



## CONSTITUTIONAL INTERPRETATION IN ETHIOPIA

MOHAMMED DILU HUSSEN

DEPARTMENT OF POLITICAL SCIENCE AND INTERNATIONAL  
RELATIONS, COLLEGE OF SOCIAL SCIENCE AND HUMANITIES, WERABE  
UNIVERSITY, WORABE, ETHIOPIA

Email: [mohammeddilu32@gmail.com](mailto:mohammeddilu32@gmail.com)

### Abstract

*This paper tries to discuss Constitutional Interpretation in Ethiopia. To this end, the main purpose of this paper is to explain Constitutional Interpretation in Ethiopia. The paper has four parts. Part one dealt about the overview of constitutional interpretation. The second part of this paper discusses interpretative principles of constitutions. The third part dealt with constitutional interpretation in Ethiopia. The fourth part of the paper mainly elucidates the role of courts and other institutions in constitutional interpretation.*

*As Constitution is the supreme law of the land. The interpretation of the constitution is the big issue in different part of the world. The House of Federation the upper house has ultimate power to interpret the constitution in Ethiopia. Most of the members of the House of Federation are not legal expert to interpret the constitution. So the Council of Constitutional Inquiry is play advisory role to the house of federation. Unlike the Ethiopian system of constitutional interpretation many systems in the world prefer ordinary Courts, other have vested Constitutional Courts the interpret body of the constitution.*

### Introduction

The essence of constitutional interpretation is preserving supremacy of the constitution. So far, constitutional interpretation unfailingly entails complex questions having equally competing but conflicting socio-politico-legal aspects and options. Finding a feasible and constitutionally appealing way out from the nexus of these three-dimensional issues obviously requires a sound background of constitutionalism and knowledge of appropriate principles of constitutional interpretation. In this regard the FDRE Constitution provides little instruction on how the constitution should be interpreted where the need arises, except for fundamental rights and freedoms specified in chapter three of the constitution. The general reference to international instrument in the interpretation of fundamental rights and freedom does not help much if it is not specified. Apart from the constitution Proclamation No. 251/2001 authorizes HoF to identify,

develop and implement principles of constitutional interpretation as it deems appropriate. However, constitutional interpretive principles have not developed yet by HoF. Hence, lack of constitutional interpretive principles/methodology result in lack of consistency and predictability of how the constitution is interpreted as well as the outcome of the decisions itself.

Interpretation of legal texts whether it be a sub-constitutional law or the constitution itself has presented problems from the earliest times to the present day (John L. Murray). Hence, interpretation of constitutions is no exception in this regard; hence, it is worth defining what the meaning of constitutional interpretation is all about. Theoretically speaking constitutional interpretation may be regarded as just another branch of legal interpretation (Jens Elo Rytter, 1999). This is because a constitution is a law though with a higher significance. The constitution deals with issues more fundamental than do most other legal documents, such as proclamations (ibid). Moreover, from a political perspective the stakes involved in constitutional interpretation are much higher than in others fields of legal interpretation (ibid), because the constitution is the superior law of the legal system, commanding all branches of the government.

### **Overview of Constitutional Interpretation**

Constitutional interpretation can be defined as ‘the activity aimed at extracting from a written constitution the general normative content and specific meaning of its provisions’.

It is not however only assigning certain meaning to the constitutional text. It has a lot to do with maintaining the supremacy of the constitution. The supremacy clause is provided in the FDRE Constitution that ‘any law, customary practice or a decision of an organ of state or a public official which contravenes [the] shall be null and void’ which establishes an ‘objective normative order and value system’ (Takele Soboka Bulto (2011) so as to provide ‘a yardstick against which the legal validity of legislations and governmental actions and inactions are measured’ (Ibid). Takele Seboka referred the constitution as a ‘grand norm’ against which all governmental actions are required to conform to it.

Constitutions are not self-executing documents, hence they have to be interpreted to adapt to changing circumstances by keeping in consistence with the underlying fundamental principles and values of the constitution. The determination of constitutional validity of the executive and other branches of government and interpretation of constitution do invariably involve complex questions having equally competing but conflicting socio-politico-legal dimensions and choices. Finding a viable and constitutionally appealing way out from the web of these three-dimensional issues obviously requires a sound background of the Constitution, constitutionalism as well as interpretive principles. In the following sub sections, an attempt is made to assess the constitutional and legislative basis of constitutional interpretive principles in Ethiopia.

## **Interpretative Principles in Constitutions**

Certain constitutions like the Republic of South African Constitution, provide a detailed provision as to how the constitution be construed by the constitutional court (Section 39 cum. Section 36 of the Republic of South African Constitution ), some other constitutional systems develop a distinct constitutional interpretive system like that of in Germany (Jeffrey Goldsworthy, 2006) that the principles of proportionality and rationality is employed where the state must satisfy to justify laws that limit basic rights (ibid).

The Ethiopian constitution offers little guidance on how the constitution should be interpreted where the need arises, except for fundamental rights and freedoms specified in chapter three of the constitution wherein it stipulates to ‘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’ (Article 13 (2) of the FDRE Constitution).

## **Constitutional Interpretation in Ethiopia**

### **Ethiopia’s Constitutional Interpretation Arrangement**

The FDRE constitutional interpretation arrangement is characterized as a centralized system of constitutional review as opposed to decentralized system of constitutional review. For instance, in some countries, constitutional interpretation is carried out by general jurisdiction courts capped by a supreme court which is decentralized (Paul Gawirtz, 2000); yet in some countries constitutional interpretation is performed by a specialized constitutional court like Conseil Constitutionnel in France or Federal Constitutional Court in Germany which can be considered as centralized systems (Danielle E. Finck,1997). The same is true with Ethiopian constitutional arrangement too, i.e. though it was not conferred up on a special court like to that of Germany, it is a business of the second chamber of the FDRE parliament known as The House of Federation. However, some argue that the Ethiopian system of constitutional interpretation arrangement can be characterized as mixed system of judicial review which apportions constitutional adjudicating power between the regular judiciary and a separate constitutional interpreting body like HoF (Takele Soboka Bulto, 2011). This argument is based on the constitutional provision which states that all branches of the Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce chapter three of the Constitution (Article 13 (1) of the FDRE Constitution). However, this argument is based up on a weak premise that ignored the constitutional provision which unequivocally apportioned the power to interpret the Constitution to the HoF by stating ‘all constitutional disputes shall be decided by the House of the Federation’ (Article 83(1) of the FDRE Constitution). Therefore, the Ethiopian constitutional interpretation arrangement can be considered as a centralized system of constitutional review where by the HoF and the CCI are the only institutions entrusted to this business.

## **The House of Federation and the CCI**

The House of Federation is one of the two houses of the Federal parliament established as per the Constitution (Article 53 of the FDRE Constitution). Unlike bicameral parliaments of other federations, it is, however, a non-legislative chamber of the parliament with different set of powers and responsibilities one of which is the power to interpret the constitution. Members of the House of Federation are selected from each respective Regional State's Council for a period of five years term. They are meant to represent the diverse nations, nationalities and peoples of Ethiopia so much so that each nation and nationality is represented by a representative, and for an extra one million population of the respective nationality an extra representative is allowed.

The number of representatives in the HoF has increased over the years due to an increase in population and recognition of new nationalities either by the HoF or Regional State Councils as per the Constitution. In order for the proper discharge of the responsibility of settling constitutional disputes through interpretation of the Constitution, the FDRE Constitution has established the Council of Constitutional Inquiry (Article 82 of the FDRE Constitution ) so as to support the House in the process of interpretation. Here the Council submits its recommendation to the HoF with regard to the constitutionality of the matter submitted to it yet the final decision on the constitutionality or otherwise of the matter rests with the House (Article 84 (2) of the FDRE Constitution).

The Council of Constitutional Inquiry, established under Article 82 of the Constitution, hears the first level of constitutional matters before submission to the Council of the Federation (Article 84 of the FDRE Constitution and Article 3 of Proclamation No.798/2013). It is composed of eleven members, consisting of the President and Vice-President of the Federal Supreme Court, 'six legal professionals appointed by the President of the Republic on recommendation by the House of Peoples' Representatives, who shall have proven professional competence and high moral standing', and three persons among members of the HoF (Article 84 of the FDRE Constitution; and Article 15 of Proclamation No.798/2013). The Council of Constitutional Inquiry has the power of constitutional interpretation, but its decisions must be approved by the HoF. The CCI serves as a filter for those cases adjudicated by the House; if the constitutionality of a federal or state law is at issue and is submitted by a "concerned party to the dispute or court," the CCI hears the case and submits its final decision to the HoF (Article 84 of the FDRE Constitution & T.S. Twibell, 1999). In situations where the constitutional issue arises in courts, the CCI has the option of remanding the case if they determine no constitutional issue exists, or interpreting the case and submitting their recommendation to the HoF (Article 84 (3) of the FDRE Constitution).

## **The Role of Courts and Other Institutions in Constitutional Interpretation**

One of the unique features of the FDRE Constitution is that it bases its premises on direct and indirect popular participation (Article 8 (3) of the FDRE Constitution). That is why beyond a mere ratification, the FDRE Constitution is framed in such a way that its implementation

requires a popular participation so much so that the power of constitutional interpretation is conferred to the HoF, the second chamber of the FDRE parliament more of political body presumed to represent the various nations, nationalities and peoples of Ethiopia further proves the aforementioned assertion. It is an attempt to respond to a debate of counter majoritarian dilemma (Tom Ginsburg, 2003). With reference to maintaining constitutional order in Ethiopia, there are several stake holders. On the one hand we have institutions and individuals engaged in the application and protection of the constitution. It comprises the three branches of government i.e. the executive, legislative and judiciary, political parties, individuals holding political office, all citizens and civic societies (Article 9(2) of the FDRE Constitution). These institutions have the power to interpret the constitution to the extent that their decisions and actions do not contradict to the constitution. In other words their power to interpret the constitution is to the extent necessary so that they can ensure laws they enact or decisions they made are in conformity with the constitution. They have to understand and apply the values and principles of the constitution, hence; their interpretational power is limited to that extent. As far as the role courts in constitutional interpretation is concerned, their role is only limited to referring the case to CCI when encountered with constitutional disputes (Article 84 (2) of the FDRE Constitution). Though there are contradicting views about the role of courts in interpreting the constitution, a cumulative reading of Article 61(2) and Article 83(1) of the constitution is explicit in demarcating the sole mandate of HoF in constitutional interpretation. Where Article 62(1) mandates the HoF to interpret the Constitution and Article 83(1) stipulates that ‘all constitutional disputes’ to be decided by the HoF only.

Constitutional interpretation is important because as stated in Article 9(1) of the FDRE Constitution, laws and decisions of such institutions will not have legal effect if they undermine the values and principles of the constitutional provisions. Therefore institutions must make sure that their laws, procedures, judgments or decisions are in conformity with the values and principles of the constitution. This is because institutions are tasked with implementing the constitution. Hence, whenever there is a law, decision or a customary practice that violates the constitution, the HoF has exclusive mandate to ensure that the unconstitutional decision or customary practice has no legal effect. Therefore it is of paramount importance to develop a methodology of constitutional interpretation in Ethiopia.

## **Conclusion**

The Ethiopian approach to methods of constitutional interpretation lacks predictability even in some cases experiences inconsistencies in the decisions of HoF in similar cases. The lack of and/or unable to develop a method of constitutional interpretation added to the existing problems. Moreover, the reasoning of the CCI/HoF, in almost all cases, is very brief and lack proper explanation and argumentation to reach at conclusions which clearly show lack of workable methodology.

Lack of proper methodology of constitutional interpretation is also evident when constitutional rights are limited or suspended. The reasoning of CCI/HoF lacks in depth analysis of the alleged act of a legislative or executive against the essential elements of the limitation clause provided in those constitutional provisions.

Moreover, the HoF failed to uphold its own laws with regard to giving final decisions within two years' time from accepting the case and also relinquishes its mandate after it has been presented before it. Its institutional incompetence is exacerbated by the fact that its large number of gathering has hindered a thorough and in-depth debate over constitutional values and principles pertinent to the case.

Furthermore, the parties trust towards the CCI has been questioned by the fact that in certain cases, appellants often lodge a complaint over some members of the CCI not to sit over their case as they have already seen the case as FSC judge capacity.

It has been revealed that unable to introduce the proportionality and balancing analysis in dealing with the limitation and possible interference of fundamental rights and freedoms enshrined in the constitution has resulted in the lack of proper analysis of the legality and legitimacy the interference or limitation concerned. This in turn resulted in the lack of certain level of predictability and transparency in the decisions of HoF so much so that it has failed to attain institutionalized reason in constitutional interpretation.

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