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MECHANISMS OF CONSTITUTIONAL CONTROL: A PRELIMINARY OBSERVATION OF THE ETHIOPIAN SYSTEM

Getahun Kassa

Ethiopian Human Rights Commission
Addis Ababa
Ethiopia

e-mail: ateykg96@fastmail.fm

SUMMARY

Mechanisms of Constitutional Control: A preliminary observation of the Ethiopian system

The present mechanism of constitutional adjudication in Ethiopia demonstrates unique features. The mechanism does not belong to any of the constitutional adjudication models operating in other countries. However, a well-developed system of constitutional adjudication is lacking in actual practice. The federal and regional state organs that exercise the power of constitutional control, i.e. the Council of Constitutional Inquiry and the House of Federation at the federal level and the Constitutional Interpretation Commissions, Council of Nationalities and Councils of Constitutional Inquiry at the regional level, are not functioning fully and, moreover, are not moving at equal pace. In some regional states, the institutions competent for constitutional control, though mentioned in the regional constitutions, are not even established yet. In other regions, these institutions have been

established, but are not operating in practice. Besides, a challenge of judicial overlap is likely to emerge when the regional organs start to execute their task of constitutional control. Since no mechanism is devised to delimit the respective competences of the federal and state organs, overlap between federal and state institutions is inevitable. Furthermore, there is no clear guidance with regards to the role of the judiciary on matters that involve determination of constitutionality.

***Key Words**: Constitutional Control, Federal Constitution, Regional Constitutions, Cases, Traditional and Religious Rules and Institutions*

I. INTRODUCTION

This paper seeks to provide an examination of the mechanisms of constitutional control as depicted in the present constitutional system of Ethiopia. In an attempt to do that, reference is made to the powers and functions of the House of Federation (the final authority in the interpretation of the federal constitution), to the Council of Constitutional Inquiry and to the organs of the regional states that assume similar functions. It attempts to provide an overview and analysis of the background, legal basis and practices related to the powers and functions of the House and the Council and of the regional state organs with similar functions as of 1996; the time when this new approach was started to be practised at the federal state level. The exercise of constitutional control, as practised by many other countries, is mainly undertaken by the judiciary as an important aspect of its role of controlling against arbitrary exercise of governmental power. In the present constitutional system in Ethiopia, this role is mainly assumed by the second chamber of the federal parliament (the House of Federation) with the Council of Constitutional Inquiry organised to assist it in the accomplishment of this task.

The aim of this paper is therefore to examine the following issues. How is this function of determination of constitutionality and constitutional interpretation being executed? Which organ or organs are charged with this task? What is or what should be the role of the federal and state organs in this process of constitutional adjudication? How do these organs interact? What is the delimitation of jurisdiction between federal and state organs with regard to such a competence?

In an attempt to deal with these issues, the paper draws on the already existing limited experience of constitutional adjudication as exercised by the Council of Constitutional Inquiry and The House of Federation and on available local literature. With a view to provide a realistic account of the process, the author of this work has exerted his utmost effort to access the records of the Council of Constitutional Inquiry and the House of Federation and attempted to review the cases addressed by the Council and the House. These cases are reviewed with a view to provide the practical dimension of this process. For comparative analysis purposes, the paper has, in addition to the federal constitution, consulted the regional state constitutions of the states of Tigray, Afar, Amhara, Oromyia, Benishangul-Gumuz, Southern Nations Nationalities and Peoples Regional State, Somali, Gambella and Harari and relevant subsequent legislation.

II. AN OVERVIEW

Prior to the promulgation of the 1931 constitution, Ethiopia had no tradition of having a written constitution to regulate such issues like mechanisms of constitutional control and checks and balances. The first formal document was the 1931 constitution, which was modeled after the Japanese Meiji constitution. However, long before 1931, Ethiopia had legal texts that determined the power relations in the royal dynasty or the relations of the government with the church and the role of the church in the governance system. More specifically, the old tradition of Ethiopian history refers to much older Ethiopian legal texts like the *Fitha Ngest,* which is considered by legal scholars as an *important* development in Ethiopian legal tradition. This was a legal instrument that dealt with important aspects of the relationship between government, church and nobility. Pertaining to the then system of governance, it was necessary to determine the relationship between these organs that had an essential role in the whole system of governance. A wider consensus revolves around the view that the growing interactions with the West, the emergence of Ethiopian scholars educated in Europe and the growing diplomatic relations during the reign of Emperor Haile Selassie were the major driving force that led to the promulgation of the first written constitution in 1931.

The 1931 constitution was considered by many as a step towards centralization and modernization of the system of governance in Ethiopia. Its peculiar feature was that more power or almost all powers of the state were bestowed on the emperor. This was reflected explicitly in the constitution itself:
"By virtue of his Imperial blood, as well as by the anointing which he has received, the person of the emperor is sacred, his dignity is inviolable and his power is indisputable. Consequently he is entitled to all the honors due to him in accordance with tradition and the present constitution."

A five-year colonial subjugation by the Italians ended in 1941 after a struggle for liberation. The involvement of the West in this struggle for liberation and its role in post-colonial Ethiopia gave rise to an increasing interest in modernising the Ethiopian legal system. As a result of this historical event and of other internal developments, a revised constitution was adopted in the Ethiopian legal system in 1955. This revision of the 1931 constitution implied a change in the organisation of the system of governance, limiting the power of the emperor to a certain extent and a relatively better recognition of rights and freedoms.

As a reaction to changes in the socio-political reality, written constitutions have subsequently been issued at different times. These were the 1974 draft constitution, issued by the emperor as a compromise to calm down the political turmoil (which merely ended up as a draft due to the deposition of the emperor before its adoption); the 1986 constitution which was promulgated during the military administration period; the 1991 charter which served as an interim constitution for the transitional period and the 1995 constitution of the Federal Democratic Republic of Ethiopia (FDRE). Furthermore, regional state constitutions were promulgated in 1995 and these were amended between 2001 and 2003.

The 1931 and 1955 constitutions, as pointed out by various authors and as some of the provisions of the constitutions themselves clearly imply, were more inclined to legitimize the all-embracing (executive, legislative and judicial) authority of the emperor. Compared to its

predecessors, the 1995 constitution has some peculiar aspects. As often cited by various authors, the introduction of a federal form of governance and the assignment of the competence of determining constitutionality to the second chamber of the parliament are among the notable features the 1995 constitution came up with. The 1995 constitution protects fundamental rights and freedoms broadly recognized in a number of international human rights instruments. This necessitated putting appropriate mechanisms of constitutional control in place.

Obviously the issue of who shall interpret the constitution and whether the power of interpreting the constitution shall be assigned to the judiciary or to an organ other than the judiciary has been the subject of debate. Depending on the socio-political realities that have influenced the process of constitution-making, constitution drafters of different countries have opted for an approach that, they believe, suits their realities. It seems that the current political trend in Ethiopia has greatly influenced the development in this regard and led to the adoption of a unique mechanism. Though different views are evolving this time around with regards to the role and extent of engagement of the House of Federation on issues of constitutional interpretation, the practice of according this power to the legislative arm of the state has prevailed over all other model options.

Since member states of the Ethiopian federation have the legislative power to issue their own constitution, the competence of constitutional adjudication is organised in two tiers, i.e. at the federal and state level. Article 62 of the federal constitution and proclamation 251|2001 on the House of Federation have entrusted this power to the House of Federation. The House is thus empowered with the power to interpret the constitution and to determine the constitutionality of legislative or other acts. The Council of Constitutional Inquiry, by virtue of article 84 of the FDRE constitution and proclamation 250|2001 on the Council of Constitutional Inquiry, has the power to investigate constitutional disputes and submit recommendations to the House of Federation.

In a similar way, the regional state constitutions granted this power to the Council of Nationalities (in the Southern Nations Nationalities State) and to a Commission for Constitutional Interpretation in the states of Afar, Tigray, Amhara, Oromyia, Harari, Benishangul-Gumuz, Gambella and Somali. All of the state constitutions envisaged the establishment, by the regional Council, of a constitutional organ (the Constitutional Inquiry Council) designed to assist the Commission for Constitutional Interpretation or the Council of Nationalities. In general, the present system of constitutional adjudication in Ethiopia at federal and state level includes the House of Federation, The Council of Nationalities, the Commission for Constitutional Interpretation and the Council of Constitutional Inquiry.

III. THE HOUSE OF FEDERATION

With the advent of the 1995 constitution, a new form of government has been introduced into the Ethiopian constitutional system. Besides the transformation of the country from a unitary into a federal system of governance, a two chamber parliamentary system has been established, formed through direct popular election and, in the case of the House of Federation, through direct or indirect representation. The two chambers are the House of Peoples Representatives and The House of Federation. The House of Federation, which represents Nations, Nationalities and Peoples (whereby each Nation or Nationality is represented by one representative and one additional representative for each one million of its population), is entrusted with powers that range from determining requests for the exercise of the right to self-determination to constitutional interpretation.

With the introduction of this unique arrangement of constitutional adjudication the judiciary in Ethiopia is left aside from having a direct power on constitutional interpretation. Dr. Fasil Nahum has stated this as:

"The Ethiopian Constitution, on the other hand, in a creative stroke provides for something quite different, emanating from and consistent with the overriding supremacy of the nations, nationalities and peoples whose sovereignty the constitution expresses... Thus the

ultimate interpreter of the constitution is made, not the highest court of law, but the House of Federation", (Fasil Nahum, p. 59).

This power is accorded to the Upper House of the parliament over and above its sensitive responsibilities of deciding on issues such as the request by nations, nationalities and peoples for the exercise of their self-determination rights up to secession. The task of constitutional adjudication and ruling on matters of constitutional interpretation is thus entrusted to the Upper House of the parliament that is to be assisted by the Council of Constitutional Inquiry. With such an explicit recognition of the power of the Upper House to be the ultimate authority on issues of such nature, the courts in Ethiopia are kept aside from dealing with those matters. This, however, does not seem to prevent them from applying the constitution in the day-to-day exercise of their duties and responsibilities.

Proclamation 251|2001, which was enacted to consolidate the House of Federation of federal Ethiopia, has, among other things, attempted to elaborate on the functions of the House on matters of constitutional adjudication. With a view to ensure the implementation of this function, the House is empowered to organize the Council of Constitutional Inquiry, to approve the rules of procedure for the Council, to make final decisions upon submissions for constitutional interpretation by the Council, to receive appeals from dissatisfied parties whose cases have been rejected by the Council on grounds of no need for constitutional interpretation and to decide on submissions of the Council within thirty days. Though the House is obliged to give its decision on submissions of the Council within thirty days, in practice, cases are taking longer to resolve.

IV. THE COUNCIL OF CONSTITUTIONAL INQUIRY

As hinted at in the preceding discussion, the unique aspect of the present system of constitutional adjudication in Ethiopia is demonstrated in the fact that a combined setting of a professional and political approach is formed to handle the task of constitutional adjudication. A similar pattern is also followed at state level where the

Constitutional Interpretation Commission, Council of Nationalities and Council of Constitutional Inquiry are envisaged to be engaged in this matter. The Council of Constitutional Inquiry has been established at the federal level as well as in a few regional states. At the regional state level, the states of Amhara, Oromiya and Southern Nations Nationalities have already established a Council of Constitutional Inquiry. At the federal level, the Council of Constitutional Inquiry was established in 1996 and some of its members are already serving their second term.

Unlike its counterparts in many other countries, the composition of the Council of Constitutional Inquiry is not confined to judges. The constitution arranged it for the Council to have eleven members of different mix of which six is "...legal experts of proven professional competence and high moral standing..." to be appointed by the head of state upon recommendation of the House of Peoples Representatives. The federal Council of Constitutional Inquiry (the regional Councils of Constitutional Inquiry have a similar composition) is therefore composed of the president and vice-president of the federal supreme court who occupy the position *ex officio* (to serve as chairman and deputy chairman of the Council), six legal experts appointed by the president of the republic on recommendation of the House of Peoples Representatives for their proven professional competence and high moral standing, and three persons designated by the House of Federation from among its members.

Members of the Council have their terms of office determined according to their way of inclusion in the Council. Hence, the *ex officio* members have their term for as long as the period of their position in the Supreme Court lasts, the six legal experts have a term equal to that of the president of the republic, i.e. six years, and they can also be renominated and the term of members designated by the House of Federation equals the term of this House.

The Council of Constitutional Inquiry proclamation provides some guidance as to the appointment, term of office of members of the Council and removal of their membership. However, the proclamation does not seem to have sufficient prescriptions for issues that might

arise in some respect. It is provided that the body that appoints them is authorised to remove members of the Council subject to good cause and the removal is effected upon approval of a majority vote of the House of Federation. The fact that what constitutes a good cause for removal of a member of the Council is not clarified, is likely to cause tenure insecurity which, as a result, could have the effect of undermining the independence of members of such an important institution. Obviously, the *ex officio* positions are not subject to such a threat. In view of strengthening the institutional independence of the organ, this is a point worth considering. At state level, since this organ is not fully established or organised, it is necessary that state authorities be aware of the importance of a clear determination of such issues and address it in a way that helps create a strong and independent institution. Parallel to that, revisiting the working rules of procedure at the federal level is also important.

The unique nature of the mechanism of constitutional interpretation applied by Ethiopia since the adoption of the 1995 constitution is not only reflected in the nature of the organ entrusted with the power of constitutional interpretation but also in the composition of the members of the Council of Constitutional Inquiry. More specifically, as indicated above, non-legal professionals are included as members and this is not a common practice in many systems. Membership in the Council therefore is not restricted to legal experts. Eight of them are obviously legal professionals as the constitution prescribes that six members should be lawyers of proven professional competence and integrity. The other two are judges by their position in the Supreme Court. The remaining members however may or may not be legal experts since their membership is not conditioned on their professional competence but their representative capacity.

The Council of Constitutional Inquiry has the power to investigate constitutional disputes and to submit recommendations to the House of Federation should it find interpretation of the constitution necessary. As stipulated in the rules of procedure of the Council and the Council of Constitutional Inquiry proclamation, the Council may receive cases from the House of Federation, state legislative and

executive organs and from any court or interested party. The Council sits quarterly but an extraordinary meeting may also be called.

Though its rulings are non-binding, as they are subject to approval by the House of Federation, the Council of Constitutional Inquiry still influences to an important degree the protection of human rights and the sustainment of democracy. Given the level of recognition accorded by the constitution to the respect for and protection of human rights, the role of the Council and the House of Federation in sustaining democracy and the protection of human rights is immense. Their involvement and interaction in matters of constitutional adjudication is thus of significant importance in ensuring the constitutional guarantees.

The Council of Constitutional Inquiry was established in 1996 to deal with issues of constitutional interpretation. The Council exercises a power of investigating constitutional issues and submits recommendations to the House of Federation for constitutional interpretation when there is a case meriting constitutional interpretation. In prior times there was no such arrangement in the 1931 and 1955 constitutions and in the 1986 constitution this was a power vested in the Council of state, the supreme law making organ of the then regime.

Exercising its constitutional powers, the Council of Constitutional Inquiry has adopted its own rules of procedure, which have been approved by The House of Federation. Along with that, it has determined the persons or organizations that could institute a case before it and the mode of presentation of applications. Guided by the constitution, the Council of Constitutional Inquiry proclamation and the rules of procedure together with the adjudication process as practised by the Council for a decade have enabled parties to bring their case before the Council and to The House of Federation on an appeal basis.

Slowly the present constitutional interpretation system in Ethiopia, especially with the advent of some important cases like the Benishangul-Gumuz election case and the Kedija Beshir case related to adjudication by religious laws and institutions, is moving towards

influencing the legal and constitutional system in general. However, the fact that the Council is organised to work in sessions convening on a quarterly basis does not enable it to be as accessible as it should be. Some suggest that the Council cannot deliver what is expected of it unless it is made to work on a full-time basis. Taking account of the level of complexity of cases reaching the Council this appears to be a sound proposition.

V. PROCEEDINGS BEFORE THE COUNCIL

Initiation of cases for constitutional adjudication is an important aspect of the constitutional adjudication process. As this is an important aspect of empowering citizens, it holds a key place in the whole process of adjudication. According to the rules of procedure of the Council of Constitutional Inquiry and the Council of Constitutional Inquiry proclamation, the House of Federation, state legislative and executive bodies, courts and any interested party are allowed to launch the process. These instruments have provided indicative provisions on who has the right to initiate cases for constitutional adjudication and accordingly the aforementioned organs are the ones who are allowed to petition a case with the House of Federation or the Council of Constitutional Inquiry. Accordingly, in the current system of constitutional adjudication an issue could arise with or in the absence of court litigation.

Compared to the general provision under article 84 of the federal constitution, the rules of procedure adopted by the Council of Constitutional Inquiry went further in elaborating upon what was stated in general terms in the constitution and gave a list of those who are authorised to launch a constitutional adjudication. Of the listings in the constitution, the Council of Constitutional Inquiry proclamation and the rules of procedure, it is the part that empowers an interested party that has the potential to be the subject of controversy. This could particularly be the case when the issue of constitutionality refers to the exercise of legislative or executive power. Such a situation has the ability to attract parties of direct or indirect interest such as human rights advocacy groups. The scope of those who or which are considered an 'interested party' and entitled to exercise the right to initiate

constitutional adjudication is therefore likely to be the subject of controversy.

The way this provision is framed leaves room for its invocation by advocacy groups to initiate a case for constitutional adjudication when especially it involves alleged violations of human rights. That seems to be the reason why the Ethiopian Women Lawyers Association for instance has instituted a case on behalf of a woman who had contested adjudication of an inheritance case by a religious court against her consent as unconstitutional. The association intervened with a view that the way the case under consideration was handled by the religious court as well as by the regular court had a far-reaching effect of jeopardizing women's rights in general. This provision could even open the possibility for extended standing to initiate cases for constitutional adjudication by a number of actors which could among others include Human Rights NGOs, political parties and moreover that could include the newly established national institutions of The Human Rights Commission and The Office of The Ombudsman.

Records of the registrar of the Council of Constitutional Inquiry and of the House of Federation reveal that, during its ten-year period of office, the Council has investigated plenty of issues alleged to involve constitutional adjudication. The majority of the cases that reached the Council of Constitutional Inquiry have been rejected on grounds of not meriting constitutional interpretation. Out of the cases recorded in the registrar of the Council, five cases were related to legislative acts alleged to contravene the constitution. These are the Land Law enacted by the Amhara state Council, the Federal Anti Corruption Proclamation, The Election Proclamation, Special Prosecutor Establishment Proclamation and Consolidation of the House of Federation Proclamation, all of which were declared to be constitutional.

A significant number of the cases were rejected for reasons of not exhausting the remedies offered by government institutions having the power to consider and decide on the matter. The Council of Constitutional Inquiry Proclamation requires that a case should first be investigated as to whether it has exhausted all the possibilities for seeking remedies from different and relevant institutions of admi-

nistrative or judicial structure. Some cases were rejected due to their linkage to a regional constitution and the Council thus decided that their determination was within the competence of the state Council of Constitutional Inquiry. This is interesting when viewed against the situation of the non-operation or non-existence in some regions of state Councils of Constitutional Inquiry. Few cases also arose in relation to adjudication by religious courts against the will of one of the parties and a couple of cases were related to self-determination demands made by applicants claiming recognition as a group of separate ethnic identity. The Denta Debemo, Bahrework Mesmes and the Silte cases of the Southern Nation Nationalities Peoples State are the notable cases in this regard. One case that was raised had to do with the contesting of a ruling of the election board and was finally decided by the House of Federation.

In undertaking its task of determining the constitutionality of an act or practice of the government or of an individual or the constitutionality of a legislative act, the Council is obliged to follow principles of interpretation as determined by the Council of Constitutional Inquiry proclamation and to be developed by it.

VI. PRINCIPLES OF INTERPRETATION

An exercise of power of constitutional adjudication has to follow certain guidelines. In the interest of the proper execution of this task, the Council of Constitutional Inquiry and the House of Federation are supposed to apply certain principles in executing their respective tasks of submitting recommendation to the House of Federation and interpreting the constitution. Except for what is provided in the constitution in a very general manner, to date it seems that no clear set of principles of interpretation have been established to guide the process of adjudication. With the adoption of the Council of Constitutional Inquiry Proclamation in 2001 there seems to have been some partial move in this direction. By way of confirmation of the principles provided in the constitution, the proclamation authorised and required the Council to develop and implement principles of interpretation, which it believes can help a executing its task of investigating issues of constitutionality and submitting recommendations to the House of

Federation. While authorising the Council to develop principles, the Proclamation also requires it to ensure conformity of its work with the principles enshrined in the Universal Declaration of Human Rights, International Covenants on Human rights and International Instruments adopted by Ethiopia. The House of Federation in similar fashion is authorised to develop and implement principles applicable to constitutional interpretation and ensure conformity of the execution of its task with the principles enshrined in the aforementioned human rights instruments. The fact that both organs are authorised to identify and implement principles of interpretation might cause overlap. However, the fact that the exclusive competence to render final rulings on adjudication is accorded to the House could take care of the possible overlap that might arise in practice.

VII. RULINGS OF THE COUNCIL AND THE HOUSE

The Council and the House, over the last ten years have handed down few decisions, but decisions of profound impact. As stated above, the sizable part of cases that reached the Council was struck out at a preliminary stage on grounds of not meriting constitutional adjudication. But there were also a few important cases heard by the Council and submitted to the House of Federation for a final ruling. Reference to the records of the registrar of the Council of Constitutional Inquiry indicates that to date nearly two third of the cases that reached the registrar of the Council are struck out at first instance and that the Council submitted its recommendation for constitutional interpretation to the House only for a very small number of cases. By case category, the majority of the cases were initiated by private parties and only five cases had to do with contesting the constitutionality of laws adopted by the House of Peoples Representatives and regional parliaments. The rest of the cases implied contesting the constitutionality of decisions of federal and state executive organs or court rulings. The cases contesting court rulings give the impression that parties to these cases considered this forum as another level of appeal against rulings in cassation or appellate level courts. Therefore, the tasks of the Council and the House in this regard do not seem to be familiar to the public.

In general there are only a limited number of cases that have been entertained by the Council as meriting constitutional adjudication. The following cases can be mentioned as landmark cases where the role of the Council and the House of Federation as interpreters of the constitution has been exercised.

The election right case

This case was initiated by a group of persons from the Bambasi and Assosa woreda of the Benishangul-Gumuz state who claimed to belong to and represent the Amhara, Oromo, Agew and Tigray nationalities, residents of the area. They contested the constitutionality of a decision of the Election Board banning them from running for election on grounds of not knowing the language of the electoral district, and of article 38 of proclamation 111|95. They argued that the decision of the board and article 38 of the said proclamation contradicted article 38 of the constitution, a provision that guarantees the right to vote and to be elected. On reference by the House of Federation (citing articles 62 and 84 of the constitution) the Council of Constitutional Inquiry considered the case and submitted its recommendation stating the unconstitutionality of the decision of the board and of the contested provision of the proclamation. The recommendation was passed by a majority vote of five to two and was forwarded to the House of Federation on 7 July 2000.

The minority opinion argued that the alleged proclamation did not have any inconsistency with the constitution and that the decision of the electoral board, as it had been decided based on the alleged law was also constitutional. The minority opinion reiterated that article 38 of the said proclamation, requiring a candidate to know the language of the electoral district as a requirement to qualify and be able to run for election, is not solely aimed at excluding those who do not know the local language, but is inspired by the concern that the candidates have to know the language of their constituency. The minority further argued that language is an important aspect of rights such as the right to self-rule and is an expression of the special place of and recognition accorded to the identity of nations and nationalities. Furthermore, this provision has not prohibited someone from running for election

because of his membership of a certain language group; it merely requires him or her to know the language of that group he or she is intending to represent. The minority opinion is also of the view that election is not a right without any limit; it is rather subjected to limits that can be imposed by law. Given these facts, the minority opinion argued there is no reason for finding the law and the subsequent decision passed by the election board discriminatory and in contradiction with the constitution.

The House of Federation in its first regular session of the first year of its term referred the opinion of the Council to the legal affairs committee. It instructed the committee to study the recommendation of the Council and propose an opinion for the final ruling by the House. Based on the deliberation of the committee, the House decided the case in its second regular session of the third year term of the House. In delivering its final verdict the House declared the alleged proclamation constitutional and the decision of the board unconstitutional referring to its decision of excluding those candidates who are running for the federal parliament. Accordingly the House decided that the decision of the board shall remain non-enforceable and instructed all federal and state organs of the government to ensure enforcement of this decision.

The Silte case

Two applicants, who claimed to represent the community, initially filed this case. They filed their case with the House of Federation and this was later followed by an application from a person who by that time was a member of the House of Peoples Representatives and of the Silte Democratic Unity Party. The applicants, referring to the fact that their people had been considered as Gurage against their will for a long period in denial of their right to self-determination, requested the House to ensure the exercise of their constitutional right. They stressed that the Silte are not Gurage, but people with their own language, territory and history and argued that their being considered Gurage contravened their right to self-determination. The Council of Constitutional Inquiry, upon referral from the House, considered the case. Upon referral of the case the House asked the Council to deal

with issues such as who shall decide on questions that arise in relation to determination of ethnic identity of a community and what procedure should be followed to reach a decision on such matter? Based on an opinion forwarded by the Council the case was referred back to the regional Council.

The Council of Constitutional Inquiry, in its opinion to the House, has emphasised the principle of exhaustion of local remedies and gave the opinion that the matter should be considered first by the regional mechanisms and indicated that the interested party or parties can bring their case back to the House of Federation if they feel the decision of the state Council is delivered in a manner that contradicts the constitution. The Council, in its opinion forwarded to the House, suggested that in dealing with this issue, the state Council needs to observe that the process of determination of this issue is conducted with direct participation of the community that raises the question, by secret ballot, in a free and fair manner and is attended by impartial observers.

Kedija Beshir case

This case was submitted to The Council of Constitutional Inquiry by an application filed by the Ethiopian Women Lawyers Association on behalf of Kedija Beshir. It refers to a decision on an inheritance case by a Naiba court based on the Sharia law. Before its submission to the Council, the case had passed through the appeal stages up to the Supreme sharia court and finally the Federal Supreme Court cassation division of the regular court. The decision of the Naiba court was upheld at all levels. The present applicant (in whose name the Ethiopian Women Lawyers Association filed the complaint) and three other co-defendants together originally filed their objection to the Naiba court itself, stating their unwillingness for the case to be considered by this religious court. However the court to which the objection was filed ruled against the objection and proceeded to deal with the merits of the case and delivered its decision according to the laws of the sharia. The Ethiopian Women Lawyers Association extended its assistance to the applicant with a view that the way this case was handled at all levels of the court it passed through, jeopardised rights of women in general by contravening constitutionally recognised

rights of women. The present applicant thus, with the assistance of the Ethiopian Women Lawyers Association, brought the case to the attention of the Council of Constitutional Inquiry challenging the ruling of the Naiba court and the further confirmation of its decision by the highest religious and regular courts of the country as unconstitutional.

The Council of Constitutional Inquiry examined the case and reached the conclusion that the way this case was resolved by the courts at all levels contravened article 34 (5) of the constitution - a provision that recognises the right of the parties to adjudication of disputes by religious or customary institutions. According to this provision, disputes relating to personal and family matters can be handled by religious or customary institutions only with the consent of parties to the dispute. Accordingly, the Council stated that the jurisdiction of religious or customary adjudication doesn't assume a compulsory jurisdiction. Thus the determination of the matter by the Naiba court against the consent of the parties to the dispute, was unconstitutional. This was so because the case was tried by the Nabia court (a religious court) against the objection of the parties to the dispute, while it was a dispute related to a family matter that needed to secure the consent of the parties as a prerequisite. The Council thus reached the conclusion that the decision of the courts (both the religious and the formal court) in this case contravened the constitution and delivered its opinion to the House of Federation. The House of Federation, in its second regular session of the fourth year of its term, approved the submission of the Council and decided the ruling of the courts was unconstitutional.

Recently the federal Council of Constitutional Inquiry has more cases directly and indirectly related to the exercise of electoral rights. Leaders of the Coalition for Unity and Democracy filed a case contesting the decision of the Prime Minister banning demonstration in Addis Ababa city following the post electoral unrest. The Council rejected the case, alleging that the contested act was undertaken within the role of the Prime Minister as the chief of the federal government.

In another case the ex-president (who served as the president of the republic from 1995 to 2001) contested the constitutionality of a law promulgated to provide for the administration of the president. He noted that proclamation 255|2001, which was promulgated to determine the administration of the president, contravened the constitutional rights to opinion, thought and expression and the right to vote and be elected. He pointed to the provision of the said proclamation, which reads *"the president shall be obliged to keep himself aloof from any partisan political movement during or after his presidency."* Failure to discharge these and other obligations set by this proclamation causes termination of the privileges and benefits that the ex-president is entitled to receive. This, he argued, infringes the constitutional right to vote and be elected. The Council struck out the case as not meriting investigation stating that the contested legislation doesn't prevent the president from exercising his rights but required him to remain non-partisan so that he can claim the privileges and benefits granted to ex-presidents by the contested law.

VIII. STATE JURISDICTIONS

Owing to the dual setup of the legislative, executive and judicial power and pursuant to article 52 (2) (b) of the FDRE constitution, states have the power *"to enact and execute state constitutions and other laws."* Accordingly, each member state of the Federal Democratic Republic of Ethiopia does have its constitution and constitutional adjudication is one of the issues addressed by these state constitutions. All the state constitutions, i.e. the revised constitutions of Tigray, Afar, Amhara, Oromyia, SNNPRS, Somali, Benishangul-Gumuz, Gambella and Harari states, have devoted a part of their text to this issue. These constitutions came up with few, though major, changes to the contents of the constitutions they amend.

As has been hinted at in the preceding discussion, in the previous state constitutions power of constitutional interpretation was entrusted to the single chamber state parliament. One of the changes was that the power to render an ultimate ruling on matters of constitutional adjudication was designated to be the competence of the state Constitutional Interpretation Commission in the constitutions of the states of Tigray,

Afar, Amhara, Oromyia, Somali, Benishangul-Gumuz, Gambella and of the Council of Nationalities in the Southern Region State constitution. Accordingly, the Southern region state constitution provided for the establishment of two Councils, i.e. the state Council and Council of Nationalities. The Council of Nationalities is established by representation from nations, nationalities and peoples of the state and entrusted with the power to interpret the state constitution. This Council is organised almost in a manner identical to the House of Federation and assumed the authority to render the ultimate ruling on the interpretation of the state constitution.

State constitutions anticipate the establishment of the Council of Constitutional Inquiry to assist the Commission for Constitutional Interpretation or Council of Nationalities in their task of interpreting the constitution. To date, only some states (Amhara, Oromyia and Southern Region State) have taken the lead in establishing the Council of Constitutional Inquiry. The composition of the state Council of Constitutional Inquiry is similar to the federal one in all the nine states. Accordingly state Councils of Constitutional Inquiry comprise the president and vice president of the state supreme court, six legal experts of proven professional competence and high moral standing to be appointed by the state Council on recommendation by the chief executive and three members to be designated from the Council of Nationalities in the Southern region and from the state Council in all other regions.

The scope of competence of federal vis-à-vis state Councils of Constitutional Inquiry and of the House of Federation vis-à-vis state Commissions for Constitutional Interpretation or Council of Nationalities remains yet unclear. Whereas, on the other hand, cases seeking determination of constitutionality are rejected on grounds of non-exhaustion of local remedies of which the state Council of Constitutional Inquiry is considered one mechanism. This is being done by the federal Council of Constitutional Inquiry as the Council of Constitutional Inquiry proclamation provides that a case may be submitted to the Council if it has exhausted the local remedies as stated under article 23 of this proclamation which reads:

"Any person who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the Council of constitutional inquiry for constitutional interpretation.

Any appeal, under sub article (1) of this article, may be made to the Council if the case has been exhausted by the government institution having the power with due hierarchy to consider it.

Final decision, under sub article (1) and (2) of this article, shall mean an adjudication that has been exhausted and against which no appeal lies on the same path way."

Because of the degree of similarity exhibited in the contents of the state and federal constitutions (especially part three of the federal and state constitutions), jurisdiction overlap over constitutional adjudication is highly likely to occur between the competent federal and state organs. The fact that the practice of constitutional adjudication is a new practice organised in a unique manner and that sufficient practice has not yet developed poses a problem to which the system has to give an answer.

This dual system of constitutional control could cause the same act of the legislative or the executive to be challenged both at the federal and state Council of Constitutional Inquiry or a case on which ruling is delivered by the federal organ could possibly be instituted as a new case at the regional level.

Thus the system has to look for a way that enables the dual system to work within the confines of the areas of competence delimited for each. One may assume that state organs for constitutional interpretation have jurisdiction only over cases related to state laws and state acts; however there is the possibility that a case can be filed at the federal Council of Constitutional Inquiry while it is a case that has already been disposed of by a state Commission for Constitutional Interpretation. This has already been experienced in the judiciary where cases tried and finally decided by state court of cassation divisions were taken on appeal to the federal Supreme Court cassation

division and disposed of by the bench. The constitutional adjudication proceedings are not immune from that. Such possibility implies that this undetermined situation could in the future be a source of debate on matters of constitutional adjudication. As cases of that type have not been encountered yet, there is no evidence to prove this arrangement as uniquely problematic but one can however foresee that it is likely to cause a challenge and that is a problem the system has to address.

No matter the reason why this hasn't happened yet and why no case has been registered at state level (even in the regions where the effort to establish the Council has been exerted) it is an issue that seeks attention. This matter is likely to be tested especially when institutions like the Human Rights Commission and The Office of the Ombudsman come to function fully and may launch cases. They have the objective of looking into the compatibility of actions and legislation or directives issued by the government with the standards of human rights and the constitution.

IX. EFFECTS OF CONSTITUTIONAL ADJUDICATION PROCEEDINGS

Countries with different mechanisms of constitutional adjudication follow their own approach towards the effect of constitutional interpretation. Under the Ethiopian system it is decided by legislation as to what the effect of a constitutional interpretation decision should be. This was a matter that had not been clarified for sometime. Though the constitution entered into force in August 1995 and the Council of Constitutional Inquiry was established in 1996 and has been operating since then, the proclamation that has clarified this matter (proclamation no 251|2001; a proclamation to consolidate the House of Federation) was only adopted in 2001. In between this period the Council and the House have entertained plenty of cases in the absence of a clear determination on effects of final rulings on constitutional adjudication.
The proclamation has now made it clear that the decision of the House on constitutional adjudication shall have an effect as of the date of the decision and the decision shall remain applicable to similar issues that

may arise in the future. This, in a way, is a new development in the field as it has introduced a precedent system; a practice peculiar to the common law system has thus been introduced into the predominantly civilian legal tradition. As a country of civil law tradition there is no possibility for the introduction of judge-made laws in Ethiopia. Law making is the sole responsibility of the legislative arm of the state. A sudden departure is exhibited with the adoption of this precedence system for the constitutional adjudication. It is provided in an explicit way that decisions of the House shall apply to future similar cases. Though the constitution was not express in this respect and even if the Council has, for sometime since its establishment in 1996, worked in the absence of a clear determination in this regard, it has now this system to apply.

The proclamation has instructed that the decisions of the House shall be published in a special issue. This arrangement helps to ensure enforceability of decisions of the House. Pursuant to this system of according the precedent effect to final rulings of constitutional adjudication, decisions of the House are going to have the effect of law and seek observance by all concerned persons or organs. For a law to enter into force, publication in the official *Negarit Gazzeta* is required. However this is not required for the rulings of the House in cases of constitutional adjudication. Publication of a special issue is taken as an alternative for that. The House, as the final authority on matters of constitutional adjudication, is required to ensure publication of its rulings in a special publication issued for this purpose. This is an important task that needs to be implemented with due care and with sufficient distribution, as such rulings are going to have significant effect.

In the face of the dual setup of constitutional adjudication, publication will be of significant importance, because that will help enable persons and organs authorized to launch cases for constitutional adjudication to check whether the House has considered the case and a ruling has been rendered on it. It is also necessary for the legislative, executive and judicial organs to be kept informed of such decisions that affect their daily work.

The House of Federation proclamation requires that federal and state legislatures have to be consulted, especially when the process of constitutional adjudication involves a law the constitutionality of which is contested. With the dual law-making being in place in Ethiopia this appears to be a matter that needs to be considered with care and due diligence. It appears that this is the reason for inclusion of article 16 (2) of the proclamation on the House of Federation which provides that the federal or the state legislative body may be communicated with within six months so that it amends, changes or repeals the law in question before a final decision of unconstitutionality is rendered by the House.

X. ROLE OF THE JUDICIARY

The judiciary is an institution that assumes a key role in the process of ensuring democracy and the rule of law. The judicial branch of the state is normally charged with the task of ensuring protection of rights and freedoms recognised by the constitution and subsequent legal sources. Hence, constitutional recognition is accorded to the judiciary and to its existence as an organ independent of the control of the executive branch of the state. Through the exercise of its judicial function the judiciary doesn't end up merely resolving disputes between or among parties to a dispute, but also plays a key role in deterring arbitrary exercise of governmental power. In the present system of the judiciary in Ethiopia the supreme judicial authority is vested in the Federal and State Supreme Courts in their respective jurisdictions.

The stated task of the judiciary keeps the judiciary closer to the functions of the Council of Constitutional Inquiry, the House of Federation and the state Constitutional Interpretation Commission or Council of Nationalities. In its daily practice, the judiciary is the primary institution where the constitution is to be under constant consideration. The challenge however is that a clear delimitation of competence in connection to matters that involve determination of constitutionality has not yet been developed to govern the relationship between the Council of Constitutional Inquiry and the House of Federation on the one hand and the judiciary on the other hand. It is

obvious that there are explicit provisions that determine the relationship between those organs in a limited way. The constitution and the proclamation on the Council of Constitutional Inquiry stipulate that a case might be referred by the court for consideration by the Council and the Council can also remand a case to the concerned court when it finds that there is no need to interpret the constitution or may instruct the court to suspend a proceeding or execution of a case which is under consideration. However the matter requires thinking beyond that, as it is impossible to draw a clear demarcation in their scope of competence. Courts can not avoid consideration of the constitution in disposing cases that come to their attention and no sufficient guidance to that effect is developed. Then cases being handled by the judiciary can reach the Council of Constitutional Inquiry on referral by the courts or when filed by an interested party. So far, only a couple of cases have been referred to the Council of Constitutional Inquiry by the courts. These are cases referred by the North Gonder Woreda Court and The Federal First Instance Court. Else the courts seem inclined to entertain cases that are brought to their attention and are within their competence. In the absence of clear reason, courts tend to avoid blanket referral of all claims of constitutionality or constitutional interpretation to the Council of Constitutional Inquiry.

XI. THE PLACE OF TRADITIONAL AND RELIGIOUS RULES AND INSTITUTIONS

Ethiopia is a country of diverse culture, religion, tradition and local institutions. Added to that, the constitutional recognition of the right to be adjudicated by traditional and religious institutions and other related rights implementation poses a challenge in view of constitutional interpretation or adjudication. The traditional or religious laws in some aspects are likely to emerge inconsistent with the principles and rules enshrined in the formal laws, particularly with some of the rights recognised by the constitution. There may therefore arise instances where determination of constitutionality could be at issue, calling for the role of the Council of Constitutional Inquiry and the House of Federation. This may present a formidable difficulty involving complex issues related to determination of the interaction between the formal laws and religious rules such as the Sharia and the

customary rules, like in the case of the ADDA system in Afar and the Gadda system in Oromia. How do these constitutionally recognised and partly institutionalised religious or customary institutions interact with these constitutional organs? Does the Council of Constitutional Inquiry need to consider the rules of these organs in executing its task of interpreting the constitution or determining issues of constitutionality? What should the relationship between rules of these institutions and the constitution be? This could be complicated especially in the absence of detailed rules to guide such an interaction.

Though not many cases have yet arisen in this regard, there was an instance where a case had reached the CCI and had its root in the right to be adjudicated by religious laws and institutions. If we, for instance, compare this issue with the system adopted in Egypt for similar matters, the Egyptian constitution incorporates explicit provisions that guide the determination by the constitutional court on such issues. These provisions state that Islam is the official religion and that the principal source of legislation is Islamic jurisprudence. At the other end the Ethiopian federal and state constitutions declare the separation of state and religion in an explicit manner. However, no mechanism seems to have been established yet, as no significant literature or precedence has been developed in this regard. Thus, if an issue of such a nature arises, its determination won't be easy as there are no developed rules or precedents to guide it.

CONCLUSION

It is evident that the present mechanism of constitutional control in Ethiopia is characterized by a dual setup envisaged by the federal and state constitutions. All the state constitutions have addressed this issue while only very few have established the institutions necessary for its execution. Owing to the prevailing ethnic, cultural and religious diversity such mode of arrangement of constitutional adjudication seems necessary. However, the absence of the institutional setting to ensure implementation of this task at state level is undoubtedly affecting the overall process of constitutional adjudication. Considering the complex federal framework that is in place, coupled with the prevailing pluralistic mode of adjudication (i.e. the judiciary in the

formal structure and the recognition accorded to religious and traditional institutions by the federal and state constitutions) and the broader recognition of human rights, one can envision the complexity of issues that this process of adjudication is expected to address. Besides, no system has been developed to delimit the scope of competence between the state and federal organs of constitutional adjudication. Consequently some cases, in the event of rejection by the federal Council of Constitutional Inquiry on grounds of non-exhaustion of local remedies, are likely to remain unaddressed.

Since the Council of Constitutional Inquiry commenced its function in 1996, the cases that appear before it are growing in size and complexity. The complexity of issues caused by the dual setup of the system of constitutional adjudication, the multicultural and multilingual background of society and the degree of constitutional recognition accorded to rights and freedoms warrants a full-time Council that is able to execute its task with sufficient time and research. Though the proclamation on the House of Federation instructs for deliberation of decisions on constitutional adjudication in the shortest possible time, in reality constitutional adjudication is taking longer time than anticipated by the law. The fact that the Council of Constitutional Inquiry is organised to work in sessions has partly contributed to this. Owing to the complexity of issues that call for constitutional adjudication, it appears that the Council of Constitutional Inquiry needs to be organised to work full time and be assisted by full-time experts. This is a matter that the Council of Constitutional Inquiry proclamation has also provided, stating that members of the Council may be assigned to work at the head office permanently. Therefore, considering the precedence effect and the far-reaching consequence of the decisions of the House of Federation, the Council needs to be institutionalised in order to be in a shape to assist the House to the level required.

A matter of equal importance in this regard is that the decisions of the House need to be publicized and made accessible. No clear mechanism of communicating rulings of the House is however in place yet. In the absence of this mechanism it will be difficult for respective institutions and parties to identify whether the Council and the House

have reviewed the case. Because of the fact that exhaustion of local remedies is adopted as a principle in the process of constitutional adjudication, parties are required to comply with that. However in the absence of publicity of decisions of the House, parties will be faced with difficulty in the exercise of this right.

The role of the judiciary in the present system of constitutional adjudication is not very clear. It however appears that the judiciary in the execution of its daily functions can not be prevented from applying the constitution as it is difficult to imagine a court case that doesn't involve consideration of the constitution. That seems also to be what is going on in practice as not many cases are being referred by the courts to the Council.

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