic groups' right to self-determination.[118] It invalidated the NEBE's decision but on the basis of a technicality: that the region's working language is Amharic and not one of the indigenous languages.[119] While the operative aspect of this decision provided an answer to the immediate complainants, its ruling on the constitutionality of the proclamation excuses discrimination against members of minority ethnic groups living in the remaining parts of the country where indigenous languages are used

[113] *Benishangul Gumuz Election Candidates v National Electoral Board of Ethiopia* (HoF, 2003) ('*Benishangul Gumuz Case*').
[114] *Electoral Proclamation*, no 111/1995 (Ethiopia) art 38(1)(b).
[115] *Benishangul Gumuz Case* (n 113).
[116] Ibid. See also *FDRE Constitution* art 38, which the CCI reproduced in its recommendation.
[117] *FDRE Constitution* art 25 also prohibits discrimination based on 'race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status'.
[118] *Benishangul Gumuz Case* (n 113).
[119] Ibid.

as regional working languages. The HoF's failure to use the *Benishangul-Gumuz Case* as an opportunity to develop jurisprudence to protect the right to equality of individuals seems to have undermined the seemingly liberal access rules for citizens whose rights are undermined particularly by group interests. The *Benishangul-Gumuz Case* was the first case to challenge ethnic-based discrimination.[120] It could have thus encouraged potential constitutional litigants to invoke the Constitution for protection against ethnic-based discrimination had the HoF emphasised individuals' right to equality under arts 25 and 38. None of the cases referred to the HoF since then have been about ethnic-based discrimination.

The institutional limitations of the CCI and the HoF have further constrained access rules. The constitutional adjudication system's affiliation with a ruling party is one of the serious limitations in this regard. The perceived or actual partiality of the CCI and the HoF, as demonstrated by the *CUD Case*, discourages parties from using these bodies to constitutionally challenge politically sensitive government measures. As indicated, the *CUD Case* was about individuals being denied the freedom of assembly in a context of post-election political controversy.

Furthermore, the CCI and the HoF adjudicate constitutional disputes on a part-time basis. None of the members of the CCI are full-time employees. As indicated, its members are drawn from the judiciary and the HoF, or are legal experts who work full-time elsewhere. They normally meet once a month to consider constitutional disputes.[121] This is at odds with the constitutional requirement that the CCI should execute its duties in an expeditious manner. In a press conference held on the CCI's 2021 performance, its Chairwoman, who was then also the President of the Supreme Court, indicated that congestion of cases has been one of the CCI's biggest challenges.[122] Of the 518 cases investigated in 2021, over 93 per cent (482) were rejected based on the ground that there was no need for constitutional interpretation, just over 3 per cent (18) were submitted to the HoF for a final decision and the remaining were adjourned, suggesting a trend of avoiding hearing cases in response to the congestion.[123]

The problem is worse when it comes to the HoF for it normally meets twice a year to make decisions and it is a more partisan body than the CCI. It is not in the nature of such a political

[120] The Council of Constitutional Inquiry of Ethiopia (n 30).
[121] *CCI Proclamation*, no 798/2013 (Ethiopia) art 23(1).
[122] 'The Council of Constitutional Inquiry Announced Its Work Performance Increased by 30 Percent in 2013', the Council of Constitutional Inquiry of Ethiopia (Web Page, 2023) <https://tinyurl.com/3xwtpr55>.
[123] Ibid.

body to meet regularly and decide cases within 30 days of receipt, as the Constitution prescribes. Most of its members live in the regional states and serve as public officials at different levels. It is thus impractical for the HoF to meet constitutional deadlines whenever complaints are referred to it by the CCI. Ostensibly in recognition of this challenge, the newly introduced *HoF Proclamation* requires it to decide cases not within thirty days, as the Constitution prescribes, but 'the shortest possible time',[124] which perhaps could be years. This is obviously inconsistent with the constitutional requirement to decide cases within 30 days. Even assuming that the HoF could manage cases in expeditious manner, its appointment by a ruling party would still undermine its impartiality and discourage complainants from seeking justice through it. As indicated, the *CUD Case* has demonstrated this.

The design of the CCI and the HoF, therefore, exhibits limitations that hinder access rules by a) tempting these constitutional bodies to limit the number of cases they entertain, and b) discouraging prospective complainants from lodging constitutional cases. This design has turned the constitutionally entrenched open access rules to largely mere aspirations.

4.6 Conclusion

Ethiopia's experience underscores the importance of a constitution's language and structure and the specific institutional features of a constitutional review system in explaining the liberal or restrictive approaches to access to constitutional justice. This is not of course to put all the blame for the poor constitutional justice in the country on the constitutional/institutional design. Undoubtedly, a myriad of factors has contributed to this. In particular, the proclamations explained in this chapter and the judiciary's weakness have exacerbated the design-related problem. If the HPR had not made those proclamations or if the courts had been a little bolder and challenged them, there would have been a possibility of the constitutionality of at least executive acts being entertained by the judiciary. A strong support structure, as Epp and Grenfell suggest, is key in this regard to broadening access to constitutional justice. Yet the judiciary's apathy and the legislative restrictions are largely the results of the Constitution, which confers broad constitutional jurisdiction on a political body without explicitly demarcating the province of the judiciary. Such opaque jurisdiction operates in the context of ethnic federalism where group rights take prominence over individual rights. Ethiopia's

[124] *HoF Proclamation*, no1261/2021 (Ethiopia) art 18.

experience thus reveals an institutional design problem which is difficult to substantially transform through a support structure or broadly defined access rules.

The Constitution's language and the design of the HoF have indeed significantly constrained the application of broadly defined access rules. The prominence group rights enjoy over individual rights and the inherent institutional limitations of the HoF including its inability to adjudicate cases on a full-time basis have left the Constitution's ostensibly liberal approach to constitutional justice in disarray. The factors Wilson found to be key to the realisation of access to constitutional justice or the rights revolution in Colombia and Costa Rica — a low level of formality, broadly defined rules on standing and an expeditious decision-making process — are all enshrined in the Constitution and subsidiary laws of Ethiopia. The failure of such rules to produce the expected result in Ethiopia due to the institutional circumstances under which they operate highlights the limitation of focusing on access rules in explaining the openness of constitutional justice.

Ethiopia's experience, therefore, underscores the significance that should be attached to a constitution's overall language and structure and the type of institution that adjudicates constitutional disputes in understanding the accessibility of constitutional justice. In this regard, further comparative and comprehensive research involving courts, constitutional courts, and non-judicial bodies is required. Such research is important as access to constitutional justice is integral to most modern constitutional democracies' rule of law project. The next chapter further explores the HoF's ability to uphold the rule of law. Building on what I have presented so far, it aims to offer an important contribution to comparative constitutional justice research given the distinct features of Ethiopia's constitutional system.

Chapter 5: Non-judicial constitutional review and the rule of law

5.1 Introduction

With the theories of constitutional review and the rule of law elaborated in Chapter 2 and the specific features of the HoF explained in Chapters 3 and 4 in mind, this chapter examines non-judicial constitutional review, the Ethiopian model, through the lens of the rule of law. It evaluates the theoretical soundness and practicability of this model of review as an alternative to the widely known strong and weak forms of review. Constitutional review, once uncommon outside the United States, has now become one of the basic tenets of constitutional democracy around the world. Its expansion has, however, been accompanied by theoretical and practical challenges. Such challenges have engendered diverse institutional mechanisms for constitutional review which can broadly be categorised as judicial and non-judicial review. The theoretical challenges emerge from the perceived undemocratic nature of constitutional review. Practical challenges to this institution stem from multiple factors including the very nature of the role constitutional review plays (controlling political power), the specific form this institution may take, and the legal and political system under which it functions.

Defending constitutional review, therefore, requires addressing the democracy-based arguments against it and presenting an existing or possible institutional mechanism that can effectively guard constitutional supremacy against everyone including the parliament. Imposing the rule of law on the parliament (legal constitutionalism)[1] no doubt entails the existence of some fundamental rules which are beyond the reach of the parliament. In most contemporary legal systems, these rules constitute a constitution. The issue then is whether there can be an institution that is both democratically legitimate and practically able to enforce a constitution.

In this chapter, I start with the assumption that the rule of law entails an institutional mechanism that ensures the supremacy of at least some fundamental rules over everyone including the parliament. The obvious objection to this assumption would be the counter-majoritarian theory, the allegation that subjecting legislation to review is undemocratic. However, rule by majority is not the same as rule by the people. For the people to rule, that is, for majority rule to be

[1] For more on legal constitutionalism, see Alec Walen, 'Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism A Review Essay on Political Constitutionalism' (2009) 7(2) *International Journal of Constitutional Law* 329.

characterised as people rule, the will of the people (as expressed in a constitution, for example) should be superior to the will of the majority. With this assumption, I evaluate the theories underpinning judicial and non-judicial constitutional review and examine practical accounts of a particular non-judicial constitutional review system (i.e. Ethiopia) to examine whether the latter is a viable alternative.

Some jurisdictions (namely Ethiopia, China and Cuba) have opted for non-judicial review in what appears to be a response to the alleged counter-majoritarian problem with judicial review. An elected constitutional jury of 108 members was indeed proposed by the French revolutionary politician Abbé Sieyès as early as in 1795.[2] This body 'would become a supreme arbiter but would require the same legitimacy as the legislative assemblies whose acts it could annul'.[3] However, none of the modern non-judicial constitutional review mechanisms seems to be its descendant. Of the countries that have a written constitution, only a few socialist states (China and Cuba) and emerging democracies (Ethiopia) have adopted non-judicial review. In China and Cuba, constitutional review is intermingled with legislative power.[4] This arrangement renders subjecting the legislator to constitutional supremacy impractical and thus defeats the very purpose of constitutional review.

Ethiopia's House of Federation (HoF) is perhaps the only modern constitutional review mechanism which somewhat resembles the one proposed by Sieyès. The HoF is, as explained in Chapter 3, a 153-member non-legislative quasi-judicial second chamber of Ethiopia. However, unlike Sieyès' constitutional jury, it is a political body representing ethnic and regional interests. It should be noted here that both Sieyès' jury and the HoF, with their 108 and 153 members respectively, can hardly be considered constitutional courts. Such 'large numbers are more characteristic of a legislative kind of reasoning'.[5] This form of constitutional review may be appealing to those who see judicial constitutional review as a threat to democracy.[6] However, this seems to be disputable both on normative and pragmatic grounds.

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[2] Jouanjan, Olivier, 'Constitutional Justice in France' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press, 2020) 223, 230.
[3] Ibid.
[4] In China and Cuba, the power of constitutional review is vested in the National People's Congress and the National Assembly of People's Power respectively.
[5] Marco Goldoni, 'At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power' (2012) 32(2) *Oxford Journal of Legal Studies* 211, 231.
[6] See e.g.Mark V Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) 154-163.

Is Ethiopia's form of non-judicial review consonant with constitutionalism, which is counter-majoritarian, if not anti-democratic, by design? What does Ethiopia's experience, as a notable (and perhaps the only operative) example of this model, tell us about the prospects of constitutional enforcement via a non-judicial body? This chapter attempts to address these normative and empirical questions. Answering these questions is important to appreciate the theoretical and pragmatic strengths and weaknesses of non-judicial review, and to evaluate whether it is a viable alternative to judicial review.

Much has already been said in support of and against judicial review.[7] Therefore, the focus of this chapter is on evaluating non-judicial review in light of the rule of law. Yet, as the main purpose of this study is to test whether Ethiopia's form of constitutional review can be a viable alternative to judicial review, I analyse Ethiopia's experience through the lens of the theories underlying both judicial review and non-judicial review. As explained in the previous chapters, Ethiopia's Constitution places ethnic groups at the forefront. One may thus question the relevance of the theories on judicial review or liberal constitutions to the Ethiopian case. It should however be noted that Ethiopia's Constitution has incorporated features of liberal constitutions though with an imperfect design. As indicated in Chapter 4, a third of the Constitution is dedicated to the fundamental rights and freedoms of individuals. One of the main objectives of the Constitution is realising the autonomy and dignity of individuals.[8] This objective is however met with a contradicting vision, as explained in Chapters 3 and 4: ethnic groups' unconditional right to self-determination. One of the main challenges of Ethiopia's Constitution lies perhaps in its attempt to realise both individual and ethnic rights through a political institution which is meant to protect the latter. This raises questions as to whether Ethiopia has a viable institutional mechanism that can ensure the rule of law through enforcing constitutional rights and principles.

The rule of law in this thesis, as indicated in Chapters 1 and 2, refers to the ideal that underlies constitutional review, that is, constitutional supremacy or constitutionalism broadly. In Chapter 2, I evaluated the substantive and formal conceptions of the rule of law and explained why the formal conception is wanting. Thus, this thesis is guided by the substantive understanding of

[7] See, eg, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996); Miodrag Jovanović (ed), *Constitutional Review and Democracy* (Eleven International Publishing, 2015); Jeremy Waldron, *Law and Disagreement* (Clarendon, 1999); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).
[8] See *FDRE Constitution* art 10, preamble.

this concept. This conception of the rule of law is also relevant to the subject of my study for Ethiopia has a rights-rich constitution although the ethnic-based political system has posed a huge challenge to its enforcement.

Although non-judicial review has not drawn much attention and is still under-researched, there are some pioneer works which I intend to build on. Abebe has explored Ethiopia's non-judicial constitutional review with a focus on the link between the 'unique institutional and procedural aspects' of this review system and 'the political and ideological background of the dominant actors who drafted and adopted the constitution'.[9] Fiseha, Mulu, Melaku and Vibhute have addressed other aspects of constitutional review in Ethiopia including the HoF's overall performance,[10] the constitutional interpretation principles it has developed,[11] its 2020 ruling to delay general elections,[12] and its design under the Constitution.[13] Drawing on this scholarship, the views of leading 20th-century thinkers such as Rawls, Dworkin, Ackerman, Ely, Tamanaha and Waldron, and Ethiopia's experience in constitutional review, this chapter aims to probe whether non-judicial review is a theoretically sound and realistically viable alternative to judicial constitutional review.

Accordingly, the next section examines the theories underlying (non-)judicial review or constitutional review. Section 5.3 explains the theoretical underpinnings of Ethiopia's non-judicial review. Then Section 5.4 evaluates Ethiopia's form of review through the lens of the theories underlying constitutional review. Section 5.5 explores the HoF's experience to illustrate the practical implications of Ethiopia's form of review for constitutionalism. Finally, Section 5.6 concludes that this form of review is neither theoretically grounded nor practicable.

5.2 Theories underlying (non-)judicial review/constitutional review

As indicated, this chapter assumes that constitutional review is integral to constitutional democracy. It is necessary to hold everyone including the parliament to account for their actions. If the parliament is not subject to enforceable limits, the rule of law relinquishes space

[9] Adem Abebe, 'Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia' in Charles M Fombad (ed), *Constitutional Adjudication in Africa* (Oxford University Press, 2017) 181, 181.
[10] Assefa Fiseha, 'Constitutional Adjudication through Second Chamber in Ethiopia' (2017) 16(3) *Ethnopolitics* 295.
[11] Anchinesh Shiferaw Mulu, 'The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia' (2019) 13(3) *Mizan Law Review* 419.
[12] Tadesse Melaku, 'Transition and the Pitfalls of Nondemocratic Institutions: A Review of Constitutionality in Ethiopia' (2021) 2021(1) *Africa Journal of Comparative Constitutional Law* 67.
[13] KI Vibhute, 'Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct' (2014) 22(1) *African Journal of International and Comparative Law* 120.

for rule by men or women who happen to be legislators. The idea of controlling political power through the constitution — the constitutional dimension of the rule of law — entails a distinction between the constitution and legislation. Distinguishing democracy in which majoritarianism is the overarching system from constitutional democracy where the constitution is superior is very important here. In constitutional democracy, the relationship between the constitution and legislation is hierarchical. In the absence of such a relationship, making a distinction between the two would be superficial. In this hierarchy, the constitution must be placed at the top because it represents, if in the abstract, the will of the people as opposed to the will of the majority. If the constitution is not beyond the reach of the majority, its role in controlling legislation is minimal. In this case, governance is essentially majoritarian democracy rather than constitutional democracy.

Furthermore, the principal–agent problem with representative democracy necessitates some institutional mechanism that corrects deviations from the principles set by the principal (the people). In an ideal constitutional democracy, the constitution is an expression of the people's will that must not be substituted by the will of their agents.[14] After all, a constitution is not significantly different from ordinary laws if it cannot be enforced against the parliament.

An ideal constitution is one that is authored by the people as a whole, not by its part (a majority). If majority rule were infallible and thus equivalent to rule by the people as a whole, the need for constitutional review would be questionable. This is not the case, however. Conflicts of interest are bound to occur between a majority and the people as a whole, for the latter accommodates not only a majority but also a range of minorities. The majority, therefore, must be restrained so it can operate in line with what the people as a whole agreed. One can, therefore, safely assume that constitutional review is intrinsic to constitutional democracy.

The next question then is what institution is appropriate to review the constitutionality of laws and decisions. A closer look at the debates surrounding constitutional review suggests that no answer to this question is entirely satisfactory. Central to this problem, I would say, is the practical difficulties of the people overseeing the day-to-day activities of their representatives without an agent and the difficulty of ensuring such an agent mirrors the views of the whole people. If courts are entrusted with this role, constitutional review will be counter-majoritarian by design and may be seen as a threat to a majority's legislative program. If the legitimacy of

[14] Alexander Hamilton, James Madison and John Jay, 'Federalist No. 78' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Springer, 2009) 235.

a constitutional review body is premised on representation and non-judicial review is opted for, it tends to be a majoritarian mechanism short of being an institution that mirrors the people as a whole. Here it is apt to examine the theoretical foundations of judicial and non-judicial review with this paradox in mind.

The main theoretical challenge to judicial constitutional review is the 'counter-majoritarian difficulty'.[15] Bickel, in explaining his theory of the 'counter-majoritarian difficulty',[16] rejected Hamilton's claim that judicial review does not 'suppose a superiority of the judicial to the legislative power'.[17] For Hamilton, judicial review 'only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter'.[18] In sharp contrast to this, Bickel maintained that 'judicial review constitute[s] control by an unrepresentative minority of an elected majority'.[19] According to him, the claim that the judiciary is acting on behalf of the people to uphold constitutional limits on political power is problematic because 'the word "people" so used is an abstraction'.[20] This abstraction, he went on, 'obscure[s] the reality that … judicial review exercises control, not on behalf of the prevailing majority, but against it'.[21]

At the risk of oversimplification, the responses to this alleged tension between judicial review and democracy can be grouped into three broad categories. The first considers judicial review as an intrinsic element of democracy. Democracy would thus be incomplete without judicial review. The second response admits the alleged conflict and then justifies judicial review on grounds other than democracy. The third presents judicial review as a threat to democracy and thus proposes what is perceived to be a democratically legitimate constitutional review mechanism as an alternative or wants to see the legislature being immune to constitutional review altogether. Let me elaborate each of these three categories.

[15] For more on the counter-majoritarian difficulty, see Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).
[16] Ibid 16.
[17] Hamilton, Madison and Jay (n 14) 235.
[18] Ibid.
[19] Bickel (n 15) 16.
[20] Ibid.
[21] Ibid 17.

5.2.1 First category: Judicial review is intrinsic to democracy

For those who consider judicial review as an essential element of democracy, the former is the guardian of the conditions necessary for the latter. However, there is notable disagreement over what these conditions are. The two sides of this disagreement represent the substantive reading of democracy by Dworkin and his followers[22] and the procedural views of democracy presented by intellectuals like Ely.[23] Dworkin contrasts his substantive conception of democracy with the majoritarian conception.[24] He asserts that 'the constitutional conception of democracy [substantive democracy] … as a rival to the majoritarian conception that reflects the majoritarian premise, presupposes democratic conditions'.[25] These conditions, he clarifies, are 'the conditions of moral membership in a community'.[26] According to him, collective decisions are legitimate when they are characteristically attributable to all members of a community, instead of a statistical majority alone.[27] In this sense, Dworkin concurs with Hamilton's view that the constitution, as an expression of the will of the people, should operate as a limitation on the will of the majority.

In *Political Liberalism*,[28] Rawls supports a version of democracy compatible with Dworkin's view. While he does not, unlike Dworkin, explicitly claim that democracy by definition embraces substantive justice, his theory of 'overlapping consensus' claims that democracy assumes some principles of justice such as liberty and equality.[29] Central to his theory is what he calls 'a liberal political conception that those non-liberal [for example religious and political] doctrines might be able to endorse'.[30] Rawls considers a liberal conception of justice essential for a stable democracy. Accordingly, judicial review is indispensable to reinforce the prerequisites of democracy through sustaining a constitution 'upon an overlapping consensus on issues of public morality based upon a liberal theory of justice'.[31] Rawls's theory of overlapping consensus seems to be consistent with Dworkin's legitimacy test. As indicated,

[22] See, eg, Dworkin (n 7); John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005); Brian Tamanaha, *On the rule of law: History, Politics, Theory* (Cambridge University Press, 2004).
[23] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).
[24] Dworkin, *Freedom's Law* (n 7) 23.
[25] Ibid.
[26] Ibid.
[27] Ronald M Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28(2) *Alberta Law Review* 324, 331.
[28] Rawls (n 22) 144-68.
[29] Rawls (n 22) xliii–xlv; Jerome C Foss, 'John Rawls and the Supreme Court: A Study in Continuity and Change' (PhD thesis, Baylor University, 2011).
[30] Rawls (n 22) xlv.
[31] Foss (n 29) i.

Dworkin claims that collective decisions should be characteristically attributable to all members of a political community to be legitimate. This assertion is premised on the assumption that 'a fair consensus on morality' is possible.[32]

Ackerman's dual conception of democracy, characterised by 'normal lawmaking', and 'higher lawmaking' by the people, similarly suggests that democracy presupposes consensus on certain principles.[33] According to Ackerman, 'higher lawmaking' represents deliberative democracy, which aims to produce consensus, and the role of judicial review is to maintain this consensus until it changes. In this sense, judicial review constitutes a democratic process which maintains the will of the people.

Dworkin approaches democracy through what he calls 'integrated communal collective action, which insists on the importance of the individual'.[34] Central to his theory of democracy is that 'all members of the community, as individuals' should be treated 'with equal concern and respect'.[35] His moral reading of democracy considers individuals as bearers of moral rights. Accordingly, there has to be an institution to provide 'answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions'.[36] Dworkin considers democratic conditions including the right to liberty and equality as defining elements of democracy. Judicial enforcement of constitutional limits on political power would, therefore, constitute democratic practice. According to his theory of democracy, the alleged tension between democracy and judicial review is premised on a wrong assumption which equates democracy with majoritarianism.

Dworkin's conception of democracy is compelling, for the purely majoritarian conception of democracy is wanting. As stated earlier, there is a principal–agent problem in representative democracy. Two types of conflict of interest may arise out of this. The first is between the will of the people and the will of the representatives. The second is conflict of interest between the two constituting parts of the same people, the majority and minority. In both cases, upholding the majority's interest entails deviation from the interest of the people as a whole unless 'people' is misread to mean the majority, most people or anything of that sort. Dworkin, by adopting a conception of democracy that embraces rights, brings representative democracy

[32] Stephen Guest, 'How to Criticize Ronald Dworkin's Theory of Law' (2009) 69(2) *Analysis* 352, 359.
[33] Bruce Ackerman, *We the People, Volume 1: Foundations* (Harvard University Press, 1993) 3-7.
[34] Dworkin, 'Equality, Democracy, and Constitution' (n 27) 330.
[35] Dworkin, *Freedom's Law* (n 7) 17.
[36] Ibid 34.

closer to people's will because his conception allows all members of a society, as individuals, to correct their agent (the majority) by claiming their rights.

Content wise, Ethiopia's Constitution has thick features. It embraces civil, political and socio-economic rights. It gels with Dworkin's conception of democracy to the extent it entrenches human and democratic rights and allows individuals to challenge legislation by invoking their rights. In this regard, Ethiopia's Constitution, like other liberal constitutions, seeks to guard the autonomy and dignity of individuals by making fundamental rights and freedoms beyond the reach of parliament. However, contrary to this rights regime, Ethiopia's Constitution in general and its constitutional review system in particular is premised not on liberal constitutionalism or recognition of the individual as the main autonomous unit but, rather, on the autonomy of ethnic groups. As indicated in Chapter 4 and further elaborated in this chapter, this inconsistency has resulted in a complex institutional setup and poses a major challenge to constitutionalism in Ethiopia.

Dworkin's conception of democracy is consistent with the substantive rule of law discussed in Chapter 2 since, according to his theory, the law derives its legitimacy from the democratic conditions, and not the majoritarian decision-making processes per se.[37] While Dworkin's theory of democracy, as a substantive conception, naturally invites many disagreements about, for example, which rights should be beyond the legislature's reach and the content of each right, it is no doubt a compelling solution to address the principal–agent problem in representative democracy.

Like Dworkin, Ely considers judicial review essential to protect the conditions of democracy. But the similarities between the views held by the two end here. For Ely, the democratic conditions that the judiciary should protect are procedural, such as the integrity of the majoritarian decision-making process. He rejects rights-based review of legislation, claiming that objective interpretation of rights is hardly achievable.[38] Ely, like Dworkin, believes that majority tyranny is the main problem with majoritarianism.[39] Nonetheless, as Bellamy puts it, 'Ely proposes combating it not by asking whether the decision itself confirms to a given

[37] Dworkin, 'Equality, Democracy, and Constitution' (n 27) 331.
[38] Ely (n 23) 44–6.
[39] Ibid 81–2.

understanding of rights or equality of concern and respect, but by seeing that the procedures by which it has been made are equitable'.[40]

Ely's process-based proposal leans towards political constitutionalism, the idea that constitutional accountability has to be maintained through political institutions. In my view, ensuring equal participation in decision-making processes does not remove the threat the majority poses to minorities unless majoritarianism is qualified. Minorities participate but cannot control the excesses of the majority so long as majoritarianism is not subject to substantive limits. If majoritarianism is qualified to allow minorities to challenge the excesses of a majority, we will end up with a substantive conception of democracy.

At any rate, majoritarianism is problematic to the extent it reduces rule by the people to rule by the majority and thus needs to be tamed. As Woodruff puts it, 'the majority is not the people … minorities must be included in the people, and so the law must give them ways to defend their interests'.[41] In this sense, any form of majoritarianism which is not subject to some norms produced by the people themselves deviates from the essence of democracy. It is not, therefore, majoritarianism per se, rather majoritarianism functioning under the rule of law which is closer to rule by the people.

5.2.2 Second category: Democracy is essential but insufficient for governance to be legitimate

Some scholars including Bickel, who coined the term 'counter-majoritarian difficulty',[42] insist that democracy and judicial review are conceptually irreconcilable. Yet, they do not reject judicial review altogether but defend its restrained version on grounds other than democracy. The point is that democracy is essential but not sufficient to legitimise governance. Since judicial review is seen both as deviant to democracy and instrumental to legitimise governance, they believe it should exist but in a restrained form. Bickel considers democracy to be governance through an elected majority and then presents judicial review as an institution which 'thwarts the will of representatives of the actual people of the here and now'.[43] Accordingly, he argues that the legitimacy of judicial review cannot be based on democracy. Yet, he considers it legitimate 'as a process for the injection into representative government of

[40] Bellamy (n 7) 108.
[41] Paul Woodruff, 'Majority Rule is Not Democracy', *OUP Blog* (Blog Post, 22 January 2022) <https://blog.oup.com/2022/01/majority-rule-is-not-democracy/>.
[42] Bickel (n 15).
[43] Ibid 16–7.

a system of enduring basic values'.[44] The counter-majoritarian difficulty could be, Bickel argues, tempered through what he calls 'the passive virtues' or 'prudence',[45] which is a 'strategy of deciding [constitutional] cases on the narrowest ground — often procedural — available'.[46]

Bickel's counter-majoritarian difficulty and his resultant vigilant approach to judicial review appear problematic for two reasons. First the counter-majoritarian difficulty is premised on majoritarianism or the procedural conception of democracy which is, as indicated, wanting. Second, his preference for procedural grounds over substantive ones for deciding constitutional cases does not seem to be cogently responsive to minority and individual rights, which procedural democracy is insufficient to protect. Advocates of the substantive rule of law like Tamanaha concur with Bickel's view that democracy is a deficient ideal, but respond to the problem differently. For Tamanaha, 'democracy is a blunt and unwieldy mechanism that offers no assurances of producing morally good laws'.[47] His remedy to this problem is the substantive rule of law. Accordingly, governance would rely for its legitimacy not only on democracy but also the substantive rule of law.

Like Dworkin, Tamanaha considers individual rights — civil and political rights in particular — integral to his substantive conception of the rule of law. However, the views of the two on the relationship between democracy and individual rights are conflicting. For Dworkin, there is, as mentioned, no conflict between the two concepts as his version of democracy by definition embraces individual rights. For Tamanaha, 'individual rights inevitably have anti-democratic implications'.[48] Yet, he justifies judicial review based on individual rights. He claims individual rights are 'anti-majoritarian by design'.[49] Accordingly, entrusting them 'to a democratically accountable body … would defeat their purpose'.[50]

As indicated, Tamanaha views democracy as an ideal devoid of substance. Consequently, he sees individual rights as anti-democratic or anti-majoritarian. This view is premised on majoritarianism. As I explained, this version of democracy is problematic for it is reductionist and equates democracy with majoritarianism. Limiting majoritarianism through individual

[44] Ibid 51.
[45] Alexander M Bickel, 'Foreword: The Passive Virtues' (1961) 75(1) *Harvard Law Review* 40, 40–51.
[46] Sandeep C Ramesh, 'Alexander Bickel', *Free Speech Center, Middle Tennessee State University* (Web Page, 19 September 2023) <https://www.mtsu.edu/first-amendment/article/1285/alexander-bickel>.
[47] Tamanaha (n 22) 101.
[48] Ibid 104.
[49] Ibid 105.
[50] Ibid.

rights and other constitutional principles should not automatically be considered anti-democratic. Anti-majoritarianism could represent an institutional mechanism that aims to bring a majority in line with the will of the people. To the extent individual rights and other constitutional principles are recognised or produced by a political society and can be invoked by all members (of course individually as Dworkin puts it) of that society against a deviating majority, the limitation is an effort to ensure rule by the people. In this sense, the end is rule by the people and the means is rule by the majority under the rule of law.

5.2.3 Third category: Judicial review is a threat to democracy

The third category is antagonistic to judicial review.[51] Democracy, according to intellectuals falling under this category, is a self-sufficient ideal capable of protecting rights. This category either rejects the institution of constitutional review altogether or proposes majoritarian (non-judicial) review as an alternative. For those arguing along the lines of political constitutionalism, judicial review is not only in conflict with democracy but also superfluous. Bellamy, for example, rejects judicial review, claiming that an open electoral process and majoritarianism 'offer superior and sufficient methods for upholding rights and the rule of law'.[52] He charges counter-majoritarian mechanisms in general and judicial review in particular for undermining 'the equality of votes and the incentives towards the responsibility and accountability of politicians'.[53] He seeks to protect 'rights, the rule of law and even democracy' through democracy.[54] His theory of democracy is premised on the assumption that democracy or 'people rule' entails a free *demos* which is able to redefine its democracy whenever it wants to do so, and thus is not 'tied to any given definition'.[55] Accordingly, individuals would have the autonomy to define their rights and political rules through a democratic process.

Democracy as an end, as Bellamy himself concedes, denotes people rule. As indicated, democracy as a means to this end represents majoritarianism. The main problem with Bellamy's conception of democracy, I would argue, is that it offers protection for only one of these two aspects of democracy, majoritarianism. Democracy as a means, however proximate it may be to democracy as an end, has unavoidable limitations. For practical reasons, it reduces

[51] See, eg, Bellamy (n 7); Waldron (n 7).
[52] Bellamy (n 7) i.
[53] Ibid 260.
[54] Ibid 141.
[55] Ibid 90.

the people into the majority and the equality of votes into majority rule. Then comes the principal–agent problem as elaborated earlier for the majority is not the whole people, nor can majority rule automatically be characterised as people rule. In this sense, subjecting majority decisions to Dworkin's democratic conditions or Rawls' people's overlapping consensus or Ackerman's constitutional politics constitutes the rule of law, an ideal which is in play between people rule and majority rule to bring the latter in line with the former.

Like Bellamy, Waldron, an eminent advocate of procedural democracy, considers judicial review democratically illegitimate.[56] Alluding to the disagreement about rights, he argues that the legitimacy of collective action should be premised on the aptness of the decision-making process rather than the righteousness of the outcome it produces.[57] His point is that both the judiciary and legislature resolve disagreements about rights through the same process, majority decision, and 'this majoritarian decision-making process is more legitimate in legislatures than in courts because legislatures consist of representatives who have a *moral claim* to represent a community's view in making their decisions'.[58]

Waldron further argues that 'there is no reason to suppose that rights are better protected by this practice [judicial review] than they would be by democratic legislatures'.[59] According to him, 'the ordinary discipline of judging' distances judges from moral arguments while legislatures have the freedom to extensively debate moral issues.[60] Waldron is not indifferent to substantive values like rights and justice. His view is that such values are better protected through participatory majoritarianism. As explained in Chapter 2, he rejects strong judicial review — nullification of legislation by the judiciary for being unconstitutional — as democratically illegitimate, while he embraces weak judicial review, as practiced by the UK and New Zealand, as 'a mechanism that allows citizens to bring … [rights issues] to everyone's attention'.[61]

As Waldron's argument is grounded on the procedural or majoritarian understanding of democracy, the limitations of this conception of democracy elaborated earlier apply here. Although he bases his case against judicial review on a number of assumptions including well-

[56] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346, 1346.
[57] Ibid 1373.
[58] Salman Shah, 'Democracy as the Moral Justification for Judicial Review', *AusPubLaw* (Web Page, 15 April 2020) <https://www.auspublaw.org/2020/04/democracy-as-the-moral-justification-for-judicial-review/>. See also Waldron, 'The Core of the Case against Judicial Review' (n 56) 1396.
[59] Waldron, 'The Core of the Case against Judicial Review' (n 56) 1346.
[60] Ibid 1359.
[61] Ibid 1370.

functioning democratic institutions and a society committed to rights, these conditions offer no predictable guarantee of the protection of individual and minority rights, particularly where such rights are in conflict with interests that the majority favours.

In a nutshell, while none of the three theoretical positions on the relationship between constitutional review and democracy are free from criticism, the first theory that defends constitutional review based on the substantive understanding of democracy seems to be a compelling approach. The remaining two positions are premised on majoritarianism, which is a reductionist theory of democracy as explained. It should still be noted that the first and second positions are somewhat similar in terms of outcome. In particular, protection of individual rights is central to both Dworkin's constitutional conception of democracy and Tamanaha's view on legitimate governance which combines majoritarianism and the substantive rule of law. The Ethiopian case falls primarily under the third category as it rejects judicial constitutional review. Yet, it embraces a rights-based constitutional review of legislation and thus shares features of the first two theoretical positions. It therefore represents a complex and an imperfect institutional design, as is explained below.

5.3 Theoretical underpinnings of Ethiopia's non-judicial constitutional review system

As already explained in Chapters 3 and 4, Ethiopia has an unusual constitutional review system whose design is largely defined by its ethnic federal system. The theoretical underpinnings of this non-judicial constitutional review system are tied, one way or another, to the main organising principle of political life in Ethiopia since 1991, namely ethnic groups' unconditional constitutional right to self-determination. According to Ethiopia's existing constitutional dispensation, the constituent units of the federation — ethnic groups (termed nations, nationalities and peoples) — are not obliged to stay within the federation. The Constitution allows them to exercise their internal or external right to self-determination at any time. This right is absolute. Unlike most individual rights,[62] this group right is immune from suspension even in times of state of emergency. The Constitution does not set a substantive condition which could serve as a glue to hold the federation's entities together. As indicated in

[62] *FDRE Constitution* art 93. All the constitutional provisions are subject to suspension during a state of emergency except arts 1 (nomenclature of the State), 18 (the prohibition against inhuman treatment), 25 (the right to equality), and 39 (ethnic groups' right to self-determination).

Chapter 3, it is the single and dominant party system that has held these entities together for the last three decades.

Leaving concentration of power at the centre through a party system aside, the Constitution has established a federal system whose fate is utterly dependent upon the consent of ethnic groups. The Constitution identifies nations, nationalities and peoples as the authors of the Constitution. Sovereignty is conferred on each of these entities and the Constitution declares itself an expression of such sovereignty.[63] One of the five fundamental principles of Ethiopia's Constitution is that the nations, nationalities and peoples exercise their sovereignty through their representatives or direct participation.[64] The constitutional founders' decision to distance courts from constitutional review and embrace non-judicial review is premised on this overarching framework. The idea is that it is the representatives of ethnic groups and not unelected judges that have legitimacy to determine the content of a document which is a product of the consent of sovereign equals. Ethiopia's second chamber, the House of Federation (HoF), is meant to serve this purpose. The constitutional founders considered judicial review a threat to democracy — in particular, to ethnic groups' right to self-determination — and introduced non-judicial review to address the alleged conflict between judicial review and democracy.

Each ethnic group's absolute right to sovereignty is not accompanied by an equal or overriding sovereignty of a countrywide single demos. Popular sovereignty in the current Ethiopian context, therefore, refers to each ethnic group's unconditional right to self-determination. Ethnic groups, as the owners of the political system and bearers of an unconditional right to self-determination, take pre-eminence over individuals. This overarching framework has undermined the Constitution's commitment to fundamental rights and freedoms of individuals. Although a third of the Constitution is dedicated to these rights and all international human rights instruments 'ratified by Ethiopia are an integral part of the law of the land',[65] this rights-regime is not matched by recognition of the individual as the main unit of the polity. This has posed a challenge to the realisation of constitutionalism through enforcing individual rights. There are two reasons for this. First, there is conflict between ethnic-based privileges and individual rights, as elaborated in Chapter 4. For example, the right to equality and identity-based exclusive ownership over regional administration cannot go together. Second, the

[63] See ibid preamble, art 8.
[64] Ibid.
[65] Ibid art 9(4). See also ibid art 13(2).

constitutional founders established non-judicial review with the aim to make constitutional review responsive to ethnic-based demands. This review system is inherently political and thus its amenability to individuals is highly questionable. As I will explain later, its political nature undoubtedly poses a significant challenge not only to individual constitutional complainants but also ethnic-based group claims.

There was some debate during the constitution-making process — although not adequate because such process was controlled by the then ruling party — about whether courts or representatives of ethnic groups should interpret the Constitution.[66] As indicated in Chapter 3, the majority of members of the Constitutional Drafting Commission insisted that the HoF is the most suitable body to interpret the Constitution in general and to settle constitutional disputes among the nations, nationalities and peoples, and between regional states specifically.[67] A minority of the members of the Commission objected to this, asserting that such an arrangement takes power away from the judiciary.[68] They added that denying the judiciary the power to adjudicate constitutional disputes would, in addition to violating the principle of separation of powers, weaken the historically disenfranchised courts.[69] The majority's response to this was that the Constitution is not like other laws. This argument, as indicated, is premised on democracy — the popular sovereignty of nations, nationalities and peoples.

From the standpoint of procedural democracy which considers participatory majoritarianism superior and sufficient to legitimise governance, constitutional interpretation by representatives is no doubt more democratic than judicial review. However, such an arrangement is problematic from the standpoint of substantive democracy. A decision by a representative political body like the HoF is more characteristic of majoritarianism than being attributable to all members of a political society. It should be noted here that characteristically attributing the HoF's decisions to all members of the Ethiopian polity is even more difficult as the HoF represents not the people but different ethnic groups. Its members are not only party members but also ethnic partisans. This makes one ask: Is the HoF a theoretically sound constitutional review mechanism? What does its experience tell us about non-judicial review as an alternative to judicial review? The remaining part of this chapter aims to answer these questions.

[66] Transitional Government of Ethiopia, *Constituent Assembly Minutes*, vol 5 (1994) no 000009.
[67] Transitional Government of Ethiopia, *Constitutional Commission Minutes*, vol 2 (1993) no 000179.
[68] Ibid no 000180.
[69] Ibid.

5.4 Is non-judicial review (the Ethiopian approach) theoretically sound?

As can be understood from the foregoing analysis, Ethiopia's non-judicial review is premised on two principles: that the people should rule themselves and that judicial review deviates from this. This form of review is closest to the third school of thought elaborated in Section 5.2 as it considers judicial review a threat to democracy. Yes, democracy entails that people should rule themselves. The question however is whether non-judicial review represents rule by the people. As already indicated, majority rule is not a substitute for rule by the people; it rather functions under the auspices of the latter. An ideal constitutional democracy hence embraces both people rule and majority rule. In this combination, the constitution (the will of the people) should remain superior to the will of the majority. Democracy understood properly has thus both constitutional (legal) and majoritarian (political) elements. Constitutionalism therefore entails subjecting majority rule (politics) to people rule (the express or implied agreement of the people on fundamental issues, set forth in the constitution). In this regard, controlling the majority through non-judicial review is problematic for at least two reasons.

First, it involves a majoritarian mechanism to control a majority. Horizontal checks and balances are no doubt useful to enhance accountability in governance. However, when it comes to constitutionalism or maintaining the superiority of the will of the people over the will of the majority, majoritarian mechanisms can hardly be the best institutional choices. There could be conflict of interest between the will of the people expressed in the constitution and the will of the majority. Using a majoritarian mechanism to uphold constitutionalism could thus be self-defeating.

Second, such an arrangement undermines the role an individual should play in the political process in an open and democratic society. Non-judicial review, as an inherently political process, is not amenable to individuals who seek to pursue constitutional justice. As John Laws observes, politics and politicians are guided by 'political morality', which is 'largely forward-looking, utilitarian and collective'.[70] Therefore, by their nature, political processes are not suitable to guard constitutional rights and principles against the flaws inherent in rule by the majority.

As indicated, the long list of individual rights in Ethiopia's Constitution is not complemented by an institutional setup that places the individual at the forefront. Regulating the relationship

[70] John Laws, *The Constitutional Balance* (Bloomsbury Publishing, 2021) xii.

between individuals and state organs is indeed one of the main objectives of most constitutions around the world. The task of determining this relationship has to do with constitutionalism rather than majority rule and thus requires an institution open to all members of a political society.

As a political institution principally defined by ethnicity, the HoF is essentially an interethnic/intergovernmental body. Managing interethnic issues through a political process is one thing; it is another thing to uphold constitutionalism in general and constitutional rights of individuals in particular. Both these tasks are entrusted to the HoF in Ethiopia. This no doubt makes the problems with Ethiopia's model of non-judicial review quite complex. The next section analyses Ethiopia's experience with non-judicial review to further scrutinise whether this form of review is a feasible alternative to judicial constitutional review from both a theoretical and a practical point of view.

5.5 Non-judicial constitutional review: The HoF's experience

So far, I have argued that Ethiopia's non-judicial review is not theoretically sound for it is a primarily political (majoritarian) mechanism whose decisions can hardly be characteristically attributed to all members of the polity. As elaborated, constitutionalism entails supremacy of the will of the people (as expressed in a constitution) over the will of the majority and this in turn requires an institutional mechanism that controls the majority. In this regard, constitutionalism is both counter-majoritarian by design and democratic (an application of the will of the people). Thus, Ethiopia's use of a majoritarian-oriented institution as a constitutional review body is not consonant with constitutionalism. The next question then is: what is the practical implication of this theoretical limitation for constitutionalism?

As I will illustrate hereafter by an analysis of the cases decided by the HoF and its advisory body, the Council of Constitutional Inquiry (CCI), Ethiopia's constitutional review system has not been successful in maintaining constitutionalism for two main reasons linked to its theoretical limitation. First, as a majoritarian-oriented and thus inherently partial system, both individuals and ethnic groups (particularly minorities) have found it difficult to challenge the majority through this review system. This has resulted in the prevailing lack of constitutionalism. Second, limited relevant expertise and time pressure are also characteristics of such a majoritarian-oriented system. Thus, it is not in the nature of this institution to

adjudicate constitutional disputes, which are usually complex. Due to this, its decisions are in many instances of poor quality and highly inconsistent.

This section aims to illustrate how such design-related factors have made Ethiopia's non-judicial review ineffective. It is informed mainly by an analysis of cases decided by the HoF and the CCI. Ethiopia's Constitution and relevant subsidiary laws are also analysed to clarify the link between the HoF's design and the practical challenges it faces. To collect the cases, I visited the HoF and the CCI because many of the cases have not been publicly available. These institutions have a poor publication culture which has constrained studies into Ethiopia's constitutional jurisprudence.

Until the official end date of my data collection (August 2022), the CCI had submitted 104 recommendations to the HoF. According to the Constitution, 'should the [CCI], upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendations thereon to the House of the Federation'.[71] The CCI is required to do two things at this point: a) determine whether there is a need for constitutional interpretation; and b) if there is such a need, advise the HoF on what it should decide. In this regard, the CCI's practice seems to be significantly different from what the Constitution prescribes. Conspicuously, once a need for constitutional interpretation is established, an inquiry into a constitutional meaning might imply that a questioned act/omission, or an anticipated act/omission in an abstract case, is either constitutional or unconstitutional. To be precise, a need for constitutional interpretation does not necessarily imply a constitutional violation. Despite this, the CCI has, in almost all the cases it has referred to the HoF, considered a constitutional violation as a precondition to establish a need for constitutional interpretation.[72] This is putting the cart before the horse, and it has seriously impacted the number of cases referred by the CCI to the HoF for a final decision.

The HoF has made a final decision on those 104 CCI recommendations and three appeals against rejection decisions made by the CCI. Thus, the total number of constitutional cases decided by the HoF is 107. The HoF has approved most (85) of the recommendations submitted

[71] *FDRE Constitution* art 84.

[72] In 102 of the 104 cases it referred to the HoF for a final decision, the CCI found a need for constitutional interpretation after establishing a constitutional violation. The remaining two cases (the 2000 *Office of the Prime Minister Request for Advisory Opinion on Federal Jurisdiction on Family Matters* and the 2020 *House of People's Representatives Request for Advisory Opinion on the Postponement of Elections*) involved abstract questions. In these cases, the CCI established a need for constitutional interpretation on the ground that the *Constitution* is vague or silent on the relevant matter.

by the CCI. The CCI has rejected 2645 cases on the ground that there was no need for constitutional interpretation. Most of these cases that were rejected are not well documented. The CCI provided me with only 84 such cases. Unfortunately, as indicated in Chapter 4, the CCI and the HoF lack a strong documentation and publication culture.

There are instances where disputing parties complained that the CCI had not given them a copy of its rejection decision. This includes former President Negaso who unsuccessfully challenged the constitutionality of legislation on the Administration of the President.[73] This poor documentation has impacted the CCI's case management. For example, one case was considered twice by the CCI without it realising.[74] There is also no clear documentation about how many of the cases rejected by the CCI have been appealed to the HoF. Yet, as the HoF has entertained only three cases on appeal from the CCI, it can be said that almost all the CCI's rejection decisions are either not appealed to the HoF or are dismissed by the HoF on technical grounds. These publication and documentation related problems are testament to the general lack of transparency about how constitutional cases are decided by the CCI and the HoF. This lack of transparency is a rule of law problem.

In the below subsections, I explain how Ethiopia's politically oriented constitutional review has resulted in the prevailing lack of constitutionalism and highly inconsistent decisions which highlight its design-related fundamental flaws. I analyse over 25 relevant cases to illustrate this overall lack of constitutionalism and widespread inconsistency in constitutional decisions in Ethiopia. While my thesis is informed by a study of all the decisions made by the HoF over the last three decades, a focused and detailed analysis of the cases that depict the major practical limitations of Ethiopia's non-judicial review is apt here.

5.5.1 Prevailing lack of constitutionalism

This subsection analyses seven politically important cases that illustrate the CCI's and the HoF's lack of commitment to uphold the Constitution against the political branches. To begin

[73] *Former President Negaso Gidada v House of Peoples' Representatives* (HoF, 2005). In his submission to the HoF, the former president mentioned that the CCI refused to give him a copy of its decision against him.
[74] *Kokebe Yilma v Roza Mohammed and Co* (HoF, 2018). This case was first submitted to the CCI in 2010. The CCI rejected it, ruling there was no need for constitutional interpretation. After five years, Kokebe submitted the same case to the CCI, which ruled there was a need for constitutional interpretation and, as a result, submitted it to the HoF. While the case was under consideration by the HoF, the defendant pleaded that this case had been seen by the CCI previously. Asked by the HoF how this happened, the CCI responded that the minutes of the previous deliberation were lost and there could be a possibility that a single case is considered again due to its lack of a modern system that allows it to cross-check its cases.

with, the HoF has been entrusted with the power of constitutional interpretation with the assumption that the Constitution is authored by Ethiopia's nationalities, and that the constitutional privileges of these entities are better protected by it as their representative. Despite this, as a recent HoF-sponsored Addis Ababa University study into the constitutional interpretation approaches and procedures of the HoF shows, over 90 per cent of the constitutional cases entertained by the CCI or the HoF are disputes between private parties coming through the courts.[75] As explained in Chapter 3, most questions related to ethnic groups' right to self-determination are either ignored or addressed by the HoF in its capacity as an intergovernmental body. Of the 107 constitutional cases decided by the HoF so far, only two of them related to the constitutional rights of ethnic groups.[76] In this regard, the HoF's practice strongly deviates from the theoretical underpinnings of its adjudicative power. As an adjudicative body, the HoF has become neither an effective forum for ethnic groups nor suitable to resolve disputes between private parties, as is further illustrated by analysing the cases it has decided.

The HoF has rarely upheld challenges to the constitutionality of legislation, including the legislation that expanded the constitutional jurisdiction of the CCI and the HoF. As explained in Chapter 4, constitutionally speaking, the validity of legislation is checked by the HoF while the acts of the executive are evaluated by the courts.[77] Despite this, in its three-decade history, the HoF has ruled legislation unconstitutional only in two cases[78] and under circumstances where external factors came into play. The first of these rulings was initiated by the Federal High Court (FHC) and the second concerned legislation enacted by the Regional Government of Tigray in the context of the war between Tigray and the federal government.

In the first case, the 2014 *Melaku Fenta v Attorney General* case, a corruption charge was instituted against Melaku and other people before the FHC.[79] Melaku was a senior government official with the rank of minister. According to the *Federal Courts Jurisdiction Proclamation*,

[75] Addis Ababa University, *Ensuring Constitutional Supremacy and Constitutionalism in Ethiopia: The Role of the HoF* (Final Report, 15 May 2021).
[76] In the 2003 case *Benishangul Gumuz Election Candidates v National Electoral Board of Ethiopia* (HoF, 13 March 2003), the CCI and the HoF were asked whether it is constitutional to exclude election contestants on the ground that they do not speak regional native languages, and in the 2000 case *Silte Nationality Question* (HoF, 2000), the Silte people claimed to have an identity distinct from the Guraghe.
[77] *FDRE Constitution* art 84. The Amharic version in particular makes a clear distinction between parliamentary and executive acts. According to this provision, so long as legislative and executive acts are concerned, HoF has jurisdiction only in constitutional cases involving parliamentary Acts. Executive acts are left for the courts.
[78] See *Melaku Fenta v Attorney General* (HoF, 2014); *Tigray Democratic Party v Tigray Regional State* (HoF 87/12, 2020).
[79] *Melaku Fenta v Attorney General* (HoF, 2014).

no 25/1996 and the *Revised Anti-corruption Special Procedure and Rules Proclamation*, no 434/2005, the Federal Supreme Court (FSC, Ethiopia's apex court) has jurisdiction over corruption and related cases instituted against federal authorities including ministers. This required the FHC to single out and refer Melaku's case to the FSC. The FHC ruled that doing so would violate Melaku's constitutional right to appeal and his right to equality before the law. It adjourned the case and referred the matter to the CCI so that the HoF could make a final decision on the constitutionality of the relevant parts of the two proclamations. The CCI and the HoF confirmed the constitutional violations identified by the FHC and partly nullified the two proclamations.

In the second case where the HoF held that a parliamentary Act violated the Constitution, the legislation had been enacted by the Parliament of Tigray Regional State Government to establish a regional election board and hold the 2020 regional elections in defiance of the HoF's decision to postpone them due to the COVID-19 pandemic.[80] As explained in Chapters 3 and 4, the HoF ruled this legislation unconstitutional, stating that the Constitution recognises only one electoral board. As indicated in Chapter 3, the region's decision and the HoF's response were triggered by the then simmering political difference between Tigray Regional State and the federal government. This HoF decision does not thus indicate much about its level of commitment to enforcing constitutional supremacy by nullifying unconstitutional parliamentary Acts.

None of the remaining HoF decisions have declared parliamentary Acts unconstitutional. In most (80) of its decisions, the HoF overruled judicial decisions. Most (20) of the remaining decisions relate to rejection of the CCI's recommendations or appeals against the CCI's decisions. The remaining seven decisions relate to requests for abstract constitutional review submitted by the federal government, right to self-determination questions, and the constitutionality of subsidiary laws[81] enacted by administrative agencies. This indicates that the HoF has emerged more as an appellate judicial body than a constitutional review mechanism that oversees the political branches by enforcing constitutional supremacy.

[80] *Tigray Democratic Party v Tigray Regional State* (HoF 87/12, 2020).
[81] The HoF has thus far nullified three regulations enacted by administrative agencies in *Tesfaye Belete v Oromia Region Revenue Authority* (2020), *Civil Service Tribunal v Federal Revenue Authority* (2019), and the request by the Federal Supreme Court Cassation Division for an abstract review of the *Constitutionality of a Condominium Regulation* (2019).

The 2003 case *Benishangul Gumuz Election Candidates v National Electoral Board of Ethiopia* is the first case where the HoF was directly requested to examine the constitutionality of legislation.[82] In this case, a proclamation that set a native language requirement to participate in regional elections was challenged for its constitutionality. This requirement contradicted article 38 of the Constitution which grants to all citizens the right to vote and be elected without discrimination based on language and other grounds. The CCI recommended, based on this ground, that the proclamation be partly declared unconstitutional. However, the HoF ruled that the proclamation was constitutional, referring to native nationalities' right to self-determination. This left many minority nationalities that do not speak major native languages in the respective regions without any legal or constitutional recourse. This problem is attributable not only to the lack of rights-based constitutional review but also to the constitutional conflict between individual and ethnic-based freedoms, as explained earlier.

The HoF also refused to protect minority nationalities in the 2000 *Silte Nationality Case*.[83] In this case, the Silte people claimed to have a distinct identity. As per article 62(3) of the Constitution, it is the HoF that determines nationality issues based on the Constitution. Despite this, the CCI and the HoF held that the question raised by the Silte people was related to the administrative organisation of a regional state and, therefore, that the matter should be decided by the concerned region, the then Southern Nationalities Region. Since this case, the region has eventually recognised the identity of the Silte people and allocated a separate zonal administration for them. Nevertheless, the CCI/HoF's ruling left minority nationalities at the mercy of regional states. The HoF has become an unreachable forum for minorities raising nationality questions. As indicated in Chapter 3, when minority nationalities approach relevant regions, they are not welcomed as demonstrated by the Wolkait and Raya nationality issues in the north and many others in the south. When such cases are submitted to the CCI/HoF, they are usually dismissed on the ground that no formal decision has been made by the concerned region first.

Furthermore, in politically highly sensitive cases, the CCI and the HoF have shown a disinclination to uphold and enforce the Constitution against majoritarianism. Former President Negaso Gidada's case is a good example here.[84] On 22 June 2001, Negaso, the then President of Ethiopia, walked out of the then ruling party (EPRDF) council meeting citing pressure from

[82] *Benishangul Gumuz Election Candidates v National Electoral Board of Ethiopia* (HoF, 2003).
[83] *Silte Nationality Question* (HoF, 2000).
[84] *Former President Negaso Gidada v House of Peoples' Representatives* (HoF, 2005).

the then Prime Minister Meles Zenawi. Negaso was expelled from this party hours after he walked out of the meeting. His term then expired on 8 October 2001, and on this same day, new legislation, *Administration of the President Proclamation*, no 255/2001, was enacted by the Parliament. This proclamation requires the President 'to keep himself aloof from any partisan political movement during or after his presidency'.[85] After the expiry of his presidential term, Negaso joined an opposition party, and he was denied presidential benefits including housing and healthcare coverage based on the above-mentioned proclamation. Negaso submitted a constitutional case to the CCI claiming Proclamation no 255/2001 violated his human and democratic rights including his right to 'vote and to be elected … without any discrimination based on … political or other opinion or other status' under article 38. This proclamation went beyond what was required of the President under the Constitution. According to article 70 of the Constitution, 'a member of either House shall vacate his seat if elected President'.[86] Conspicuously, what is prohibited here is holding more than one office at a time. The Constitution neither prohibits the President from being a member of a political party nor denies him/her the right to join a political movement upon expiry of his/her presidential term. Indeed, Negaso was both Ethiopia's President and a member of the then ruling party from 1995 to 2001.

In this case, the CCI and the HoF ruled that presidential benefits are not constitutional rights, and that Negaso had the freedom to enjoy the constitutional rights he invoked or distance himself from politics to receive the presidential benefits. However, by treating former presidents differently on the basis of their political status, the proclamation introduced a discriminatory practice which was not warranted by the Constitution. The proclamation made a former president's privileges conditional upon him/her being politically inactive. This contravenes article 38 of the Constitution which prohibits discrimination based on political status and the right to equality before the law under article 25. Both the proclamation and the decision of the CCI/HoF were likely politically oriented, as demonstrated by the government's decision to restore Negaso's privileges following a change in political leadership in 2018.

The second case that illustrates the level of partiality in Ethiopia's constitutional review system in politically highly sensitive cases is the CCI's decision on the constitutionality of a decree issued by the country's Prime Minister in 2005.[87] As indicated in Chapter 4, Prime Minister

[85] *Administration of the President Proclamation*, no 255/2001 (Ethiopia).
[86] *FDRE Constitution* art 70.
[87] *Coalition for Unity and Democracy v Meles Zenawi* (CCI, 2005).

Meles Zenawi issued a decree in 2005 to suspend all forms of public meetings and demonstrations in the capital Addis Ababa and its surroundings for a month (later extended for a second month). This decree was issued in a bid to control popular unrest ignited by election irregularities. The Coalition for Unity and Democracy (CUD) petitioned the FHC, arguing that the Prime Minister does not have the power to suspend the right to assembly and demonstration. I have already explained in Chapter 4 how the Court relinquished its constitutional jurisdiction by simply referring the case to the CCI. Constitutionally speaking, courts are required to uphold human and democratic rights under Chapter 3 of the Constitution against the executive branch and thus check the constitutionality of laws and decisions except parliamentary Acts. As indicated in the previous chapter, the Court should have requested the CCI/HoF to review the legislation that narrowed its jurisdiction instead of referring the case on that basis. By failing to do so, the Court left the CUD in a constitutional adjudication process whose impartiality is questionable due to its association with politics.

The CUD has neither requested the CCI to investigate this case nor lodged an appeal to the HoF against the CCI's decision, in what appears to be a lack of trust in these institutions. As a political institution controlled by the ruling party, it is indeed difficult to expect the HoF to be impartial in such cases. Even though the CCI is relatively impartial, the *CUD Case* has revealed that it can lack legitimacy when it comes to the politically most important cases. Previously, it held in the 1996 case of *Ethiopian National Association of the Blind (ENAB) v Oromia Region* that the constitutionality of laws and decisions other than parliamentary Acts should be decided by the courts as per article 84(2) of the Constitution and returned the case to the Federal First Instance Court (FFIC) on this basis. Contrary to this, it entertained the *CUD Case* itself and held that the Prime Minister's decree was constitutional. It ruled that article 30 of the Constitution provides not only the right to assembly and demonstration but also the conditions under which this right can be limited. It added the Prime Minister has the responsibility to 'obey and enforce the Constitution'[88] and this role is broad enough to embrace the decree.

However, legislative power is an exclusive province of the legislator[89] and the only exception where non-legislative bodies may make laws without delegation is when there is a state of emergency declared by the council of ministers.[90] In the 2005 case, no state of emergency had been declared. Indeed, the only provision in the Constitution which talks about suspension of

[88] *FDRE Constitution* art 74(13).
[89] Ibid art 55(1).
[90] Ibid art 93.

rights and exercise of 'all necessary power' by the executive notwithstanding the separation of powers is the state of emergency clause.[91] As the decree involved not limitation but total suspension of constitutional rights at least for some time, the CCI should have examined its compatibility with the state of emergency clause.

In general, non-judicial review has resulted in a prevailing lack of constitutionalism in Ethiopia. The practice shows that it is difficult to rely on the CCI and the HoF particularly when it comes to the politically most important cases. Due to its political nature, this constitutional review system has remained unamenable to constitutional complainants and has suffered from real and perceived partiality which undermines the constitutional project. As explained next, this form of review is not only ill-suited and partial but also lacks the necessary expertise and time to render consistent and quality decisions that can maintain constitutional integrity.

5.5.2 Inconsistent decisions

According to a recent HoF-sponsored study, a great number of the CCI's recommendations and the HoF's decisions suffer from poor structure and reasoning.[92] This is not surprising given the CCI and the HoF adjudicate constitutional cases on a part-time basis and the lack of expertise particularly in the HoF. The low-quality decisions are also attributable to the two institutions' association with the political process in general and the ruling party in particular. In some cases, the CCI and the HoF have, for example, used constitutionally irrelevant political and ideological reasons to support their decisions.[93] Due to these and other reasons, a great deal of CCI recommendations and HoF decisions are marred by profound inconsistencies. This is a serious problem for a constitutional review system since enforceability of decisions of such a system depends on the quality and thus the legitimacy of its decisions, and not a military or police force. There is a myriad of dimensions of inconsistencies in the CCI/HoF decisions. Time and space do not allow a consideration of all the inconsistencies. I thus focus on the most salient and recurring ones. Most of these inconsistencies relate to issues of ordinary law and fact, jurisdictional issues, and limitation periods.

[91] *FDRE Constitution* art 93.
[92] Addis Ababa University (n 75) 34.
[93] See, eg, *Government Employees' Social Security Agency v Ergete Medibew and Co* (HoF 81/12, 2021); *Six Continents Hotel v Crown Hotel* (HoF 34/09, 2018). In these cases, the CCI's recommendations and the HoF's decisions contain arguments based on political and ideological views as to economic development, developmental state, foreign direct investment, and democracy.

Issues of ordinary law and fact

This subsection analyses nine cases to show the CCI/HoF's inconsistency in determining cases that involve issues of ordinary law and fact. The purpose of constitutional review is to prevent infringement of constitutional rights and principles. Mere wrong application of ordinary law or a factual error cannot thus constitute a constitutional dispute. Such mistakes are corrected through an appeal system instead of constitutional review. A constitutional review body may engage in statutory interpretation, but it does so not to correct the mistakes that have to be addressed through appeal, rather to answer a constitutional question presented to it. Despite this, the CCI and the HoF have, in a number of cases, decided issues of ordinary law and fact. The HoF has corrected the CCI in a few such cases and made the same mistake as the CCI in others. In five cases, it rejected the CCI's recommendations on the ground that they did not involve constitutional issues.

In the 2022 *Fikadu Sema v Addis Fana* case, Fikadu challenged the constitutionality of the Federal Supreme Court Cassation Division (FSCCD) judgment, claiming that the Court decided similar cases differently and that amounts to discrimination.[94] Fikadu and his colleagues were fired from their job at a company. They used to perform similar tasks, making shoes, at the company. One of them took his case to a court earlier. The case reached the FSCCD where the Court ruled that there was an employer–employee relationship as per the *Labour Proclamation* no 377/2003. Fikadu followed suit, but the FSCCD ruled that there was no employer–employee relationship. The CCI recommended that the FSCCD violated the constitutional protection against discrimination by deciding similar cases differently. The HoF rejected the CCI's recommendation on the ground that the case did not involve a constitutional issue. It ruled that the FSCCD is not bound by its own decisions and that an ordinary error of law cannot be corrected through the CCI and the HoF. The HoF was right. The basic question was whether the FSCCD wrongly interpreted the *Labour Proclamation* in ruling that there was no employer-employee relationship between Fikadu and the company, and this is an issue of ordinary law that should be determined by the judiciary.

Similarly, in the 2019 *Tsige Mitiku v Mesfin Shiferaw* divorce and property partition case,[95] the CCI examined detailed facts and interpreted a regional family code to establish a violation of the constitutional right to property. The basic question in this case was whether the disputed

[94] *Fikadu Sema v Addis Fana* (HoF 71/11, 2022).
[95] *Tsige Mitiku v Mesfin Shiferaw* (HoF, 2019).

property was common property or exclusively belonged to the applicant. The HoF rejected the CCI's recommendation and held that it is for the courts to examine evidence and apply the relevant law to the facts. The HoF ruled similarly in *Birhane Tiumelisan v Government Houses Agency*,[96] *Bogalech Asefa v Sime Negash*[97] and *Haymanot Sebsibie v Ashenafi Alemie*.[98] It has however, as shown below, decided issues of ordinary law and fact in a number of cases like the CCI. This inconsistency demonstrates that the quality of the HoF's decisions vary from time to time based on the advice it receives from the CCI, its own experts and the views of its members.

Contrary to the HoF's ruling on the five above-mentioned cases, the CCI and the HoF have, in many instances, entertained issues that do not engage constitutional questions. In what may be perceived to be favouring the government's interests, the HoF, for example, requested further evidence from administrative bodies to decide the 2022 *Aberash Gemeda v Dembidolo City* case.[99] This case related to the nationalisation of all extra rentable houses in Ethiopia by the socialist Dergue regime by legislation enacted in 1975. Following the regime change, the Privatisation Agency was established to facilitate privatisation of nationalised properties. The applicant approached this agency and claimed that a house that belonged to her and which had never been nationalised by the government was in the government's possession. The agency refused to entertain the case, stating that its jurisdiction is limited to properties that had been nationalised and there was no evidence that showed the disputed property was nationalised. She approached the courts, and the FSCCD made the final decision that the case could not be adjudicated by the courts without evidence from the agency which indicated the house had not been nationalised, even though it had been in government possession for many years. The question that was left unanswered in this case is who has jurisdiction when there is no evidence as to whether a property has been nationalised. The agency had already refused to consider this case and its jurisdiction under the relevant proclamation was limited to nationalised properties. Left with no option, the applicant submitted her case to the CCI. The CCI recommended that the applicant's constitutional right to access to justice had been violated and thus the courts should hear this case.

[96] *Birhane Tiumelisan v Government Houses Agency* (HoF 79/12, 2022).
[97] *Bogalech Asefa v Sime Negash* (HoF, 2019).
[98] *Haymanot Sebsibie v Ashenafi Alemie* (HoF 43/10, 2018).
[99] *Aberash Gemeda v Dembidolo City* (HoF 62/10, 2022).

Instead of investigating whether the FSCCD's decision that left the applicant with no alternative justice forum violated the constitutional right to access to justice and guiding the relevant bodies on that basis, the HoF sought further evidence from administrative bodies and examined this evidence to determine whether the property indeed belonged to the applicant. Based on this, it decided that the property belonged to the government and the applicant's constitutional right had not been violated. By basing its decision on letters from administrative bodies, the HoF not only favoured the government, which was a party to the case, but also engaged with issues of ordinary law and fact. Approving the CCI's recommendation and ordering the courts to entertain this case would have better served the applicant's constitutional right to access to justice.

Similarly, both the CCI and the HoF entertained issues of ordinary law and fact in *Teare Desta v Genet Alene*,[100] *Birke Legesse v Black Diamond*,[101] *Beletu Baruda v Woynshet Haile*[102] and many other cases. As indicated, these cases make the CCI and the HoF look more like an appellate judicial body than a constitutional umpire. Such interference in the province of the judiciary is also worrying as it undermines judicial independence and further minimises the already limited jurisdiction left for the courts.

Jurisdictional issues

This subsection analyses five jurisdiction cases. The CCI/HoF's response to situations where no court or administrative body claims jurisdiction over a justiciable matter is highly inconsistent. Such situations no doubt contravene the constitutional right to access to justice. The CCI and the HoF have failed to protect this right in numerous cases. In the 2022 case of *Muluwork Tibebu v Federal Houses Corporation*,[103] for example, the relevant administrative body failed to provide evidence as to whether a disputed property had been nationalised by the government and the courts at all levels were unwilling to adjudicate the case without evidence from such an agency indicating the status of the property. There are indeed many similar cases as there is poor documentation about the houses being administered by the government. Cognisant of the profound lack of evidence as to whether such houses were lawfully nationalised, the FSCCD previously ruled in the 2019 case of *Khat Farm v Government Houses*

[100] *Teare Desta v Genet Alene* (HoF, 2019).
[101] *Birke Legesse v Black Diamond* (HoF, 2016).
[102] *Beletu Baruda v Woynshet Haile* (HoF 51/10, 2020).
[103] *Muluwork Tibebbu v Federal Houses Corporation* (HoF 102/13, 2022).

Agency[104] that a person claiming to be an owner of a property which has been under government control for many years has to first secure a decision from the Privatisation Agency that the property has not been nationalised. But this left applicants without recourse as the agency has neither evidence nor jurisdiction over property that is not classified as nationalised, as indicated before. To be precise, the FSCCD's decision ignored the applicant's right to access to justice under article 37 of the Constitution. The FSCCD decided Muluwork Tibebu's case in this manner and consequently denied her access to justice.

In both the *Muluwork* and *Khat Farm* cases, the CCI and the HoF failed to frame and answer the question whether the FSCCD's decision which provided no alternative justice forum for a justiciable matter was constitutional. The CCI examined detailed facts in both cases. It held that it found a violation of the right to property under article 40 of the Constitution, on that basis. The HoF rejected both of the CCI's recommendations and ruled there was no violation. It confirmed the FSCCD's *Khat Farm* judgment on the extra-constitutional ground that the government had previously introduced administrative arrangements to resolve similar issues, and the applicant should have used such arrangements. It further added a lack of evidence should not be used as an opportunity to claim government houses. As indicated before, the HoF failed to protect the constitutional right to access to justice in deciding the 2022 case of *Aberash Gemeda v Dembidolo City* by engaging in a factual issue instead of framing its question around this constitutional right.

Conversely, the CCI and the HoF have held in many other cases that the constitutional right to access to justice was violated because the decisions of courts and administrative bodies have left concerned parties with no alternative adjudication mechanisms.[105] However, lack of consistency in upholding such a ruling and the multitude of other factors discussed in Chapter 4 have undermined the constitutional right to access to justice.

Period of limitation cases

This subsection analyses six relevant cases to depict the inconsistencies in period of limitation cases. It is undoubtedly in the interest of the effective administration of justice to settle disputes as early as possible. Legal systems thus set periods of limitation to ensure cases are settled before evidence is lost and because allowing an action to be lodged long after the cause of

[104] *Khat Farm v Government Houses Agency* (HoF, 2019).
[105] See, eg, *F/Selasie Construction v Omedad PLC* (HoF 84/12, 2021); *Birhanu Belay v Bole Sub City* (HoF, 2018); *Wasihun Mekonen v Government Houses Agency* (HoF, 2012).

action occurred might disadvantage a defendant. Ethiopia is no exception to this rule. It has a general ten-year period of limitation under its *Civil Code 1960* for civil matters, and other specific periods of limitation. The CCI and the HoF have in numerous cases considered the application of such rules by the courts as a violation of the constitutional right to access to justice and in many others as an issue of ordinary law falling within the province of the courts. In the 2019 *Defar Asefa v Diriba Ayane* farmland dispute, for example, the courts at all levels closed the case on the ground that the cause of action occurred 30 years ago.[106] However, both the CCI and the HoF held that farmers' rural land use rights are not subject to a period of limitation.[107] They based their decision on the constitutionally declared public land ownership policy. As per the Constitution, land is not subject to sale or exchange and farmers have the right not to be evicted from their land.[108] However, the Constitution does not preclude transfer of use rights over land, nor does it protect a land right abandoned for a long time against a period of limitation. Instead, it allows the legislature to determine the particulars of this right.[109]

The CCI and the HoF have treated the period of limitation rule similarly in many other cases including the 2020 case of *Almaz Mamo v Shenkore Ugamo*[110] where they held that a limitation period goes against the special place of marriage under the Constitution. In *K/Tsion Berhe v Teshome Abamegal*,[111] they ruled that the courts' application of the period of limitation rule constitutes a violation of the constitutional right to property. These rulings could cause hardship for defendants. In the 2019 case of *Kemeria Ahmed v Bedredin Abdulwahab*,[112] for example, the applicant claimed ownership of a house occupied by her grandson and his family for 47 years. Her grandson claimed he should not be required to return the house after occupying it for such a long time. He did not expressly formulate the period of limitation as his preliminary objection. The FSCCD, in what appeared to be an attempt to avoid unpredictable destabilisation of the defendant's life, ruled that judicial notice can be taken about such a preliminary objection from the statement of defence and closed the case based on the objection. The CCI and the HoF overturned this decision, stating that the Court was not directed by the law.

Departing from such a stand on the period of limitation rule, the CCI and the HoF have in other cases considered the application of this rule as the province of the courts. In the 2019 case of

[106] *Defar Asefa v Diriba Ayane* (HoF, 2019).
[107] Ibid.
[108] *FDRE Constitution* art 40.
[109] Ibid art 40(4)– (7).
[110] *Almaz Mamo v Shenkore Ugamo* (HoF 58/10, 2020).
[111] *K/Tsion Berhe v Teshome Abamegal* (HoF 67/11, 2020).
[112] *Kemeria Ahmed v Bedredin Abdulwahab* (HoF, 2019).

Kasahun Alemayehu v Fitsum Alemayehu,[113] for example, the HoF held that closing a case based on the period of limitation rule does not violate the right to property and it is the courts that determine whether this rule applies in a particular case. In 2020, the CCI decided *Ambachew Sisay v Yekaba Sisay*[114] similarly. This ruling has not been consistently upheld, as explained above, and by being inconsistent in deciding cases, the CCI and the HoF have generated legal uncertainty.

In a nutshell, Ethiopia's experience with non-judicial constitutional review exhibits a prevailing lack of constitutionalism and highly inconsistent decisions in cases involving issues of ordinary law or fact, jurisdiction, and limitation periods. Such failures of the CCI and the HoF attest to the theoretical limitations of Ethiopia's non-judicial constitutional review. The analysis of the cases suggests that Ethiopia's non-judicial review falls short of maintaining both the rule of law and the very ideal that justifies its existence, nationalities' right to self-determination. This review system has been endorsing political power instead of constraining it and its decisions are generally marred by a high level of inconsistency.

5.6 Conclusion

This thesis has analysed the theoretical underpinnings and practice of Ethiopia's non-judicial review system through the lens of the rule of law, which is defined for the purpose of this study as constitutional supremacy. The analysis depicts that the Ethiopian model of constitutional review is neither theoretically sound nor practically effective. Even though it was supposed to be an instrument to guard constitutional rights and principles by controlling political power, it has proved to be an inherently politicised process that sides with a ruling party particularly in high-profile cases.

The theoretical limitations of Ethiopia's model of non-judicial review originate from the concept of democracy underlying it and its ethnic characteristics. While the Constitution has, like other liberal constitutions, entrenched the fundamental rights and freedoms of individuals to which all federal and state organs including the legislature are subjected, this is not matched by recognition of the individual as the main unit of the political system. Ethnic-based autonomy is at the forefront. This has resulted in a constitutional review system which is political in nature. This review system is not amenable to ethnic groups, let alone individuals, as it is a

[113] *Kasahun Alemayehu v Fitsum Alemayehu* (HoF, 2019).
[114] *Ambachew Sisay v Yekaba Sisay* (CCI, 2020).

primarily majoritarian mechanism. The HoF's power to decide constitutional cases is premised on the perception that constitutional review by ordinary or constitutional courts is anti-democratic. There is no doubt that judicial constitutional review is counter-majoritarian. However, categorically labelling counter-majoritarian mechanisms as anti-democratic is not tenable for it equates democracy with the inadequate concept of majoritarianism. The ultimate objective of democracy is rule by the people, not rule by the majority. As the HoF is primarily a majoritarian mechanism, it is difficult to attribute its decisions to all the people. Despite everyone having a constitutional right to bring a case to the HoF under article 37 of the Constitution, the process is inherently political and not amenable to constitutional complainants. Moreover, it is self-defeating to use a majoritarian mechanism to control a majority.

The ineffectiveness of Ethiopia's non-judicial review system attests to the theoretical limitations of its design. Due to its attachment to politics, limited expertise (in the HoF in particular) and lack of time, Ethiopia's constitutional review system has not been successful in upholding the Constitution, and its practice is marred by inconsistencies.

The theoretical and practical limitations of Ethiopia's constitutional review system thus suggest that this system needs to be rethought. Reforming this system and introducing a constitutional review mechanism that is impartial and open to all is key to make governance attributable not only to the majority but also the whole people. The next chapter recommends how this system could be reformed.

Chapter 6: Conclusion

6.1 Introduction

As stated in Chapter 1, the main objective of this study has been to examine the theoretical soundness and practicability of non-judicial constitutional review in terms of upholding the rule of law. Constitutional review is usually associated with either ordinary courts or specialised courts, as explained in Chapters 1, 2 and 5. However, the dichotomy of the institutions of constitutional review between ordinary courts and specialised constitutional courts does not capture the phenomenon of non-judicial review, where constitutional controversies are entertained by non-judicial bodies with or without a final say on such matters. In most constitutional systems, not only courts but also non-judicial bodies including ombudsman offices, human rights commissions and political bodies[1] engage in constitutional interpretation with, however, the final say resting in an apex court or a supreme legislature. Indeed, the executive and legislative branches cannot distance themselves from constitutional interpretation so long as the constitution obliges them to adhere to it in carrying out their day-to-day activities, which is usually the case in states with a written and supreme constitution. There are also constitutional uncertainties that invite the executive and legislative branches to engage in constitutional interpretation.[2] The main objective of this sort of constitutional interpretation is not to resolve a controversy over the meaning of the constitution but to act in accordance with the accepted meaning.

In this study, I have examined a distinct form of non-judicial constitutional review. The form of constitutional review I considered — the Ethiopian model — does not only involve a non-judicial body but also relies on this body as a final arbiter on constitutional matters. Neither Ethiopia's apex court, the Federal Supreme Court, nor the legislature have a final say on constitutional issues, but instead it is the non-legislative federal upper house (the HoF) that has this authority. The HoF is assisted by its advisory body, the Council of Constitutional Inquiry (CCI), whose role is limited to submitting recommendations when it finds a need for

[1] Mark V Tushnet, 'Non-Judicial Review' (2003) 40(2) *Harvard Journal on Legislation* 453, 454.
[2] For more on the role of the political branches in constitutional interpretation, see Gabrielle Appleby and Anna Olijnyk, 'Executive Policy Development and Constitutional Norms: Practice and Perceptions' (2020) 18(4) *International Journal of Constitutional Law* 1136, 1142–9; John Harrison, 'The Role of the Legislative and Executive Branches in Interpreting the Constitution' (1988) 73(2) *Cornell Law Review* 371, 371; Steven Ross, 'Role of the Legislative and Executive Branches in Interpreting the Constitution' (1988) 73(2) *Cornell Law Review* 383, 384.

constitutional interpretation. The ultimate authority on constitutional controversies in Ethiopia has been conferred on the HoF with a view to enable entities that the current Constitution recognises as its authors — nations, nationalities, and peoples — to interpret the Constitution through a body that represents them. Denying a final say on constitutional matters to both the judiciary and the legislature is indeed quite an unusual and complex institutional arrangement.

The Ethiopian model is thus distinct from both 'strong-form' constitutional review through (constitutional) courts (ie the European[3] and US[4] models) and the Commonwealth model of weak constitutional review (Canada, New Zealand and the UK) where there is a deliberative dialogue between the judiciary and the legislature, the final say resting with the legislature.[5] Given the debates surrounding the legitimacy of judicial review, one would expect a proliferation of comparative constitutional law literature evaluating Ethiopia's politically oriented constitutional review as an alternative instrument of constitutionalism. But this is not the case as the HoF has not produced impactful constitutional jurisprudence that can draw international attention. Yet, investigating this alternative model is important to appreciate the implications of leaning to political constitutionalism for constitutional implementation.

This investigation is timely. Ethiopia is going through a protracted and trying transition from a socialist military regime to an ethnic-based frail political system to constitutional democracy. One of the anticipated outcomes of this transition process is constitutional revision. Identifying and studying the complex features of Ethiopia's constitutional review system can, therefore, help inform this transition process on top of enhancing the understanding on the interaction between politically oriented constitutional enforcement and the rule of law.

Accordingly, I have asked whether the Ethiopian form of constitutional review is a viable mechanism to ensure the rule of law, which is defined for the purpose of this study as constitutional supremacy or constitutionalism. Realising the rule of law through constitutional review presupposes an accessible constitutional adjudication system which is ideologically and structurally fit to uphold the constitution. In a federal context, such an adjudication system bears the added responsibility of maintaining the federal balance through constitutional review. I have thus examined the HoF in terms of its potential to maintain the federal balance, its

[3] See Victor Ferreres Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?' (2004) 2(3) *International Journal of Constitutional Law* 461.
[4] See Martin Shapiro and Alec Stone Sweet, 'Abstract and Concrete Review in the United States' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics, and Judicialization* (Oxford University Press, 2002) 347.
[5] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49(4) *American Journal of Comparative Law* 707, 709.

accessibility, and its ability to uphold constitutional supremacy, and hence the rule of law. To that end, I elaborated the key concepts of my thesis, constitutional review (adjudication) and the rule of law, in Chapter 2. Based on the conceptual framework developed in Chapter 2, Chapters 3, 4 and 5 examined issues central to the realisation of the rule of law through a supreme constitution, in a federal context considering the Ethiopian case. Chapter 3 explored the HoF through the lens of federalism. Chapter 4 evaluated constitutional review by the HoF in terms of its accessibility. And Chapter 5 evaluated this form of review from the standpoint of constitutional supremacy, or the rule of law.

While I am concerned only with the constitutional dimension of the rule of law, my point of reference is the broader or substantive conception of the rule of law. As I explained in Chapter 2, the formal conception tends to be indifferent to oppressive laws and could lead to rule by law as opposed to the rule of law. Therefore, considering the deficiencies of the formal conception of the rule of law, which were explained in Chapter 2,[6] and the thick features of the Ethiopian Constitution, presented in Chapter 4, I have employed the substantive conception of the rule of law. The analysis of Ethiopia's model of constitutional review in light of this conception of the rule of law along with the theories on constitutional review suggests that this form of review is neither theoretically plausible nor effective in practice. The next section presents the main findings in this regard. Section 6.3 explains the significance and implications of these findings for constitutional review and the rule of law. Section 6.4 provides some recommendations for reform. Finally, Section 6.5 concludes that the Ethiopian model of review leans to political constitutionalism and is nowhere close to the type of constitutionalism which the substantive conception of the rule of law requires, and thus needs to be reconsidered.

6.2 The Ethiopian model of constitutional review: Neither theoretically plausible nor practicable

As elaborated in Chapters 3, 4 and 5, maintaining constitutional supremacy — upholding the rule of law through constitutional enforcement — requires an institution which is insulated from, if sensitive to, politics. Without such an institution, the fate of constitutional rights and principles remains uncertain. In the absence of a neutral institution which is ideologically and structurally fit to protect such rights and principles, political, and not legal, constitutionalism

[6] In Chapter 2, I explained why the formal conception of the rule of law is incomplete. In particular, I indicated that formal rule of law does not prevent repression through the law and is, therefore, close to rule by law as opposed to the rule of law.

would prevail. As explained in Chapter 5, distinguishing political constitutionalism (which the Ethiopian model of constitutional review leans to) from legal constitutionalism is indispensable to appreciate the implications of different models of constitutional review for the rule of law. Unlike legal constitutionalism, where decisions are mostly made based on established rules and thus are more predictable, political constitutionalism is volatile. This is so because politics is, as set out in Chapters 2 and 5, primarily utilitarian or outcome oriented and sensitive to changing views.[7]

If a political system lacks legal constitutionalism, there is a risk that politics will sacrifice constitutional rights and principles to utilitarian objectives. This partly explains the Ethiopian case. Even though Ethiopia's Constitution appears to have embraced legal constitutionalism by declaring itself supreme and entrenching human and democratic rights, its overall language and structure and constitutional enforcement mechanism lean to political constitutionalism. The analysis of the Constitution and HoF's experience in Chapters 3, 4, and 5 revealed that this anomalous constitutional/institutional design is inconsistent with — and has indeed undermined — federalism, access to constitutional justice and constitutional supremacy, all central to ensuring the rule of law through a federal and supreme constitution.

6.2.1 Federalism

Upholding federalism through constitutional adjudication presupposes the existence of a non-partisan umpire.[8] This is because the federal and regional governments should remain independent of each other, being only subject to a supreme constitution. The analysis in Chapter 3 demonstrated that the HoF is an inadequate institution in this regard. As it is composed mainly on the basis of population size (of ethnic groups), it is basically a majoritarian house which can easily fall prey to a few larger ethnic groups. The HoF can also be, and has been, controlled by a ruling party through the indirect selection process.

To be precise, the design of the HoF means it is either part of a single and dominant ruling party, as has been the case over the last three decades, or a house of a few ethnic-based centrifugal forces if major regions are controlled by opposition parties. This makes the HoF an institution of centralisation at some times and decentralisation at other times, instead of a neutral umpire that steadily fine tunes the balance between the two. As a result, the HoF can

[7] For more on the utilitarian nature of politics, see John Laws, *The Constitutional Balance* (Bloomsbury Publishing, 2021) xii.
[8] See, eg, Ronald L Watts, *Comparing Federal Systems* (McGill-Queen's University Press, 3rd ed, 2008) 157.

hardly secure trust from both centripetal and centrifugal forces at once to legitimately determine issues of federalism. Centrifugal forces tend to reject the legitimacy of a single-party-controlled HoF as demonstrated by the Tigray War, whereas a HoF controlled by a few larger ethnic groups is less likely to be accepted by smaller ethnic groups and centripetal forces. An institution like the HoF is thus hardly competent to legitimately settle constitutional controversies around federalism.

HoF's legitimacy deficit in terms of addressing issues of federalism is worsened by the accumulation of both political and adjudicative roles in its hands. It is the HoF that manages intergovernmental relations in Ethiopia. Issues of federalism arise out of such relations. However, the power both to politically determine intergovernmental relations and adjudicate federalism disputes arising out of such relations belongs to the HoF. Such accumulation of power in the same hands not only violates the principle of the separation of powers but also makes the HoF inefficient. Although the HoF is supposed to be the guardian of Ethiopia's federalism and its building blocks, ethnic groups, it has failed both. Its failure to amicably solve federalism disputes including the controversy around the scope of regional autonomy has led to conflicts. The HoF has also evaded the regional statehood questions of many ethnic groups with the exception of a few larger ethnic groups that put the government under pressure, like the Sidama. All this attests to the inherent inconsistency between the design of the HoF and federalism.

6.2.2 Accessibility

As Chapter 4 set out, the Ethiopian constitutional review system has also exhibited a significant limitation in terms of making constitutional justice accessible, even though the Constitution defines constitutional disputes and standing broadly. This limitation can be linked to two main factors: a) the partisan nature of the constitutional adjudication process as a whole (as both the HoF and, to some degree, the CCI comprise senior politicians as their members) and the resultant lack of commitment to consider cases challenging the political branches; and b) the fact that the HoF adjudicates constitutional cases on a part-time basis where it holds two regular sessions a year and hardly ever calls extra sessions.

Owing to the partisan nature of the review system, individuals and opposition political bodies have found it difficult to access the constitutional review system to challenge the political branches, as illustrated by the cases analysed in Chapter 4. This review system has remained

largely inaccessible even for most of the ethnic groups — which were the very reasons for its existence — as it is controlled by a few ethnic-based political groups. The constitutional adjudication process is not only politicised but also in most cases non-transparent. Little is known, for example, about the status of over three thousand cases years after their lodgement, as indicated in Chapter 4. What is clear about these cases is that they have not made it to the HoF. But it is not possible to discover why, because of the lack of documentation. Due to its partiality and lack of transparency, there is a trust deficit in Ethiopia's constitutional review system's ability to professionally settle constitutional disputes. While the transparency of this review system could be improved over time by better resourcing the HoF and the CCI, as indicated in Chapter 5, the partiality problem is endogenous to the system. As elaborated in Chapter 5 and the following subsection, this partiality inherent in Ethiopia's non-judicial constitutional review not only impedes its accessibility but also weakens its commitment to uphold the constitution against the political branches in deciding cases it has chosen to entertain.

The political nature of the HoF coupled with the Constitution's excessive emphasis on ethnic-based privileges has resulted in a highly politicised constitutional adjudication system. The HoF has prioritised ethnic rights over individual rights through an expansive reading of ethnic privileges. This has, for example, led the HoF to employ a restrictive approach to the right to equality. By employing such a restrictive approach to the right to equality in relation to ethnic privileges, it has effectively barred cases that arise out of ethnic-based discrimination, which is common in Ethiopia. This is not to say that the HoF is open to ethnic-based constitutional questions. The HoF has indeed evaded many ethnic-based regional statehood questions, even though the Constitution stipulates the unconditional right to self-determination for every ethnic group. What I want to point out here is that the constitutional language and the HoF's practice have constrained individuals' access to constitutional justice, particularly where the rights to be claimed are or appear to be in tension with ethnic privileges. When the tension is not horizontal but vertical, that is, in high-profile cases involving political bodies, the HoF is generally inaccessible to individuals, opposition political parties and most ethnic groups in more or less the same way. While these complainants can submit any constitutional issue, such high-profile cases are usually rejected at an early stage under the guise of screening cases that require constitutional interpretation.

It is also not in the nature of a political institution like the HoF to adjudicate disputes on a full-time basis. As a house with a large membership, it meets a few times a year. And it has

additional duties to constitutional adjudication. This results in a huge backlog of cases, which is an inducement to frequently reject cases on technical grounds. For this and the above-mentioned reasons, Ethiopia's model of constitutional review is not in harmony with the broad access to constitutional justice the Constitution aspires to.

6.2.3 Constitutional supremacy

Due to its majoritarian nature, and limited time and expertise, Ethiopia's non-judicial review body lacks the features a constitutional umpire needs to uphold constitutional supremacy. These institutional limitations are, as explained in Chapter 5, the manifestations of the ill-thought-out premises that underlie the HoF. This model of review is premised on the view that ethnic groups, and not individuals, are the main units of the political system; thus the representative of these groups is considered the most legitimate body to interpret the Constitution. Central to this view is the constitutional founders' primordial approach to Ethiopia's ethnic identities, which considers them as territorially identifiable despite the fact that the country's history is marked by centuries of interethnic interactions. This primordial approach led to the unusual recognition of each ethnic group as a sovereign entity. Counter-majoritarian mechanisms like constitutional review by ordinary or specialised courts were considered inconsistent with the unconditional nature of the ethnic-based sovereignty. The result was the establishment of an ethnic-based majoritarian mechanism as a constitutional review body. The HoF is, therefore, the direct outcome of the Constitution's overall language and structure.

As a primarily political process, Ethiopia's constitutional review has suffered from a perceived or actual lack of impartiality, especially when determining high-profile cases. It has aligned its decisions with the intention of the ruling party in complex cases involving the political branches. Such a politicised process means that a majority vote in the HoF is more a reflection of political views than a sober analysis of the Constitution. This in turn deviates from the constitutional view of democracy which aims to use the constitution to bring politics closer to the ideal notion of people rule or democracy proper.

The Constitution's over-commitment to ethnic groups has also significantly constrained the enforcement of individual rights, particularly at the regional level. This is so because the territorially defined and unrivalled ethnic-based privileges operate for the benefit of only identified ethnic groups in the respective regions, excluding 'others'. This constitutional design

does not therefore offer equal concern and respect for everyone in all places. This has left systematic ethnic-based discrimination at the regional level largely unchecked and has made ethnic-based states increasingly unitary rather than inclusive, which is at odds with the very purpose of the ethnic federal system which is accommodating diversity.

What is more, the design of Ethiopia's constitutional review body means it cannot adjudicate constitutional cases on a full-time basis and it lacks the necessary expertise to deliver constitutional justice. The result has been highly inconsistent decisions. This has further undermined enforcement of the Constitution via the HoF. Even though the HoF is assisted by the advisory body, the CCI, in determining constitutional issues, the latter is not insulated from politics as it comprises three HoF members, nor can it control outcomes as its role is limited to submitting recommendations. The CCI, like the HoF, adjudicates cases on a part-time basis as its members include senior judicial and political officers who work full time in their respective home departments. It is not thus just the decisions of the HoF but also those of the CCI that have been marred by a high level of inconsistency.

On balance, the HoF has failed to be a reliable constitutional enforcement mechanism. Instead of controlling political power with the aim to protect the constitutional rights of individuals and various ethnic groups, it has aligned its position from the beginning with the major political actors including the ruling party and a few politically influential ethnic groups. Its design and the Constitution's language have made it vulnerable to manipulation by such actors. For this reason, the constitutional project to realise the rule of law through maintaining the federal balance, democratising access to constitutional justice, and upholding constitutional supremacy has largely failed.

6.3 Significance and implications for constitutional review and the rule of law

As Chapter 1 set out, comparative constitutional law scholarship usually approaches constitutional review with the assumption that judicial bodies are tasked with this role, hence the term judicial review. The focus then is on whether a given state has strong or weak judicial review, and which approach is more legitimate. Non-judicial constitutional review has thus been overlooked by most comparative constitutional law scholarship. There is, therefore, little understanding of the soundness of the theories of constitutional review that underpin this form of review, and of its implications for the rule of law which is the core of constitutional review.

At a broad level, there is a dearth of theoretically informed and empirically rich research about non-judicial constitutional review in general, and particularly about Ethiopia's non-judicial constitutional review and what it means for the rule of law. There are some excellent works on Ethiopia's non-judicial review.[9] Yet, given the fact that this form of review has quite unique features and is opaque in practice, the research on its theoretical soundness and practicability is still inadequate. Previous works on this subject tend to be either theoretical or empirical in their approach instead of integrating the two or, when they do, they focus on particular aspects of this review system including its scope and nature, its history of performance, its potential to protect human rights, and the constitutional interpretation approaches it has adopted.[10] The complex nature of this review system can hardly be well understood without a combination of theoretical and empirical approaches. There is also a good reason to extend the research on this system beyond its particular features. While studying its particular aspects can help improve it in the short run, its overall design and three-decade history raise the bigger question of whether its very existence is theoretically sound and pragmatically defensible from the standpoint of its purpose. The purpose of constitutional review is, and should be, to uphold the rule of law (and the constitution more specifically).

In this study, I have attempted to contribute to filling the above-mentioned gaps. By considering the existing theories on constitutional review and Ethiopia's experience of non-judicial review (this includes an investigation of all the cases decided by the HoF until the last date of my data collection), I have explained how the Ethiopian model of constitutional review is inconsistent with its very purpose, the rule of law. My argument is a case against a politically leaning constitutional review and, for a stronger reason, a case against political constitutionalism. Prominent scholars including Richard Bellamy and Jeremy Waldron have strongly critiqued legal constitutionalism, alluding to the alleged conflict between democracy and the use of constitutional review to strike down legislation.[11] Their argument is that this form of review interferes with the people's freedom to address any issues as equals through a

[9] See eg. Getachew Assefa, 'All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 *Journal of Ethiopian Law* 139; Assefa Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)' (2017) 16(3) *Ethnopolitics* 295; Adem Kassie Abebe, 'The Potential Role of Constitutional Review in the Realisation of Human Rights in Ethiopia' (LLD thesis, University of Pretoria, 2012); Anchinesh Shiferaw Mulu, 'The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia' (2019) 13(3) *Mizan Law Review* 419. See also Section 1.6.

[10] See the sources cited in n 9.

[11] See Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) 549; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346, 1371–5.

democratic process. This view considers majoritarianism as superior and sufficient to legitimise governance. Accordingly, they have rejected the idea of legal constitutionalism (and a justiciable constitution) and proposed political constitutionalism as an alternative. Although the Ethiopian form of review is not fully consistent with this proposition for it embraces the idea of striking down unconstitutional legislation, it meaningfully subscribes to political constitutionalism as it uses a political rather than a non-partisan process to determine constitutional controversies. Like political constitutionalism, Ethiopia's non-judicial review is premised on majoritarianism, albeit in a distinctive way. I argue that political constitutionalism or majoritarianism is, in and of itself, nowhere close to democracy or people rule, and the evidence from Ethiopia's politically leaning constitutional review corroborates my assertion.

Political constitutionalism in general and Ethiopia's non-judicial review in particular are problematic for they do not distinguish between democracy as an end and democracy as a means. Democracy as an end represents people rule (rule by the *demos*) and people means the whole people as opposed to the majority or minority. For people to rule themselves, there must be an implied or express agreement among them on matters of most importance. In this sense, the constitution is an expression of the constituent power of the people. While constituent power – the power to create, fundamentally alter or replace the constitution[12] – is generally exercised through constituent representatives for practical reasons, such exercise of constituent power is still attributable to the people and distinguishable from exercise of constituted power by representatives. In exercising constituent power to create or fundamentally alter a constitution, there is a "higher order normative requirement that constituent representatives consider a wide range of viewpoints"[13] so that the outcome is, at least symbolically, attributable to the people. Constitutional making and amendment processes thus aim to build consensus on certain fundamental principles than just imposing majority rule. This is particularly the case in federal systems where there is a plurality of constituent power.[14] The result of a legitimate constitutional making process is thus an agreement (a constitution) which is, at least characteristically, attributable to the people.

This agreement must be superior, and employed, to check majoritarianism (democracy as a means). In the absence of such a hierarchy, the parties to the agreement (individuals) would

[12] George Duke, 'Can the People Exercise Constituent Power?' (2023) 21(3) *International Journal of Constitutional Law* 798, 798.
[13] Ibid 820.
[14] See Stephen Tierney, 'Federalism and Constitutional Theory' in *Comparative Constitutional Theory* (Edward Elgar Publishing, 2018) 45.

not have direct and meaningful means to correct the misdeeds of their agents. The outcome would be an unrestrained majority which can threaten the very premise of democracy, the recognition of individuals as autonomous and equal contracting parties. Majoritarianism may embrace these values as a process, but not so necessarily when it comes to its outcomes. Unless majority rule is subject to superior rules that represent the people's will, its decisions remain attributable only to the statistical majority. Unqualified majority rule limits the role of the individuals who make up the minority to mere participation without a means to challenge the transgression of the will of the people by the majority. It can therefore be safely argued that a constitutional conception of democracy that makes the people's agreement superior to majority rule is necessary to characterise governance as people rule.

Therefore, a legitimate governance is one that is attributable to all the people via their agreement. Every individual should be able, as a member of a political community, to challenge the acts of the majority that contravene the agreement. Governance that is attributable only to the majority or minority leads to monopoly of power and thus denies the individual, the main unit of democracy, the means to make self-rule a reality. The instrumental benefits of majority rule should not thus lead to the abandonment of the premises of democracy — namely the autonomy and equality of individuals. These premises of democracy entail recognition of basic individual rights and consequently the existence of an institutional arrangement that enables everyone to challenge majoritarianism when it allegedly runs against democracy as an end. Democracy, therefore, needs to have both instrumental/utilitarian and constitutional elements at the same time. It cannot be functional without being utilitarian, for a political community inevitably has collective needs. And there should be minimum constitutional safeguards that operate against utilitarianism for democracy to serve its ultimate purpose.

Although majoritarianism can be effective to meet the utilitarian goals of a society, there is no guarantee that it will not undermine individual rights and the principles of political organisation like vertical (federal) and horizontal separation of powers so long as it is not subject to constitutional safeguards. When there is conflict between utilitarian goals which the majority aims to attain through forward-looking programs and minimum constitutionally entrenched safeguards which the people agreed upon in advance, preference should be given to the latter. This way, the rule of law (constitutional supremacy) reinforces the will of the people as set out in the constitution. This is of course based on my assumption explained in Chapter 5 that, in an ideal constitutional democracy, the constitution represents, if in the abstract, the will of the people and thus should be superior to the will of the majority. Pure majoritarianism or political

constitutionalism is thus reductionist as it does not guarantee the constitutional element of democracy necessary to make governance attributable to all members of a political community.

Seen in light of the constitutional elements of democracy, Ethiopia's Constitution and the constitutional review system it established are not aligned with democracy. As indicated in Chapter 4 and further elaborated in Chapter 5, the main unit of the political system as per Ethiopia's Constitution is not the individual but ethnic groups. Thus, ethnic autonomy, which is formulated by the Constitution as the will of an ethnic majority in each territorially defined political society, takes precedence over individual autonomy. Only an identified ethnic group has a right to self-rule over a defined territory. This constitutes *ethnocracy* as opposed to democracy. Ethnocracy represents ethnic rule or government by *ethnos* and not rule by the people (*demos*).[15] It is premised on group autonomy, as opposed to individual autonomy which underlies democracy. Because ethnocracy's main unit is an ethnic group, individuals who do not belong to the ruling ethnic group are left behind. This exclusive nature of ethnocracy is indeed one of the most visible causes of political unrest in Ethiopia.

The ethnic-based definition of the Ethiopian state has in turn resulted in a constitutional review system which is premised on ethnic self-rule as opposed to individual autonomy and equality. This Constitution is thus dead on arrival so long as legitimating governance via people's agreement is concerned. To be precise, Ethiopia's Constitution was designed to be a reflection of an agreement between ethnic groups instead of an agreement between the individual members of a political community, which the idea of people rule requires. The result is a constitutional paradox: the constitution boldly recognises the fundamental rights and freedoms of the individual but does not recognise the individual as the main unit of the polity. The Constitution's failure to place the main unit of democracy at the forefront is worsened by the politically oriented constitutional review system which is not amenable for individuals and non-dominant groups to challenge the majority. This theoretical limitation has resonated in practice, as demonstrated by the HoF's failure to uphold the Constitution.

Ethiopia's experience in non-judicial review suggests that politically oriented constitutionalism is not only theoretically unsound but also practically infeasible. The HoF's experience has been marred by partiality and inconsistency due to its political nature and that has resulted in a prevailing lack of constitutionalism. This has in turn discouraged dissatisfied groups, including the very designers of the Constitution like the Tigray People's Liberation Front, from using

[15] See Chapter 4.

constitutional means to solve disputes. The widespread ethnic-based conflicts in Ethiopia are attributable, in part, to this systemic problem.

This highlights the practical limitations of politically oriented constitutionalism, particularly in jurisdictions with significant pluralism. Even in jurisdictions with a relatively homogenous society, the mere presence of a strong majority and an absence of violence cannot necessarily indicate legitimacy in governance. There is no doubt that governance consolidates its legitimacy through efficiency. Yet, the essence of its legitimacy lies in its connection with the rule of law. If every individual member of a political community is not able to invoke the rule of law against majority rule, the connection between the people and governance is loose and that represents a deficit in governance legitimacy.

My argument is thus that democracy unavoidably has both constitutional and utilitarian elements in which constitutional review aims to serve the former and majoritarianism the latter. As indicated, people rule or democracy presupposes that individuals are autonomous and equal. This entails recognition of the fundamental freedoms and rights of individuals. On the other hand, human beings depend on scarce resources. They should thus allow their agents to enjoy the necessary freedom to choose effective ways of utilising resources. In this process, however, the majority should not be allowed to sacrifice the constitutional elements of democracy to utilitarian goals because this would be contrary to the essence of democracy — what individuals aim to secure in entering a social contract as autonomous and equal beings. Kant's view on utilitarianism is worth mentioning here: 'A political leader may achieve fine ends, but be ruthless in the cost she is willing to impose on others in order to carry out her plans'.[16] To ensure that majority rule does not deviate from the constitution or what the people agreed upon, there has to be a non-majoritarian constitutional review that is open to everyone.

As the Ethiopian case clearly demonstrates, leaving all kinds of constitutional controversies to political determination results in accumulation of power in the same hands by shifting the task of protecting the rule of law (as expressed in the constitution) to those who might benefit from disregarding it. This constitutes what I would call an assailable constitutionalism. If the legislature is superior to the constitution or constitutional supremacy over the legislature is determined by a majoritarian mechanism, as I explained using the Ethiopian case, the ultimate result is essentially not constitutionalism (control of political power), but rather supremacy of

[16] Immanuel Kant *Groundwork of the Metaphysics of Morals*, tr Mary Gregor (Cambridge University Press, 1998) xi–xii.

political power over the people's constituent power. An assailable constitutionalism thus embraces anti-democratic features for it allows the majority to impose its rule on everyone without correspondingly providing everyone with an effective means to challenge that rule. My point is democracy is incomplete unless it enables the people both to empower and, when necessary, correct their agents. The latter feature of democracy assumes a predetermined standard against which majority rule must be evaluated.

Therefore, political constitutionalism in general and Ethiopia's non-judicial review in particular deviate from the constitutional conception of the rule of law which aims to control the excesses of majoritarianism. The Ethiopian case highlights that politically oriented constitutionalism is not simply theoretically inconsistent with the rule of law but also poses a practical challenge to individuals and non-dominant groups relying on the rule of law for their protection. The HoF's failure to protect individuals and a range of non-dominant ethnic groups through constitutionalism and the resultant ethnic-based conflicts suggest that this form of constitutional enforcement is hardly practicable. Ethiopia's experience further underlines that this form of constitutional review can reinforce the marginalisation of politically non-dominant groups and thus generate forces that could destabilise democracy. This is particularly discernible in plural societies like Ethiopia where there is radical political polarisation.

To sum up, politically oriented constitutional review is incompatible with the rule of law for it gives political leaders carte blanche, leaving individuals and minority groups who are threatened by the majority helpless. This form of review constitutes an assailable constitutionalism and can cause instability, particularly in societies with significant pluralism. In Ethiopia, it has resulted in a prevailing lack of constitutionalism, a highly asymmetric federalism, and systematic human rights violations. This poor constitutional enforcement has led to widespread conflicts including the two-year Tigray War that ended late in 2022 and the ongoing armed conflict in the Amhara Region between the central government forces and the Amhara youth militia known as Fano,[17] just to mention the recent and most damaging ones. Constitutional review should offer dissatisfied groups a reliable and non-violent means to challenge majority rule. Therefore, there should be an open and non-majoritarian review system so governance can ultimately be linked to not only the majority but everyone.

[17] 'Ethiopia Declares "State of Emergency" over Amhara Violence', *France24* (online, 4 August 2023) <https://www.france24.com/en/live-news/20230804-ethiopia-declares-state-of-emergency-over-amhara-violence>.

The legitimacy of a non-majoritarian mechanism depends not on representative democracy but rather democracy as an end. It derives its legitimacy from the express or implied consent of the people based on its openness and structural and ideological competence to uphold the rule of law or constitutionalism. A political system that offers an opportunity for everyone to invoke the rule of law against majority rule widens the scope of democracy beyond what the parliament would allow and thus helps remedy the flaws in pure majoritarianism. Stripped of the rule of law, democracy is incomplete and vulnerable to being ruined by demagogues. So, constitutional review should be justified based on democracy's ultimate end, people rule, which is embodied in the constitution as an express or implied agreement between the people.

My democracy-based justification of constitutional review is thus premised on the idea that the overarching scheme in an ideal democracy is not majoritarianism but rather what the people agreed, expressly or impliedly, to be their common rule. This agreement concerns the matters of most importance including the fundamental rights and obligations of every party to the agreement, and other organisational principles. As the point of reference in my democracy-based constitutional review is what the people agreed, it transcends theories that justify constitutional review based only on its instrumental value to protect individual rights. Democracy as an agreement among individuals as autonomous and equal beings entails recognition of fundamental rights and freedoms. As this agreement turns individuals into a political community, it must also set out the basic principles of political organisation. Controlling political power through individual rights and basic principles of political organisation thus constitutes people rule. So, constitutional review is not only instrumental to the protection of individual rights and other principles but also democratically legitimate. This understanding of constitutional review makes governance more legitimate by offering everyone a means to challenge a rule imposed on him/her. Therefore, majoritarianism needs to be tempered by the rule of law for governance to be legitimate or characterised as people rule.

6.4 Recommendations

Ethiopia's unsuccessful attempt to realise the rule of law via a non-judicial constitutional review system suggests that political constitutionalism in general and the Ethiopian model more specifically need to be rethought. Ethiopia's ethnic-based Constitution and the resultant politically oriented constitutional review system have resulted in a significantly unbalanced federalism, inaccessible constitutional justice and a prevailing lack of constitutionalism, and all these require radical constitutional reform. Ethiopia's Constitution needs substantial

revision not only because it has been ineffective in delivering the rule of law but also because it hosts a fundamental internal inconsistency which makes it to a considerable extent a source of conflict rather than a people's agreement that aims to create social cohesion.

Such reform needs to be guided by the understanding that democracy, understood properly, entails constitutional review of the acts of the legislature and the government by an institution insulated from them. In addition to this democracy-based rationale, an insulated constitutional review can also be justified as a functional necessity. If a constitution embraces ideals like federalism, a neutral umpire that settles conflicts between, for example, federal and state legislation by employing a superior law is required.[18] The notion of the separation of powers is also incomplete in the absence of a neutral body that determines jurisdictional disputes. In this regard, politically oriented constitutional review should be reconsidered as it constitutes, as I have shown using Ethiopia as an example, amassing political and adjudicative roles in political leaders.

If constitutional enforcement via an independent body is justifiable both on theoretical and functional grounds, what follows is the question of its design. The purpose of constitutional review and the inevitable conditions under which it functions should be taken into consideration in addressing this question. On the one hand, constitutional review has to realise the rule of law by enforcing the constitution. On the other hand, this enforcement relies on support from a range of political actors including the legislature, the executive and the fourth branch (such as the press, civil society organisations and people). This means constitutional review bodies cannot be viewed in isolation. To understand 'their constitutional role, we must situate them in a broader social and political context'.[19] Although there does not seem to be a single constitutional review system that fits all contexts, such a system needs to be designed in a manner that makes it both sufficiently insulated from politics, and able to garner the political support necessary to enforce its decisions. As constitutional review is mainly meant to control political power, it may not always please those in power. So, its support should come mainly from not pleasing but convincing.

This task of convincing is a difficult yet an important role that constitutional review should play. As explained in Chapter 2, it is the formulation of fundamental values at a higher level of

[18] Tom Ginsburg, 'The Global Spread of Constitutional Review' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 81, 83.
[19] Erin F. Delaney and Rosalind Dixon, 'Chapter 1: Introduction' in Erin F. Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar Publishing, 2018) 1, 1.

abstraction that makes an agreement of the people on issues most important to a polity possible.[20] Yet such abstraction makes the constitution (an agreement of the people) largely indeterminate.[21] Thus, mechanical application of constitutional law or any law for that matter is hardly possible, for the abstract nature of legal rules precludes precision and allows multiple plausible outcomes. The role of constitutional review in most cases then is not to find an exact and fixed answer to a given controversy but to resolve the same through establishing judicially identifiable standards based on abstract constitutional rules. If a constitutional review body is not able to establish such standards to resolve a given case, it is very likely that the case involves policy or political issues that need to be addressed by the political branches or through constitutional amendment. So, the proper role of constitutional review is not to distance itself from indeterminacy but to minimise the same through interpretation. If interpretation leads to multiple outcomes and a constitutional review body prefers one of the outcomes over the others, the legitimacy of such a decision depends not on the decision being the best outcome, but on its ability to show in a transparent manner that the choice was guided by a sound analysis of the relevant abstract constitutional rules.

Therefore, the abstract constitutional rules do not only allow multiple outcomes but also serve as grounds for making choices. Understood this way, constitutional review enforces an agreement of the people which is necessary for governance to operate under the will of the people. Of course, the task of minimising indeterminacy in a real-world situation is never easy. To avoid non-implementation of its decisions by the political branches and thereby to remain a trustworthy institution, a constitutional review body may, in exceptional circumstances, need to exercise self-restraint by acknowledging the discretionary powers left for the legislative and executive branches.

As indicated in Chapters 2, 3 and 5, constitutional controversies are complex because they involve legal-political questions. Thus, constitutional interpretation is different to statutory interpretation. Determining the will of the people as expressed in the constitution is one thing; discovering the will of the legislature is another thing. The former requires an understanding of the legislature's constituted power to keep it within its realm. The scope and nature of legislative power is not an issue in the latter. This suggests that, while law and politics are never

[20] For more on how abstraction makes a constitutional order possible while people disagree on particular cases, see eg. Cass Sunstein 'Constitutional Agreements without Constitutional Theories' (2000) 13(1) *Ratio Juris* 117–30.

[21] Renáta Uitz, *Constitutions, Courts, and History: Historical Narratives in Constitutional Adjudication* (Central European University Press, 2005) 2-13.

mutually exclusive, the constitution is at the epicentre of their interaction. This complexity means that constitutional review bodies cannot remain indifferent to politics. To be precise, interpretation of abstract constitutional rules should aim not solely to constrain political power but also, when necessary and in the spirit of the constitution, to avoid obstruction of the same.

So, a constitutional review system needs to be both insulated from and sensitive to politics for it is meant to apply legal rules to constrain political power. Both ordinary courts (in countries such as the United States and Australia) and constitutional courts (in countries like Germany and South Africa) have shown resilience in fostering democratic orders based on constitutional accountability or the rule of law. In contrast, constitutional review through a political institution (the Ethiopian model) has manifested profound limitations. While both ordinary courts and specialised courts have demonstrated efficiency in many jurisdictions in nurturing constitutional democracy and their success depends on a multitude of factors including the scope of their power, their constitutional interpretation approaches, and their interaction with the political branches, the design of specialised constitutional courts seems to be, as indicated in Chapter 2, bolder in terms of resonating the legal-political characteristics of the constitution. Indeed, Kelsen introduced the specialised constitutional court model considering the special nature of the constitution.[22]

As the Kelsenian model of constitutional review is tailored to local circumstances in different jurisdictions, it lacks uniform elements. Yet, one of its salient features is that it embraces both political and legal characteristics.[23] This model of review combines a comparatively strong involvement of the political branches in the process of appointing constitutional judges with a set of mechanisms that aim to sufficiently insulate it.[24] In most cases, both political and independent institutions participate in the selection of constitutional judges, these judges usually have a fixed tenure which means that there is no incentive for them to favour one party to secure reappointment, and these judges cannot be dismissed by the institutions which appointed them.[25]

[22] Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange, 1999) 134. See also Nuno Garoupa and Tom Ginsburg, 'Building Reputation in Constitutional Courts: Political and Judicial Audiences' (2011) 28 *Arizona Journal of International & Comparative Law* 539, 540.
[23] See Organisation for Economic Cooperation and Development, *Constitutions in OECD Countries: A Comparative Study* (2022) 126–35; John E Ferejohn, 'Constitutional Review in the Global Context' (2002) 6 *NYU Journal of Legislation & Public Policy* 49, 56–9.
[24] Brun-Otto Bryde, 'Constitutional Courts' in James D Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2nd ed, 2015) 700, 701.
[25] OECD (n 20) 132–5

Such specialised constitutional courts may have symbolic value to promote the sociological legitimacy of constitutional review in states with a poor history of judicial independence and undergoing a trying political transition like Ethiopia. As Ferejohn has observed, 'one thing that post-authoritarian systems have in common is that the judges that are still on the bench are implicated, to some extent, in the practices of the previous regime'.[26] Ethiopia's judiciary functioned for most of its history under kings with absolute power, and then for about two decades (1974–91) under a socialist military rule. As indicated in Chapter 4, it has remained an inadequately independent judiciary that has, for example, rarely rejected politically motivated prosecutions over the last three decades.

Ethiopia's long awaited constitutional reform may thus need to consider a specialised constitutional court as an alternative to the HoF and the ordinary judiciary. This must be, of course, preceded by the recognition of the people, and not ethnic groups, as the bearers of constituent power, and by acknowledging that the people's will (the Constitution) is a legal-political institution rather than, as the architects of Ethiopia's Constitution believed, a political contract among ethnic groups. Reconstructing the Ethiopian state this way, therefore, requires a departure from the ethnic-based constitutional dispensation, and overhauling of the resultant institutions including the HoF and the asymmetric ethnic-based regional states. It should be noted that there will be pushback from ethnic groups, for ethnic consciousness is at its peak in present-day Ethiopia. To soothe the tension between ethnic and individual autonomy, both recognising the plurality and building a common constitutional identity distinct from ethnic or other forms of identity are essential. This can be achieved through constitutional democracy, not ethnocracy.

Simply moving from politically oriented model of constitutional review to more independent review by a specialised constitutional court is conspicuously not sufficient. To make constitutional justice accessible, constitutional jurisdiction should not be exclusively vested in this institution. The ordinary judiciary should be allowed to complement this function. The mixed models of constitutional review in countries like South Africa[27] and Colombia[28] are commendable in this regard. The superior and centralised constitutional review by a specialised

[26] Ferejohn (n 20) 51.
[27] See IM Rautenbach, 'Constitutional Court 1995–2012: How Did the Cases Reach the Court, Why Did the Court Refuse to Consider Some of Them, and How Often Did the Court Invalidate Laws and Actions?' (2013) 16(4) *Potchefstroom Electronic Law Journal* 45.
[28] See Luz Estella Nagle, 'Evolution of the Colombian Judiciary and the Constitutional Court' (1995) 6 *Indiana International & Comparative Law Review* 59.

body addresses the most politically important cases and maintains the integrity of the legal system, while involvement of the ordinary courts on matters not exclusively assigned to the specialised body enhances access to constitutional justice. The most politically important constitutional cases including issues of federalism, separation of powers, validity of parliamentary Acts and constitutional amendments necessitate an institution that combines legal and political characteristics. Compared to such sensitive cases, checking the legality (including constitutionality) of administrative acts is relatively apolitical, and thus a role that can be handled by the ordinary judiciary. Therefore, using a specialised constitutional court as a primary constitutional enforcement mechanism and the ordinary judiciary as ancillary seems to offer a sound, if not irreplaceable, institutional arrangement to realise constitutionalism.

Determining what form of review can best advance the rule of law and how it should be designed to suit each context is indeed a big question that needs further comparative research. In this regard, research that involves all models of constitutional review — the European model, the US model, the Commonwealth model, the Ethiopian model, and other forms of non-judicial review — is indispensable to provide practitioners and the academy with a comprehensive picture of alternative constitutional enforcement mechanisms.

6.5 Conclusion

The Ethiopian case demonstrates how a substantively thick or rights-rich constitution can fail to advance the rule of law due to its overall design and the design of the institution that enforces it. The HoF is an outcome of a defective constitutional design that denies the *demos* their constituent power and gives the right of constitutional authorship to ethnic groups. There is thus fundamental inconsistency between the organising principle behind Ethiopia's non-judicial constitutional review system and the constitutional conception of the rule of law, upholding what is constituted by the people. The HoF's poor performance corroborates this problem. Due to its association with those who wield political power, this review system has failed to maintain the federal balance, resolve potential conflicts, democratise access to constitutional justice and uphold constitutional supremacy. Ethiopia's non-judicial review is, therefore, neither theoretically plausible nor practically productive. This strongly suggests that Ethiopia's constitutional system in general and its constitutional review system in particular need radical reform. I have already outlined my reform recommendations in Section 6.4 above.

In the spectrum of constitutional review systems, the Ethiopian model stands alone. It is neither constitutional review by (constitutional) courts nor does it make the legislature supreme on constitutional matters. Yet, the HoF is an inherently political institution. It is majoritarian (as understood in the Ethiopian context) in terms of composition. Its composition and selection methods make it a house of major political actors. Constitutional review by such an institution leans to political constitutionalism. Political constitutionalism or the use of majoritarian institutions to determine constitutional controversies is premised on the majoritarian conception of democracy. However, such a conception of democracy is nowhere close to the ultimate purpose of democracy, people rule as opposed to majority rule. Democracy, understood properly, requires majority rule to be subjected to the rule of law. Ethiopia's failure to uphold the rule of law through a majoritarian institution underscores the need for an open non-majoritarian mechanism to enable everyone including individuals and politically non-dominant groups to invoke the rule of law to challenge what the majority imposes on them.

The limitations of political constitutionalism in general and Ethiopia's non-judicial review in particular underline that determining constitutional controversies via majoritarian mechanisms constitutes an assailable constitutionalism. In this case, the majority's right to impose a rule on everyone to advance utilitarian goals is not reciprocated by the people's right to correct their agents. Democracy has both utilitarian (political) and constitutional (legal) elements. In this combination, the constitutional element represents the rules and principles that embody the implied or express agreement of the people to live as a political community. It is only when such an agreement is superior to what the majority agreed to be a rule that democracy is constitutionalised and able to protect everyone, and not just the majority. There must be thus an institution that upholds constitutional supremacy.

Determining constitutional controversies involves addressing legal-political questions as it is essentially about enforcing the legal elements of democracy against the political elements of democracy. Constitutional review should thus be allocated to a carefully designed, open, insulated and yet politically sensitive institution. Both ordinary and specialised courts have functioned in many jurisdictions in ways responsive to these conditions. It is also possible, if complex, to combine these two models. As indicated in the recommendations section above, while all constitutional disputes are legal-political in nature, discerning between the most politically important (eg federalism, separation of powers, validity of legislation and constitutional amendment) and relatively apolitical cases is very important. In this sense, using a combination of specialised and ordinary courts seems to offer a sound, if not a singular,

institutional arrangement to strike the balance between the need to address complex legal-political questions and access to constitutional justice.

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