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JOURNAL OF ETHIOPIAN LAW

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JUDICIAL QUIESCENCE AND ITS EXCUSES IN THE WAKE OF AUSTRALIAN COUNTERTERRORISM HYPERLEGISLATION

Willem de Lint[*] *& Wondwossen Demissie Kassa*[**]

Abstract

In this paper, we seek to establish the case that the counterterrorism space in Australia is ripe for greater judicial proactivity than has thus far not been forthcoming. Judges in Australia, unlike national courts in comparable jurisdictions, have in the main remained quiescent or deferential where what is required is no more than institutional realism or pragmatism. After providing a synopsis of the Australian review culture and citing authorities that have already indicated that the review style will move in ebbs and tides, we provide the basis for the argument that there is ample room in this area of public law, for a pragmatic judicial approach.

Key-terms: judicial quiescence, judicial activism, counterterrorism, Australia

Introduction

Precautionary justice poses a challenge to rule of law legality and to the judiciary, its primary guardian. In this paper we seek to establish the case that the counterterrorism space is ripe for greater judicial proactivity and in many jurisdictions this has not been forthcoming. We explore the concept of institutional pragmatism, by which we refer to a tradition of judicial review that gives sufficient weight to the maintenance of the judiciary in its role as

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defender of rule of law legality. Focussing on Australian judicial experience, we begin with a discussion of the meaning of judicial activism and its changing connotation. This then ties to the second concern, which is how to evaluate judicial activism or quiescence in this space. Relying mainly on secondary authorities, we evaluate how courts have ruled during Australia's counterterrorism hyper legislation period regarding the balance between rule of law legality and the national security interests of government. In accounting for the Australian record, we explore what we perceive as two weak explanations for the review regime. Our finding is that Australia has in the main remained quiescent or deferential when what is required is no more than institutional realism or pragmatism.

We employed comparative approach, referencing the USA, Great Britain, Canada and Australia. These countries enjoy many points of similar socio-cultural experience informing approaches and practices of justice. For the comparison of proactivity between the high courts of Canada, the United States and the United Kingdom we draw primarily on the works of Kent Roach and Eyal Benvenisti. We have not found a study that compares and contrasts the performance of courts on precisely equivalent legal issues, and any comparison between Australia and other Anglo-Saxon jurisdictions is subject to this limitation. Nonetheless, we trust that the importance of an assessment of this pivotal period of judicial review will stimulate the call for more evidence and provoke further analysis of the dynamic institutional context of this echelon of Australian legal culture.

Over the past twenty years anti-terror laws have been proliferating around the world in similar form. The active encouragement of the United States and the United Nations has shaped national interests, and third world countries have more or less unquestioningly adopted anti-terror laws of the west.[1] Both Australian and Ethiopian anti-terror laws trace their source to the United Nations Security Council Resolution 1373 (2001). Australian anti-terror law was among the legislation considered during the drafting of Ethiopia's current Prevention and Suppression of Terrorism Crimes Proclamation No.1176-

[1] Beth Elise Whitaker, *Exporting the Patriot Act? Democracy and the 'War on Terror' in the Third World, 28 (5)* THIRD WORLD QUARTERLY 1017-1032 (2007).

2020.[2] Such has been the zeal to establish these laws and the zest to do so borrowing from Anglo-American and European experience.[3] One key comparative element is the relative institutional weighting of the judiciary. This paper pursues this latter element; if there is a borrowing of experience across national boundaries, what may also be invited is the relative imperviousness of the security apparatus to 'checks and balance' legality.

1. Judicial Review

In a Westminster System under a separation of powers doctrine set out in the Australian Constitution, the strength of government is found in the balancing heft that is provided, independently, by each of the branches. As a plenary institution, the judiciary is vested with a remit of sovereign capacity. Judicial review is a core feature of liberal democratic government. It is a means of providing that public officials are accountable for the legality of their actions, state jurisdictional overreach is stymied and constitutional principles and founding intentions continue to breathe life into sovereign government. Considerable institutional autonomy is a necessary condition of liberal democratic governance in this system. Where important matters of evolving rights and freedoms come before a court, the review that it provides cannot be uniformly, predictably or regularly deferential, as this will shift power 'unconstitutionally' to the executive or legislative branches. Yet, in matters of national security, it has been widely argued, following an interpretation of Locke and others,[4] the judiciary must avoid appearing to stand in for executive or legislative decision-makers, both of which are in a better position to gauge the mood of the polity and carry out the quotidian matters of governance.

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[2] Wondwossen D. Kassa, co-author of this article, was one of the members of the Working Group that drafted Ethiopia's current Prevention and Suppression of Terrorism Crimes Proclamation No.1176-2020.

[3] KENT ROACH, THE 9/11 EFFECT 427 (Cambridge University Press, 2012); Galli, F. *et al.*, *Terrorism investigations and prosecutions in comparative law*, 20(5) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, 593-600 (2016).

[4] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, 20-24, 28-30 (C.B. Macpherson (ed), Hackett Publishing, Classic Series, 1980); RICHARD TUCK, NATURAL RIGHTS THEORIES (Cambridge University Press, 1981).

While in principle, judicial review is a sovereign capacity, in its everyday function based on its constitutional jurisdiction the court may be more or less proactive. In this regard, relative deference is a function of the court's reference to dynamic political and socio-cultural contexts or historical antecedents.

In Australia (since 1986), the highest power of judicial review is vested in the High Court.[5] While *that* the Court possesses judicial review power is mostly uncontroversial, the degree to which the court exercises this power of review over legislative and executive acts has varied from time to time. Following Foley, it is possible to divide the High Court's history of judicial review into four periods/phases: the formative years, separated into the early years (1903-1919) before the end of WWI under Chief Justices Griffith, Barton and O'Connor, the Dixon years (1952-1964), the Mason Court (1987-1995), and the contemporary period (1996 to the present), established by Chief Justice Gleeson and continued by Chief Justice Robert French.

In her detailed account of the court's history, Foley has demonstrated that with the exception of its earliest couple of years and the short-lived Mason period (1987-1995) the Australian High Court - a 'unique creature with its distinctive history' - has acted within the framework of a legalistic or positivist approach to judicial review.[6] The die was cast, as it were, under Dixon. Serving for a lengthy period as Justice and Chief Justice of the High Court, Dixon taught generations of Australian judges that 'there is no other safe guide to

[5] This is covered in Chapter III, under section 76(i), by which the High Court has jurisdiction in matters 'arising under this Constitution or involving its interpretation', or in other words from what is necessary given the nature of federalism. The nullifying authority is also in Covering Clause 5, according to which courts 'must be able to determine whether a law is made "under the Constitution" to decide if that law is binding.' In addition, the power is found in Section 75(v), which has been interpreted to 'support judicial review powers generally,' and Section 109, which contemplates that courts will review the relative overreach of state and federal laws. Katheleen E. Foley, Australian Judicial Review, 6(2) WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 281, 286-7 (2007).

[6] *Id., at* 281.

judicial decisions in great conflicts than a strict and complete legalism.'[7] Legalism for Chief Justice Latham, means that 'contextual and consequential factors of a political, economic and social nature *are not taken into account*.'[8] For Dixon, review should be 'rule-driven, precedent-focused, and *greatly prizes certainty in the law*.'[9]

In contrast, the Mason Court, according to Foley, used 'more "open-ended" concepts in constitutional interpretation' and did this in part by drawing on foreign case law and international law.[10] Using 'wider' precedents, it was willing to interpret the Constitution more creatively or 'actively.'[11] Despite awareness that Australia needed to become more active in complying with international law in the area of human rights and political rights, it is noteworthy that the legitimacy of the Mason Court, according to contemporaneous opinion, was 'increasingly subject to challenge.'[12] Reflecting on the Mason Court in 1997, Craven observed that the position of Australian judges vis-a-vis judicial activism had changed from the traditional legalist view. Craven thought that repugnance against judicial activism was being usurped by what he describes as 'judicial triumphalism,' or the view that 'judges should feel free to take control of the law and to develop it in

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[7] *Swearing in of Sir Owen Dixon as Chief Justice*, 85 C.L.R. xi at p. xiv (1952) quoted in Michael Kirby, *"Judicial Activism"? A Riposte to the counter-reformation*, 13 (1) OTAGO LAW REVIEW 1, 3 (2005).

[8] BRIAN GALLIGAN, POLITICS OF THE HIGH COURT: A STUDY OF THE JUDICIAL BRANCH OF GOVERNMENT IN AUSTRALIA 258 (University of Queensland Press, 1987) emphasis added.

[9] Foley, *supra* note 5, at 292. Emphasis added. For instance, under *D'Emden*, the Court under Griffith CJ ruled, using 'ordinary statutory interpretation that formed part of the English legal canon' that the state legislature cannot 'fetter, control or interfere with, the free exercise of legislative or executive power of the Commonwealth…unless expressly authorised by the Constitution.' *Id., at* 295.

[10] *Id., at* 306.

[11] *Id., at* 310. For example, in *Street,* the Mason Court distinguished itself 'in the area of constitutional guarantees of rights and immunities' and by adopting 'a more radical approach to constitutional decision-making.' In *Lange v. Australian Broadcasting Corp* it recognized an *implied* constitutional freedom, freedom of communication, and in *Leeth v. Commonwealth*, it recognized an implied constitutional right of equality. *Id., at* 309.

[12] GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 74 (Oxford University Press, 1999) quoted in *Id., at* 314.

accordance with their perceptions of the needs and desires of contemporary society.' He explained the shift in approach as follows:

> Many Australian judges now are besotted with the learning and legal style of the United States, where a free-wheeling Supreme Court wields a Bill of Rights to the destruction of any pervasive claim of legislative supremacy. Moreover, this obsession with curially enforced rights as a means of asserting judicial supremacy over legislature and executive is powerfully reinforced by the current international fashion for broadly framed guarantees of human rights. Finally, the need for the legal profession generally to re-invent itself from what has been seen as a privileged and unresponsive professional élite, into a modern, vibrant force for the protection of civil rights against governments, cannot be over-estimated.[13]

This captures the contemporaneous sentiment. But as Foley concludes, the Mason Court was but a brief departure. The Gleeson Court, and subsequently the French Court, reaffirmed that textualist constitutional legalism is at the heart of Australian High Court review.[14] Kirby notes that Dixon's position continues to be influential in the political culture of the Australian judiciary and that judges who do not agree with Dixon's exposition of legalism are "denounced as 'judicial activists.'" Commenting on the institutional power of the executive and front bench and referring to those who are swayed by the lingering effect of Dixon's strict legalism, Kirby says that there are still those who are 'contemptuous of fundamental human rights and jealous of any source of power apart from their own.'[15]

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[13] Greg Craven, *Reflections on Judicial Activism: More in Sorrow than in Anger*, (The Samuel Griffith Society proceeding, 1997) Vol. 9, Chapter 9, 4 http://www.samuelgriffith.org.au/papers/html/volume9/v9chap9.htm

[14] In *Al-Kateb*, on whether the Migration Act, if it authorised indefinite detention of unlawful noncitizens was constitutionally invalid, Justice McHugh of the Gleeson Court drew on precedent to 'assert new principles' to find that it was not. In McHugh's words, Justice Kirby's dissent was wrongheaded in seeking to find implied rights by relying upon international law or international instruments, where these 'are not even part of the law of this country,' and thereby 'constru[ing] the Constitution.' Foley, *supra* note 5, at 320.

[15] Kirby, *supra* note 7, at 4.

A. Judicial Activism (Re)considered

The term 'judicial activism' dates back to 1947, where, in a magazine article, Arthur Schlesinger profiled the U.S. Supreme Court justices using a tripartite categorization, 'champions of self-restraint', 'middle ground' and 'activist.' [16] In the 1950s in the U.S.,[17] the term came to be used by establishmentarian commentators primarily against the 'misuse' of judicial authority in support of civil rights applications or campaigns[18] or, in the words of Anthony Lewis, 'to boldly fix up the wrongs of our system.'[19] However, there was also much support for judicial proactivity. For example, Albon P. Man observed that, 'Murphy's votes in civil rights cases reflect not only his *objectivity* and *independence* as a judge but also his position as perhaps the outstanding judicial activist on the Court.'[20] Similarly, Justice Rutledge was lauded as a judicial activist when it came to civil rights matters for exercising judicial self-restraint in economic matters.[21] In 1949, Supreme Court Justice Brandeis was described as 'a *pragmatic* judicial activist who saw in the courts a powerful instrument to be grasped by the people in ameliorating social and economic conditions.'[22]

At least between the late 1970s and currently, that the judiciary should present a robust counter to reactionary or overweening government has become a minority position. Most commentators, both popular and learned, celebrate

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16 Arthur M. Schlesinger, Jr., *The supreme court: 1947*, FORTUNE, 202, 208 (January 1947) cited in Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism,* 92 (5) CALIFORNIA LAW REVIEW 1441 (2004).

17 Erwin Chemerinsky, The Rhetoric of Constitutional Law, 100 MICHIGAN LAW REVIEW *2008*, 2019-20 (2002).

18 Kmiec, *supra* note 16, at 1451.

19 Anthony Lewis, *Supreme Court Moves Again to Exert Its Powerful Influence*, NEW YORK TIMES (online), 20 June 1964 <http://www.nytimes.com/1964/06/21/supreme-court-moves-again-to-exert-its-powerful-influence.html>.

20 Albon P. Man, Jr., *Mr. Justice Murphy and the Supreme Court*, 36 (7) VIRGINIA LAW REVIEW 889, 916 (1950). Emphasis added.

21 Lester E. Mosher, *Mr. Justice Rutledge's Philosophy of Civil Rights*, 24 NEW YORK UNIVERSITY LAW QUARTERLY REVIEW 661, 667-68 (1949).

22 Note, *Administrative Law: Judicial Review Denied Attorney General's Order for Removal of Enemy Alien*, 34 CORNELL LAW QUARTERLY 425, 429 (1949). Emphasis added.

judicial restraint and castigate activism.[23] Even the minority of scholars that advocate judicial proactivity in some contexts admit that the term generally carries a strongly negative connotation.[24] However, it may be argued that lack of support for activism may be related to misunderstandings of various factors that go into what is meant by the term, which are often conflated and confused. For example, Kmiec[25] has identified five distinct meanings (disregarding precedence, legislating from the bench, departing from accepted interpretive methodology, results oriented judging, nullifying unconstitutional actions). Such conceptualizations, in failing to distinguish a common continuum of values and methods, do not necessarily relieve the confusion. We therefore prefer to limit our exposition of the term to two dimensions - means and ends – and restore the basic logic of Schlesinger's categorisation.

We come to this view in light of the following. First, we reject that nullifying unconstitutional actions of other branches of government constitutes activism, per se.[26] As has been argued, striking down legislation on the basis that it is incompatible with a constitution should not be understood, by itself, to constitute judicial activism. As Kmiec[27] notes, where the court invalidates plainly unconstitutional law, such as 'a statute that establishes a national religion', this may assert the institutional authority of the court, but it is the context and direction of judgment that must also be considered before it may be contended that such a court is activist. Thus, judicial activism is not synonymous with 'doing the job' (to use Kirby's expression) of judicial review.[28] As Lindquist has observed 'judicial activism has to be distinguished

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23 Erwin Chemerinsky, *Perspective on Justice*, *LOS ANGELES TIMES* (New York), 18 May 2000, at BI 1 cited *in Kmiec, supra* note *16.*

24 Chemerinsky, *supra* note 17, at 2020.

25 Kmiec, *supra* note 16, at 1464-1474.

26 Cass R. Sunstein, *Editorial, Taking Over the Courts*, *New York Times* (New York), Nov. 9, 2002, at A19 cited in *Id.*

27 Kmiec, *supra* note 16, at 1464.

28 Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEXAS LAW REVIEW 1207, 1207-10 (1984). On the difficulty of drawing a line between judicial review and judicial activism see: Kmiec, *supra* note 16, at 1465-66.

from legitimate enforcement of the constitution.'[29] To paraphrase Kirby's citing of the *Communist Party Case,*[30] the court is merely *pragmatically institutionally defensive* when it acts to maintain rule of law legality, because this is the basis of its plenary institutional authority. But whilst the court should 'declare what the law is, even in difficult or politically sensitive cases'[31], scholars sometimes mistakenly equate annulments with judicial activism.

More difficult to categorize are cases, as per Sunstein,[32] where the court strikes down laws 'that are arguably *constitutional*.'[33] Consistent with Graglia's point, activism concerns "the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit'[34]. Taylor[35] succinctly refines Sunstein and Graglia as follows:

> Judicial activism involves invoking novel or debatable interpretations of the Constitution to strike down democratically adopted state or federal laws and practices that offend one's moral or political beliefs, while showing relatively little deference to the other branches of government and the voters.

In these cases, the Court may take a position that reflects conservative judicial activism[36] or progressive judicial activism.

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[29] Stefanie A. Lindquist, *The Political and Academic Debate over Judicial Activism*, in MEASURING JUDICIAL ACTIVISM 1, 39 (Stefanie A. Lindquist and Frank B. Cross (eds), Oxford University Press, 2009).

[30] *Communist Party Case* 83 C.L.R. 34 (1951).

[31] Kmiec, *supra* note 16, 1465-1466.

[32] Sunstein, *supra* note 26; Cass R. Sunstein, *Tilting the Scales Rightward*,, N.Y. TIMES (New York), Apr 26, 2001, A23 cited in Kmiec, *supra* note 16.

[33] Emphasis added. For more see: Larry D**.** Kramer, *Foreword: We the Court,* 115 HARVARD LAW REVIEW 4 at notes 5-9 and accompanying text (2001).

[34] Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARVARD JOURNAL OF LAW & PUBLIC POLICY 293, 296 (1996).

[35] Stuart Taylor Jr., *The Tipping Point*, NATIONAL JOURNAL 1810, 1818 (2000).

[36] Geoffrey Stone, *Selective Judicial Activism* 89 TEXAS LAW REVIEW 1423 (2011); Earnest A Young, *Judicial activism and Conservative Politics*, 73(4) UNIVERSITY OF COLORADO LAW REVIEW, 1139 (2002).

Kmiec has made a case that other dimensions of activism include disregarding precedence, legislating from the bench and departing from accepted interpretive methodology. However, we wish to maintain parsimony and elegance by distinguishing between, but also relating, means and ends.[37] Thus, it is correct to say that judges choose to disregard precedence as one of the devices they are in a position to exploit, but as per Sunstien and Graglia, it is that they do so in the service of a specific end that is vital to the meaning of activism. It is the political objective that is also close to the heart of other definitions including that of O'Scannlain, 'Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective'[38] and, according to Basman, 'the actions of judges who do whatever is necessary to rule as they personally prefer, regardless of what existing law provides.'[39] Given that judges may depart from an accepted interpretive methodology in order to advance a view, we believe it is vital that that view or end is incorporated. When Kmiec says that the fourth meaning of activism is 'results oriented judging', we would say that reference to objectives ought not to be a distinct category, but integrated.

Applied to the Australian context, it has been argued that in their interpretation of common law, statute or the constitution judges may take a line that is either favourable or unfavourable of an implied or explicit constituency understood as the object of a 'legal, social or other policy.'[40] For Craven, this also implies three different meaning contexts of the term (common law, statute, constitution). Consistent with a preference for parsimony, these provide interchangeable devices, so that we may, for example, posit that we have both left or progressive common law judicial activism and right or conservative common law judicial activism. Likewise, the court construes a relation with the constitution whereby it 'continually up-

[37] For a related approach to understanding judicial activism in terms of 'methods' and 'outcome' see Young, *supra* note 36, at 1147-49.

[38] Diarmuid F. O'Scannlain, *on Judicial activism*, OPEN SPACES QUARTERLY (online), 29 February 2004 <http://open-spaces.com/articles/on-judicial-activism/ >.

[39] Howard Basman, *Judicial Activism easy to criticize, but hard to define and identify*, *THE SUNDAY* (online) 10 November 2002.

[40] Craven, *supra* note 13.

date[s] it in line with perceived community and social expectations, rather than according to its tenor or in conformity with the intentions of those who wrote it.' Craven refers to this as 'progressivism,' and notes that in this action, the High Court of Australia 'has invented an implied freedom of political communication (along with other associated freedoms), a freedom which in reality emerges neither from the words of the Constitution themselves, nor from the wildest imaginings of the Founding Fathers.' He notes that 'constitutional progressivism has been and is the most prominent form of activism practised by the Australian judiciary.'

Let us step back from these words a moment. Kirby analyses four cases in which the Australian High Court has attracted the 'judicial activism' label.[41] Following one of the decisions rendered in 1996, the then Acting Prime Minster of Australia declared that the federal government would appoint 'Capital C conservatives to replace retiring justices of the High Court.' In two of these cases the court inferred rights from the Constitution. In *Dietrich v The Queen* (1992) the court held that a defendant for a serious offence, if unable to afford a lawyer, was entitled to an order halting the trial until the state provides a lawyer to represent him in the trial. That decision was made in the absence of a constitutional provision recognizing one's right to a lawyer. In *Lange v Australian Broadcasting Corporation* (1997), the court upheld an implication of free speech in the Australian constitution.

It is Justice Kirby's contention that the Court is *not activist* in these rulings, despite that politicians, media, and some law organisations may have been making that charge. Kirby notes that an '*implication* was inferred by the High Court from the necessity to make the constitutional system of representative democracy effective and truly workable.' He contends, 'in terms of legal doctrine, none of the decisions is particularly novel. All use well-worn methods of legal reasoning. None, I suggest, deserves the torrent of abuse directed at them.'[42] For Kirby 'deriving implications from written documents is rudimentary lawyering.'[43] Altogether, Kirby says, the Court merely 'did its

41 Kirby, *supra* note 7.

42 *Id.*, at 10.

43 *Id.*

job.' He observes that judicial function must embrace action beyond strict legalism and notes:

> After decades, perhaps centuries, of acceptance of the "noble lie" of the declaratory theory of the judicial function and of so-called "strict and complete legalism" most of us, by the end of the twentieth century, came to recognise the reality of the judicial role in a common law system. Judges face choices. Judges make law. They do so in construing the Constitution, interpreting legislation and reformulating the common law.[44]

To demonstrate that inference from the constitution is an inevitable task of the High Court, Kirby cites *Australian Communist Party v The Commonwealth*[45] *(1951)*. In the *Communist Party Case,*[46] the High Court invalidated the *Communist Party Dissolution Act* on the argument that the legislature was out of bounds when it relied on a Federal Parliament opinion that 'the persons to whom it applies are indiscriminately per se a danger.'[47] In explaining his conclusion, Justice Sir Owen Dixon relied on a broad political and philosophical notion of the rule of law. He treated this as an 'assumption' implied in the Constitution.[48] That assumption helped to determine that the outer boundary of the legislative power of the Federal Parliament had been exceeded. Thus, for him legalism ought not to be so strict that it cannot be consistent with both a willingness to invalidate legislation and protect the rule of law.

For Kirby, 'realism has led courts everywhere to a principle of 'purposive' construction of legislation.' This acknowledges that the judge must perform the necessary and sufficient role of ascertaining the purpose of the legislation so that s/he may give effect to it. To reiterate, under the Constitution, the judiciary in Australia must determine that legislation passed by legislatures

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44 *Id.*, at 1.

45 *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 C.L.R. 1

46 *Communist Party Case* (1951) 83 C.L.R. at 34.

47 *Communist Party Case* (1951) 83 C.L.R. at 7 (McTiernan, J.).

48 Similar reasoning has been applied in other cases. The Queen v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 C.L.R. 254; Melbourne Corporation v The Commonwealth [1947] HCA 26; (1947) 74 C.L.R. 31 at 83; Parton v Milk Board [1949] HCA 67; (1949) 80 C.L.R. 229 at 260.

are indeed law, and this involves plenary power that is only subservient to the Constitution, a document that must be interpreted by the Court. Kirby adds, 'the function of constitutional interpretation too is creative, indeed it is inescapably political in a broad sense of that word.'[49] Following Kirby and the observations of Kmiec, O'Scannlain, and Basman, we would conceptualise activism as the exploitation of the power of the institution of the court (in its devices including interpretation of the constitution, common law precedence) to advance ends in an impasse involving contested symbolic and instrumental political stakes or interests. Thus, the major feature of judicial activism, to use the words of Lindquist is that 'the justices have somehow overstepped their *institutional* boundaries.'[50] Activism may be progressive or left leaning (left activism) as well as reactionary, conservative or right-leaning (right activism). As Bolick has noted 'deference itself may constitute activism to the extent that it leaves in place legislation that unduly restricts those individual rights.'[51] Similarly, Stone has argued that activism may be conservative.[52] Accordingly, judgments may reflect a judge's broad political preferences, and may do so using more or less interpretive licence. That is to say, judges may choose to be less interpretivist when their broad politics is in accord with the overlapping view of authorities (common law, legislative purpose, constitutional division) or may alternatively be more interpretivist when their broad politics is less in accord.[53]

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[49] Kirby, *supra* note 7. The HCA is widely understood to be constrained by constitutional language and an unusually strict interpretation of the separation of powers See *R v Momcilovic* [2010] VSCA 50. Also, see *supra* note 6.

[50] Lindquist, *supra* note 29, at 9.

[51] Bolick (2007) quoted in *Id.*, at 25.

[52] Stone, *supra* note 36, at 1423.

[53] For example, in his confirmation hearing to the US Supreme Court, Judge Neil Gorsuch was asked by Senator Al Franken about his minority opinion that went against a trucker who disobeyed a supervisor and abandoned a trailer that he was driving because he was on the verge of freezing to death. Gorsuch refused to use the exception to the plain meaning rule, by which courts may go beyond the 'plain meaning' to the statute's purpose when the outcome of doing so would create an absurd result. The ruling that Gorsuch made was political in the broad sense that, as per Robert Fetter, it used 'extreme textualism in order to rule in favor of a company and corporate interest.' Watch: Sen. Al Franken Grills Neil Gorsuch on Frozen Trucker Case in Extended Questioning *DemocracyNow* 24 March 2017. Available at:

Three varieties of court behaviour may be bifurcated by institutional preference:

- Quiescent or deferential
    - Seeks 'recovery' of intentions in common law, legislation, constitution
    - Under-represents court interest in the constitutional/institutional balance
- Institutionally realist or pragmatic
    - Seeks 'reconciliation' of emergent and established authorities
    - Supports balanced constitutional/institutional position, and
- Activist
    - Seeks to offer support to a broad but not universal political constituency
    - Overplays court role in or resets the constitutional/institutional balance

Judges pay attention to the legal culture of the day; legal culture resides in a socio-political context in which there are more and less powerful ideological positions. The direction and dynamism of judicial opinion is dependent on this foundation. However, we would depart from Craven in the conflation of activism and progressivism.

The current legal and socio-political climate has put great pressure on judges, particularly in the area of counter-terrorism precaution. In this terrain, as we shall see, the executive and legislature and sometimes the specific wording of the law, seek to diminish the relative institutional role of the court.[54] This

<https://www.democracynow.org/2017/3/24/watch_sen_al_franken_grills_neil>. It was activist in that in departing from or finessing this 'textualism' it favored some actors (corporate, employer interests) over others (laborers seeking redress). Arguably, it was not institutional pragmatism that informed Gorsuch's opinion, as the opinion is most readily interpreted as impinging upon individual rights and freedoms.

[54] It may be and has been argued that this is what occurs with the intelligencization of the criminal process (where national security converts the rules of evidence into classified, sensitive or protected information, and that view of evidence migrates to various criminal categories). Kent

underlines the stakes as the judiciary faces strong challenges that have the capacity to reconfigure liberal democracy itself.[55] It is this context that compels the distorted perception that interprets an institutionally realist or pragmatic position as (left) activist. We agree with Kirby that engaging in construction of the constitution, interpretation of legislation and reformulation of the common law are judicial functions the doing of which should not be condemned as 'activist.' However, in the current environment in Australia, the court appears to be expected and increasingly to expect of itself a quiescence and passivity – the absence of which invites the erroneous charge that it is being activist – on matters of great institutional moment.

Indeed as we shall see, in the important test case of counter-terrorism, judges in Australia have in the main remained quiescent or deferential when what is required is no more than institutional realism or pragmatism.

B. Precaution and Judicial Review

Today the precautionary standard in law enforcement in terrorism cases imposes a hard test for judicial behaviour. Informed by a rejuvenated national security executive that draws upon public and legislative branch anxieties, a precautionary (or authoritarian liberal)[56] order is almost by definition a reset of the relative authority or institutional weight of the judicial branch as a defender of classic liberal legality.[57] It has been argued that this unique menace of terrorism requires a shift from a more reactive standard of crime definition, following law enforcement move into a strongly proactive, intelligence-led

Roach, *The Eroding Distinction between Intelligence and Evidence in Terrorism Investigation*, in COUNTERTERRORISM AND BEYOND 48 (Nicola McGarrity, Andrew Lynch and George Williams (eds), Routeledge, 2010).

55 ROBERT DIAB, THE HARBINGER THEORY HOW THE POST-9/11 EMERGENCY BECAME PERMANENT AND THE CASE FOR REFORM (Oxford University Press, 2015).

56 *Id.*

57 On authoritarian liberalism, see Ian Bruff, *The Rise of Authoritarian Neoliberalism*, 26(1) RETHINKING MARXISM 113 (2014); Jacques Donzelot, *Michel Foucault and liberal intelligence*, 37(1) ECONOMY AND SOCIETY 115 (2008); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (Duke University Press, 2009).

posture in line with the official objective[58] of preventing inchoate acts of terrorism from maturing to the point of where death and destruction may be immanent. In more or less deliberate break from standards of legality, precautionary counterterrorism laws follow on from an exceptional executive authority that is now readily and frequently deployed against the perceived threat[59] and whose metrics may even creep into more common crime categories.[60] At the same time, it is clear that legislation covering terrorism is rolled-out amidst amplified popular fears and that these laws are often passed with less than robust debate by legislators[61] who fear political attack for being 'soft on security.'[62] This over-broad, panic-driven legislation then comes to the court by way of defendants who are ushered about under extraordinary security, suggesting an immanent de facto danger that challenges judicial contradiction.[63]

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58 Australian Federal Police, *Annual Report 2015-2016*, <https://www.afp.gov.au/afp-annual-report-2015-16>; Lonnie M. Schaible and James Sheffield, 'Intelligence-led policing and change in state law enforcement agencies' (2012) 35(4) *Policing: An International Journal of Police Strategies & Management* 761.

59 RBJ Walker, *Lines of Insecurity, International, imperial, exceptional*, 37(1) SECURITY DIALOGUE 62 (2006); Rebecca Sanders, *(Im)plausible legality: the rationalization of human rights abuses in the American "Global War on Terror"*, 15(4) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 605 (2011).

60 For instance, control orders in anti-bikie legislation based on criminal intelligence. Willem de Lint, *Risking Precaution in Two South Australian Serious Offender Initiatives*, 24(2) CURRENT ISSUES IN CRIMINOLOGY 145 (2012).

61 Laws were passed as quickly as within hours as in the case of Germany. For the legislative process in the several democratic countries see the country reports in TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? (Christian Walter et al (eds), Springer, 2004).

62 Commenting on the counter-terrorism law making in the UK and US following 9/11, Thomas has stated that there was 'an unseemly scramble amongst the legislature so that it is seen to be doing 'something.' The law is hastily tightened, with scant recourse to reasoned chamber debate or recognition of standard procedures, in order to respond to media and public outcry. Thus, the politicians' anxiety to be viewed as resolving the crisis overrides both established process and rational action.' Philip Thomas, *Legislative responses to terrorism*, *THE GUARDIAN* (online) 12 September 2002 <https://www.theguardian.com/world/2002/sep/11/september11.usa11>.

63 Gavin Philipson, *Deference and dialogue in the real-world counter-terrorism context* in CRITICAL DEBATES ON COUNTER-TERRORISM JUDICIAL REVIEW 251 (Fergal F. Davis & Fiona de Londras (Eds.), Cambridge University Press, 2014).

Many legal observers prioritize the government view of national security necessity over the judicial institutional interest in the preservation of the scope or ambit of rule of law legality. Jenkins has noted that 'difficulties with judicial review only increase as national security threats grow… so that judges often refrain from the effective review of controversial counter-terrorism measures that restrict procedural fairness.'[64] It has also been mooted that 'those who are responsible for the national security must be the sole judges of what the national security requires.'[65] A restriction on judicial review is supported by precedent: '[t]here is no rule of common law that whenever questions of national security are being considered by any court for any purposes, it is what the Crown thinks to be necessary or expedient that counts, and not what is necessary or expedient in fact.'[66] In the *Council of Civil Service Unions and others v Minster for the Civil Service* it was stated that national security is 'par excellence a non-justiciable question' for which the court is 'totally inept to deal with the sort of problems which it involves.'[67] At one time in Australia this proposition was considered as 'unquestionable law.'[68]

Reminiscent of judicial deference to the executive during World War I & II,[69] Lord Hoffman reiterated the rhetoric in a judgment which was released a

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[64] David Jenkins, *Procedural fairness and judicial review of counter terrorism measures*, in JUDGES AS GUARDIANS OF CONSTITUTIONALISM AND HUMAN RIGHTS 163, 163 (Martin Scheinin, Helle Krunke and Marina Aksenova (eds), 2016, Edward Elgar).

[65] The Zamora [1916] 2 A.C. 77, 107 per Lord Parker of Wadington, delivering the opinion of the Judicial Committee in Williams, *supra* note 12, at 194.

[66] *A v. Hayden* (1984) 156 CLR 532 per Gibbs CJ at 548.

[67] [1985] A.C. 374 HL 412 per Lord Diplock in Lison Harris, Lily Ma & C.B. Fung, *A Connecting Door: The Proscription of Local Organizations*, in NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG'S ARTICLE 23 UNDER SCRUTINY 303, 324 (Hualing Fu, Carole J. Petersen and Simon N.M. Young (eds), HKU Press, 2005).

[68] *The Zamora* (1916) 2 AC 77 at 107 cited in Nathan Hancock, Parliament of Australia Research Paper No. 12 2001-2002, Terrorism and the Law in Australia: Legislation, Commentary and Constraints, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0102/02rp12>.

[69] For example, in 1944 the U.S Supreme Court stated that 'in the nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumption that could not be proved…Hence court can never have real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a

month after the events of 9/11. Remarking that the events of 9/11 are reminders that 'in matters of national security the cost of failure can be very high,' Lord Hoffmann notes that this underlines:

> The need for the judicial arm of government to respect the decisions of minsters of Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, they must be made by persons whom the people have elected and whom they can remove.[70]

In *Rehman*, the House of Lords unanimously upheld the decision of the Secretary of State to deport a Pakistani-born Imam based on the Security Service's allegation of his involvement in terrorist activities in India.[71] Lord Slynn has noted:

> the Commission [which reviewed the secret evidence of the Security Service] must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him.[72]

Confirming the above approach, Lord Steyn has remarked that 'the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.'[73] These and other similar statements were

military viewpoint.' *Korematsu v. U.S.*, 65 S. Ct. 193, 245 (1944). On the courts' war time jurisprudence see: Eyal Benvenisti, *National Courts and the "War on Terrorism"*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 307 (Andrea Bianchi (ed*),* (Hart Publishing, 2004).

70 *Secretary of State v Rehman* [2001] UKHL.

71 *Secretary of State v Rehman* [2001] UKHL

72 *Secretary of State v Rehman* [2001] 3 W.L.R. 877, 10 para 29.

73 *Id.*

regarded as a warning that courts would rubber-stamp legislative and executive actions taken in the name of countering terrorism.[74]

As is clear from this sampling above, courts may use precedent, the interpretation of the legislation, statutory language, common law and a positivist legalistic view of the institutional divisions in liberal democracies to support a position of deference. It has been fair to predict that the events of 9/11 will have seen the courts beat a retreat from the strident enforcement of human rights law and support government policies that institute a precautionary order.[75] In addition, we have seen that the High Court has a long history in which there has been a reluctance to intervene positively.

However, the story does not end here. As we noted earlier, citing Justice Kirby in this regard, the legal culture of Australia has at times escaped the exclusive recluse of Dickson's legalism. Several commentators, including Jenkins, have argued that rote judicial deference to national security 'would nowadays be regarded as too absolute'.[76] Turning next to Anglo-American experience, we find in contrast to the views of Lord Steyn that judicial pragmatism may *flourish* under the challenge of precautionary counterterrorism.

1. Precaution and judicial review in USA, Canada, United Kingdom

Counterterrorism legislation is a leading edge of the precautionary legal regime that has emerged in Anglo-American countries. A tranche of

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[74] Eyal Benvenisti, *United We Stand: National Courts Reviewing Counter Terrorism Measures*, Tel Aviv University Law School Tel Aviv University Law Faculty Papers, No 39 <http://law.bepress.com/cgi/viewcontent.cgi?article=1041&context=taulwps> ; Kent Roach, *Judicial Review of the State's Anti-terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review*, 3 INDIANA JOURNAL OF CONSTITUTIONAL LAW 138, 138-39 (2009). Lord Hoffmann's infamous statement has led Ewing to note that even human rights instruments and provisions of constitutions are futile in view of the sense of emergency that the terrorist attacks of 9/11 has caused. K.D. Ewing, *The Futility of the Human Rights Act*, PUBLIC LAW: THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE COMMONWEALTH, 829 (2004).

[75] Benvenisti, *supra* note 74; Roach, *supra* note 74.

[76] In *Commonwealth v Colonial Combing, Spinning and Weaving Co. Ltd.* (1922) 31 CLR 421 per Isaacs J at 442.

counterterrorism laws came into force almost immediately in the USA, Canada and Australia following 9/11 and UNSC Resolution 1373. In this, legislatures supported the so-called emergency-executive prerogative stemming from John Locke.[77] Lawmakers responded swiftly, and often, as in the case of the PATRIOT Act, without reading the text of the legislation.[78]

The legislative and executive organs of governments across Anglo-American countries have developed counterterrorism law that consolidates a precautionary rule.[79] Some security analysts and most governments pitch the new precautionary order of the 'global war on terrorism' as vital to the necessary asymmetrical posture of national security.[80]

As we shall see, however, the court response is not as might be predicted given the socio-political context.[81] Though deference to security measures taken by the other branches of government may characterize national courts in time of

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77 JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (J. W. Gough (ed), Blackwell Publishing, 1946); Ross J. Corbett, 'Locke and the challenges of crisis government' (2009) 18(2) *The Good Society* 20–25.

78 Paul Blumenthal, *Congress Had No Time to Read the USA PATRIOT Act*, *SUNLIGHT FOUNDATION* (online) 2 March 2009, <https://sunlightfoundation.com/2009/03/02/congress-had-no-time-to-read-the-usa-patriot-act/>.

79 See, for example, Lucia Zedner, *Terrorizing Criminal Law*, 8(1) CRIMINAL LAW AND PHILOSOPHY 99 (2014); William E. Scheuerman, *Survey article: Emergency powers and the rule of law after 9/11*, 14(1) JOURNAL OF POLITICAL PHILOSOPHY 61 (2006); Andrew Lynch, *Legislating with Urgency-The Enactment of the Anti-Terrorism Act (No 1) 2005*, 30 MELBOURNE UNIVERSITY LAW REVIEW 747 (2006); Filip Gelev, *"Risk Society" and the Precautionary Approach in Recent Australian, Canadian and UK Judicial Decision Making*, Comparative Research in Law & Political Economy Research Paper No. 5 (2009), <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1120&context=clpe>.

80 EKATERINA STEPANOVA, TERRORISM IN ASYMMETRICAL CONFLICT: IDEOLOGICAL AND STRUCTURAL ASPECTS (Oxford University Press, 2008) Vol 23.

81 VICTOR V. RAMRAJ ET AL (EDS), *GLOBAL ANTI-TERRORISM LAW AND POLICY* (Cambridge University Press, 2nd ed, 2012); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241 (2008).

war and crisis[82] and this is anticipated[83] in the 'war against terrorism' and, in one case, reflected immediately after 9/11,[84] the court in democracies has not been universally quiescent.[85] The relative deference/activism of a judiciary is difficult to gauge. Given the changing context of decisions and thus absent a constant objective marker against which deference may be measured, analysts face great difficulty in developing a metric. That said, comparison is regularly made across contexts that enjoy many points of similar socio-cultural experience and approaches and practices of justice. In this regard, the legal context across the USA, Great Britain, Canada and Australia is often considered sufficiently similar to permit reference to precedence that assumes the generic, and sometimes more specialised, common socio-politico-cultural ground between them. Since these countries have tended to express broadly similar national security objectives in the United Nations and other international bodies, significant national security expectations, if not practice, also provides a basis for a finding that differences in the interpretation of the judicial scope in interpreting national objectives may signal something beyond the institutional constraints that may be cited (bill of rights, positive law, constitution). That 'something' will include the (institutional proactivity of) judicial culture.

Benvenisti and Roach have examined the record of counter-terrorism judicial review in the three jurisdictions.[86] In what they have described as a 'quite

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82 *Korematsu v United States* 323 U.S. 214 (1944); Ex parte Quirin 317 U.S. 11 (1942); *Johnson v Eisentrager* 339 U.S. 763 (1950); Harold Hongju Koh, *Transnational Public Law Litigation,* 100 YALE LAW JOURNAL 2347 (1991); *WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME* (Vintage Books, 1998); *A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (Clarendon Press, 1994).

83 Ewing, *supra* note 74.

84 See for example *Secretary of State for the Home Department v Rehman*, [2001] 3 W.L.R. 877. Lord Hoffmann stated the following in approving the UK Secretary of State's decision to deport a Pakistani national. The question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

85 Benvenisti, *supra* note 81; Roach, *supra* note 74; Benvenisti, *supra* note 74.

86 Roach, *supra* note 74; Benvenisti, *supra* note 74.

striking'[87] or 'surprising'[88] development, national courts in the United States, Canada and the United Kingdom have been active in their review by challenging counter terrorism measures taken by their national legislative and executive bodies.[89] According to Benvenisti, courts have been actively engaged in thwarting the full measure of legislative and executive counterterrorism law, and far from having fallen prey to the power grab of the other branches, may be deemed precautionary era 'victors.'[90] For him 'national courts have been challenging executive unilateralism in what could *perhaps be a globally coordinated move*.'[91]

United States

Given the history of the US Supreme Court, which often supported government 'exceptionalism' during WWI and WWII and was faced with responding to legislation in the wake of an 'unprecedented' attack by foreign state supported terrorists on U.S. soil that precipitated what GW Bush termed the 'global war on terrorism,' it would have been reasonable to predict that courts would in the main have shown deference to the state's quest to tip the scales against individual freedoms.[92] On the contrary, the US Supreme Court, has, according to Roach and Benvenisti, turned critical of the counterterrorism measures put in place by the other two arms of government.[93] In his comparison of 4 countries, Roach concludes that the United States Supreme Court has not baulked from a position that we refer to as pragmatic review. This position is echoed by Benvenisti on the basis of his comparative analysis.

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87 Benvenisti, *supra* note 74.

88 Roach, *supra* note 74, at 140.

89 Benvenisti, *supra* note 74.

90 *Id.*, at 1.

91 Benvenisti, *supra* note 81, at 3. This, as he explains, 'seeks to expand the space for domestic deliberation, to strengthen the ability of national governments to withstand the pressure brought to bear by interest groups and powerful foreign governments, and to insulate the national courts from inter-governmental pressures.' *Id.*

92 Roach, *supra* note 74.

93 Roach, *supra* note 74; Benvenisti, *supra* note 74.

In *Rasul v Bush*, where whether or not Guantanamo Bay detainees are entitled to petition for habeas corpus was at issue, the Supreme Court, reversing the holding of the lower courts, ruled in the positive. The majority distinguished the case from wartime precedents, noting that the petitioners, citizens of Australia and Kuwait, were not from countries at war with the United States. Furthermore, the court gave special importance to the fact that the detainees were subject to indefinite detention and that insofar as the petitioners were under the control of the United States, the applicable legislation does not make distinction between citizens and non-citizens. Noting that the judgment in *Rasul v Bush* did not shirk from the judicial duty and authority to perform a check on executive overreach (the executive's request for exemption from court scrutiny), Justice Kirby described the ruling as 'extremely important' in upholding the rule of law.[94]

Rasul v Bush prompted Congress to pass the Detainee Treatment Act of 2005, legislation which sought to deprive federal courts of jurisdiction to entertain habeas corpus claims from Guantanamo detainees.[95] In *Hamdan v. Rumsfeld*,[96] in a 6-3 majority the court reacted negatively to the Act in two ways. First, it held that the deprivation of jurisdiction over habeas petitions could not apply retroactively. Second, the court held that the Military Commission set up by the Bush administration to try detainees at Guantanamo Bay lacks jurisdiction by violating the Uniform Code of Military Justice and the right of a detainee to be tried before 'a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people' as required under Common Article 3 of the 1949 Geneva Convention.

In response to *Hamdan v. Rumsfeld* congress passed the Military Commissions Act (MCA) 2006, a statute which authorizes trial by military commission and unequivocally stripped the federal courts of habeas

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94 Michael Kirby AC CMG, *National Security: Proportionality, Restraint and common-sense*, (paper presented at National Security Law Conference, 12 March 2005), <http://www.austlii.edu.au/au/journals/PrivLawPRpr/2005/8.html>

95 119 Stat. 2739.

96 548 U.S. 557; 126 S.Ct. 2749 (2006).

jurisdiction over petitions from Guantanamo Bay detainees.[97] In *Boumediene v. Bush,* the Supreme Court critically examined the new statute and found it incompatible with the constitutional provision that authorizes suspension of habeas corpus 'when in cases of Rebellion or Invasion the public Safety may require it.'[98] Furthermore, it held that the MCA did not constitute an adequate replacement for habeas corpus.

Recent rulings confirm that US courts are continuing to mitigate the impact of counterterrorism on human rights. Whether or not the courts should defer to the executive has been the central issue in Trump's executive order travel ban. Trump administration lawyers argued that the government is entitled to deference on the subject of the protection of national security and that immigration legislation that is motivated by national security concerns is 'unreviewable, even if those actions contravene constitutional rights and protections.' US federal judgements in Washington, Minnesota, Hawaii, and Maryland (State of Washington; State of Minnesota (plaintiffs-Appellees) v. Donald J Trump, *et al*, (Defendants-Appellants), United States Court of Appeals for the Ninth Circuit, No. 17-35105; State of Hawai'i & Ismail Elshikh v. Donald J. Trump, *et al* in the United States District Court for the District of Hawai'i CV. No. 17-00050 DKW- KSC; International Refugee Assistance Project *et al* v. Donald J. Trump, *et al*, United States District Court for the District of Maryland Civil Action No. TDC-17-0361) have found that the government's motive for issuing an executive order in the name of security is indeed subject to judicial scrutiny, and may be suspended on the basis that it violates the establishment clause of the Constitution.

In a 2015 immigration case, *Kerry v. Din,* Justice Kennedy wrote that in some circumstances the U.S. government's motives in denying someone entry into the United States could be subject to legal review. The opinion is said to show

97 28 U.S.C.A. s 2241 (e).

98 128 S.Ct. 2229.

that Justice Kennedy is 'not prepared to give complete and total deference to the executive branch in the enforcement of immigration laws'[99].

Canada

According to Roach's summation, although there are certainly cases where the Supreme Court of Canada has been deferential to the state's specific interest in the investigation and prevention of terrorism, it has generally not been quiescent regarding anti-terrorism measures taken by either of the two branches of government.[100] In *Suresh v. Canada* the Supreme Court of Canada has indicated that deporting a non-citizen who is suspected of financing terrorism to a jurisdiction where there is a substantial risk of torture violates the Canadian Charter of Rights and Freedoms.[101] Though the court did not specifically decide whether or not such deportation could be justified under 'exceptional circumstances' where the Charter authorizes restriction of rights,[102] it has explicitly noted that this would place Canada in breach of its international human rights obligations. In *Charkaoui v. Canada* the court held that a violation of fundamental fairness under the Charter occurred where the use of immigration law to detain suspected terrorists facilitated the government's submission of secret evidence without any adversarial challenge.[103]

There are cases where the court directly deals with terrorism legislation and prosecutions. In 2004 the Court dealt with the constitutional validity of a provision within the Canadian anti-terrorism law that authorises the police to obtain a judicial order that requires a person to answer questions and disclose documents that are useful in a terrorism investigation. Though the court did

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99 Lawrence Hurley, *In Trump travel ban fight, Justice Kennedy's 2015 opinion looms large*, REUTERS (online), 11 Feb 2017 http://www.reuters.com/article/us-usa-trump-immigration-court-kennedy-idUSKBN15P24R

100 Roach, *supra* note 71.

101 *Suresh v Canada* [2002] 1 S.C.R 3.

102 For the construction of this aspect of the judgment as being a deference to the executive see: Kent Roach, *Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience*, 40 TEXAS JOURNAL OF INTERNATIONAL LAW 537 (2005).

103 *Charkaoui v Canada* [2007] 1 S.C.R. 350.

not find the investigative procedure unconstitutional per se it emphasised that material obtained through this mechanism would not be used as evidence in subsequent legal proceedings including extradition and immigration proceedings against the person forced to provide the information.[104] The court's restriction on the use of material obtained through the procedure makes retaining the procedure pointless, and led the parliament to let the provision expire in 2007.[105] In *Khadr v Canada,* the Supreme Court held that the Canadian Security Intelligence Service breached the Charter when it sent its agents to Guantanamo Bay to interview a Canadian detainee for that means participation in breaches of international law as determined by the United States Supreme Court in the *Hamdan v. Rumsfeld* case.

United Kingdom

Again, drawing upon Benevenisti and Roach, the record of the House of Lords may be characterised as pragmatic. The UK has had a long recent history with IRA terrorism, including some notorious cases that resulted in miscarriages of justice (the Guildford Four, the Maguire Seven and the Birmingham Six).[106] Nonetheless, the UK legislation was drafted and passed in a context of an unwritten or uncodified constitution that assures a good quantity of legislative and judicial deference to the executive on security matters. As is the case throughout liberal democracies, in the domain of counter-terrorism lawmaking by governments legislative deference is the consequence where both opposition parliamentarians and backbenchers lack both the pluck (political courage) and the means (access to security intelligence information and expertise) to challenge the summary information with which they are presented.[107] *The Anti-Terrorism, Crime and Security Act 2001* was passed

[104] Re Vancouver Sun [2004] 2 S.C.R. 332.

[105] Roach, *supra* note 71, at 147-48.

[106] GERRY CONLON, PROVED INNOCENT: THE STORY OF GERRY CONLON AND THE GUILDFORD FOUR (Penguin Books, 1991); CHARLES PATRICK EWING, JOSEPH T. MCCANN, MINDS ON TRIAL: GREAT CASES IN LAW AND PSYCHOLOGY 54–56 (Oxford University Press, 2006).

[107] Laurence Lustgarten, *National Security Terrorism and Constitutional Balance*, in ETHICS OF TERRORISM & COUNTER-TERRORISM 261 (Georg Meggle, Andreas Kemmerling and Mark Textor (eds), Ontos Verlag, 2005).

swiftly and other anti-terrorism laws followed (*The Civil Contingencies Act 2004*, *The Prevention of Terrorism Act 2005*, *The Terrorism Act 2006*, and *The Counter-Terrorism Act 2008*), with little deliberation, against the backdrop of spectacular security events including the July 7, 2005 bombings in London.

Though the House of Lords, in *Rehman,* deferred, and extensively justified the deference, to the conclusion of the Secretary of State, in what is referred to as 'a stunning departure from the Anglo-American tradition of judicial deference,' it opposed part of a statute passed by the British parliament. Part IV of the *Anti-Terrorism, Crime and Security Act* authorized an indefinite detention of non-citizens if suspected for involvement in terrorism provided that they cannot be deported for fear of a substantial risk of torture. This Section of the *Act* was challenged in *A v. Secretary of State (the Belmarsh Detainees* case) where the House of Lords found it to be unjustifiably discriminatory against non-citizens and disproportionate to the (terrorism related) emergency situation to which the *Act* is responsive.[108] This led the Blair government to repeal the law and introduce new legislation that authorizes control orders on both non-citizen and British citizen suspected terrorists.[109]

Lord Steyn, who was not on the panel in the *Belmarsh Detainees*, commended the judgment as follows.

> Nobody doubts in any way the very real risk of international terrorism. But the Belmarsh decision came against the public fear whipped up by the governments of the United States and the United Kingdom since 11 September 2001 and their determination to bend established international law to their will and to undermine its essential structures. It was a great day for the law —for calm and reasoned judgment, analysis without varnish, and for principled democratic decision making by our highest court.[110]

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[108] 2004 UKHL 56.

[109] The Prevention of Terrorism Act, 2005, Chapter 2.

[110] Lord Steyn, *2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom*, 4 EUROPEAN HUMAN RIGHTS LAW REVIEW 349, 361 (2005).

2. Understanding the Shift

Regarding the review of legislative and executive counterterrorism measures Benvenisti has concluded that 'the challenge to the political branches [by the courts] has never been clearer.'[111] Referring to a clear contrast to a past of judicial deference in national security cases, he has described recent counter-terrorism decisions as 'defiant.'[112]

Lindquist has related the courts behaviour as reactive against the other branches of government as the latter expand their institutional room following the increase in 'government activity'.[113] The more active the other branches of the government, the more likely that they will be ultra vires. According to Lindquist, the courts' resistance to rubberstamping legislative and executive acts can be seen as an effort to 'retain a proportionate influence over the growing responsibilities of legislative and administrative institutions' and to maintain the 'tripartite separation of government powers.'[114] Relatedly, Lord Chief Justice Thomas said that in a changing constitutional landscape, it is necessary that judges show 'greater political engagement' with government and parliament and a 'much more proactive stance in promoting an understanding of the importance of justice and taking more proactive steps.'[115]

Furthermore, the courts' departure from their trend to defer to the legislative and executive acts in national security matters has been attributed to a newly emerging philosophy of the courts —the courts as expert balancers are better equipped than the political branches to resolve conflicts between liberty and security.[116] This argument has it that while the legislature is the proper body

111 Benvenisti, *supra* note 74, at 268.

112 Benvenisti, *supra* note 81, at 256.

113 Lindquist, *supra* note 29, at 26.

114 Powers and Rothman cited in *Id.*

115 Owen Bowcott, Judges must engage in politics to preserve rule of law – lord chief justice *theguardian* (online) 18 September 2015, <https://www.theguardian.com/law/2015/sep/17/judges-engage-politics-preserve-rule-law-lord-chief-justice>.

116 There are two other explanations, namely constitutional mandate and citing the court's special role in correcting the flaws of the democratic process. Benvenisti, *supra* note 74, at 19-20.

to assert general national policies and the executive is the appropriate organ to declare security needs, the court has the competence and qualification 'for balancing these interests against individual rights.'[117]

According to Benvenisti, under the emerging review regime the courts characterize the work of setting the balance between security measures and human rights as a matter that falls directly within their competence. While acknowledging the expertise of the security agencies in assessing threats, the courts have pushed back against the encroachment on human rights.[118] In this way, Benvenisti observes, the courts have been redefining their role.[119] This is best illustrated by comparing Lord Hoffman's position in *Rehman* and *Belmarsh.* In the former, he expressed the view that the courts are unable to go behind the executive to assess what is required in the interest of national security or therefore proactively balance liberty against security interests. In the latter, where he is said to have taken the strongest statement a judge in his position has ever made, he affirmed that 'the Court was entitled not only to assess the proportionality of certain measures deemed necessary by the executive to contend with grave risks to society, it was perfectly capable of examining, and in fact required to examine, the executive's determination of those risks.'[120]

Another justification for the court to be involved in checking legislative and executive acts is the protracted nature of the precautionary regime (in the 'war on terrorism', or counterterrorism). As Benvenisti has observed, the indeterminacy of this regime makes the intervention of the court compelling. Whilst there may be a more compelling case that during true emergencies the court may need to support temporary measures against the balance of rights as an independent institution, if emergency is to become a longstanding 'the new normal,' both the public and the government ought to retain their interest in a 'normal time' independent court. Relatedly, Sidhu, referring to the US

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117 *Id.*, at 20-21.

118 *Id.*, at 22.

119 *Id.*

120 *Id.*, at 5. Similarly French and German courts have rejected certain counter-terrorism legislative acts as unconstitutional. *Id.*, at 15-16.

Supreme Court's involvement in checking counterterrorism measures, has noted the following:

> … the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government. In other words, a "loss" for the executive or legislature, may be considered, in truth, a reaffirmation of our constitutional system and therefore a victory for the entire nation in the neglected but necessary post-9/11 war of ideas.[121]

The courts depart from their deference to other branches in national security matters, and do so by giving effect to international law against selective executive preferences that might wish against such implementation.[122]

3. The Courts, Hyperlegislation and Counter-Terrorism in Australia

As in the U.S., Canada and the U.K., in Australia there was a great deal of lawmaking activity following 9/11.[123] By 2013 over 60 counterterrorism laws were created or revised, leading to a remarkable profile featuring 'sheer volume.'[124] It has been commented that the 'Federal Parliament is addicted to the thrill of enacting these laws.'[125] Analysts have found that counter-terrorism law is often

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[121] Dawinder S. Sidhu, *Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict*, 1(1) AMERICAN UNIVERSITY NATIONAL SECURITY LAW BRIEF 69, 74 (2011).

[122] Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of national Courts*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 159 (1993); Benvenisti, *supra* note 74.

[123] For the lack of satisfactory parliamentary deliberation over these laws see: Nicola McGarrity and George Williams, *Counter-Terrorism Laws in a Nation without a Bill of Rights: The Australian Experience*, 2(1) CITY UNIVERSITY OF HONG KONG LAW REVIEW 45, 58-61 (2010).

[124] George Williams, *The Legal Legacy of the 'war on terror*,' 12 MACQUARIE LAW JOURNAL *3,* 6 (2013).

[125] Fergal Davis, *Opinion: Why Australia is obsessed with anti-terror laws, UNSW Newsroom* 26 June 2015. <http://newsroom.unsw.edu.au/news/business-law/why-australia-obsessed-anti-terror-laws>

rushed over the top of more than adequate existing legislation.[126] On this remarkable post 9/11 law making record, Roach has noted:

> Australia has exceeded the United Kingdom, the United States, and Canada in the sheer number of new antiterrorism laws that it has enacted since 9/11 ... this degree of *legislative activism* is striking compared even to the United Kingdom's active agenda and much greater than the pace of legislation in the United States or Canada. Australia's hyper-legislation strained the ability of the parliamentary opposition and civil society to keep up, let alone provide effective opposition to, the relentless legislative output.[127]

There has been concern expressed regarding both the quantity[128] and quality of this barrage of legislation. In relation to its qualitative impact on human rights, Fairall and Lacey have observed:

> the situation in Australia is currently such that basic and fundamental freedoms are being eroded by a parliament with increased legislative powers and an all-powerful executive government with the political will to use them … recent legislative measures have highlighted, to an unprecedented degree, the threat to human rights. [129]

The Eminent Jurists Panel of the ICJ has found with members of civil society and the legal community that Australian counterterrorism law provisions 'have introduced broadly defined offences, allowed retrospective application of the law,

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[126] LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM, 1922-2000 (Irish Academic Press, 2000); LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY (Cambridge University Press, 2008), MARK NEOCLEOUS, CRITIQUE OF SECURITY (Edinburgh University Press, 2008).

[127] KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM (Cambridge University Press, 2011) 310, emphasis added.

[128] See: Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (an Initiative of the International Commission of Jurists, 'Eminent Jurists Panel concludes Australia hearing on counterterrorism laws, practices and policies: press Release' 17 March 2006, 2 < http://www.icj-aust.org.au/>; Robert McDougall, *The Baby or the Bathwater? Terrorism, Responses and the Role of the Courts*, 14 NEW SOUTH WALES JUDICIAL SCHOLARSHIP 8-13 (2007).

[129] Paul Fairall and Wendy Lacey, *Preventive detention and control order under federal law: the case for bill of rights*, 31 MELBOURNE UNIVERSITY LAW REVIEW 1072,1096 (2007).

expanded powers of the executive branch of government and *constrained avenues of judicial review* and due process of law.'[130] Former High Court Justice Michael McHugh echoes this concern, citing Subsection 31 (8) of the *National Security Information Act 2004*. According to this provision, in deciding restrictions on the disclosure of information on the Attorney General's request for confidentiality, the court has to give greater weight to the Attorney General's Certificate over other factors including the 'substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence.' Justice McHugh has observed that:

> It is no doubt true in theory the National Security Information (Criminal and Civil Proceedings) Act does not direct the court to make the order which the Attorney-General wants. But it does as close as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General's certificate?[131]

Similarly, the Eminent Jurists Panel has commented that by requiring the court to give greatest weight to 'the risk of prejudice to national security' in deciding whether to 'maintain, modify or remove' the Attorney General's restriction order on disclosure, the legislation requires the court to favor the government. The court is in a disadvantaged position to cite the impact of the restriction order on the right of the accused to fair trial and decide differently from the Attorney General's order.

On the other hand Robert McDougall of the Supreme Court of New South Wales vehemently dismisses the claim that counter terrorism laws have deprived the courts of their core functions as a 'bold accusation.'[132] Honourable Justice McDougall argues that not only do the courts have a role to play to protect human rights under the Australian counter terrorism legislation but they have been discharging their responsibility.[133] Honourable Justice McDougall cited and

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130 Eminent Jurists Panel, *supra* note 128, at 2, emphasis added.

131 Hon Michael McHugh AC QC, *Terrorism Legislation and the Constitution,* 28 AUSTRALIAN BAR REVIEW 117 (2006).

132 McDougall, *supra* note 128, at 37.

133 *Id.*, at 37-55.

analysed four court cases to conclude that 'not once has an Australian court baulked from making a difficult decision when it is seen to be just and right to do so. Australian courts have shown that in the age of terror, laws are not silent.' The cases are *R v Mallah*,[134] *R v Roche*,[135] *R v Thomas*,[136] and *Thomas v Mowbray*.[137]

Closer examination of the cases would make it hardly possible to see how his Honour's conclusion can be based on these cases. It is only in the third case that the court sustained an objection by the defence to the admissibility of evidence that was obtained illegally. The court decided in favour of the prosecution in the first and fourth cases and only dismissed the prosecution's appeal for higher penalty in the second case.[138]

Moreover, this claim contradicts what Justice Whealy has pointed to as the quiescent role of courts in counter terrorism prosecutions. In *R v Lodhi*, Justice Whealy has made the following observation to justify the anti-terrorism legislation that criminalizes preparatory acts,

> In those circumstances, *the obligation of the Courts is to denounce terrorism and voice its stern disapproval of activities* such as those contemplated by the offender here… In my view, the Courts must speak firmly and with conviction in matters of this kind … In offences of this kind… the principles of denunciation and deterrence are to play a substantial role.[139]

He added:

> As trial judges, *we have to respect* the legislation that comes into existence from time to time relating to terrorism offences, even if we find it personally distasteful. But the very nature of the legislation to

134 (2005) 154 A Crim R 150.

135 (2005) 154 A Crim R 150 at 169.

136 (2006) 14 VR 475.

137 [2007] HCA 33.

138 Justice McDougall's response would be that it is neither because the legislation prohibits the court from deciding otherwise nor because the court abdicates its responsibility that it decided in favour of the prosecution. Instead, it is because the court exercising its plenary power does not see it appropriate to decide otherwise.

139 R v Lodhi [2006] NSWSC 691, Para. 92 (emphasis added).

> which I have referred may tend to reinforce the potential in the public mind for prejudice, animosity and bias.[140]

Indeed, the Australian Court has not been engaged in examining the validity of what some have described as 'draconian'[141] 'troubling'[142] legislative counter terrorism measures. The restraint of the court has been expressed variously. Fairall and Lacey have noted that the High Court's approach in 'cases such as *Thomas v Mowbray …* highlighted the inability of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power'[143] On the court's tendency to approve legislative measures despite their derogation from human rights, they note:

> When faced with extraordinary legislative measures that significantly erode rights traditionally viewed as fundamental, the … High Court has tended to give full effect to the words of s 51 of the Constitution, which confers broad legislative powers on the parliament.

Lamenting that the majority of the High Court Justices has not paid attention to part of the constitution that could be used to safeguard human rights from such derogatory legislation, they note "the protective ambit of Chapter III and the rule of law, which is supposed to form an assumption upon which the

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[140] Marinella Marmo, *Democratic States Response to Terrorism: A Comparative Reflection on the Perceived Role of the Judiciary in the Protection of Human Rights and Civil Liberties,* in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 241, 250 (Aciceto Masferre (ed), Springer, 2012.) (emphasis added)

[141] Julian Burnside, *Terror laws: Extreme laws an attack on what we hold dear*, *THE SYDNEY MORNING HERALD* (online), 18 October 2015 < http://www.smh.com.au/federal-politics/political-opinion/terror-laws-extreme-laws-an-attack-on-what-we-hold-dear-20151015-gkanjm.html>.

[142] Greg Barns, *Draconian anti-terrorism bid an affront to freedom*, 6 Aug 2014, *ABC NEWS* (online) <http://www.abc.net.au/news/2014-08-06/barns-draconian-anti-terror-plan-goes-too-far/5651156>.

[143] Fairall and Lacey, *supra* note 129, at 1095.

Constitution rests, are all too often invoked only as effective limits on legislative power in dissenting opinions." [144]

Justice Kirby, frustrated by the majority in *Thomas v. Mowbray,* which upheld anti-terrorism legislation that provided for control orders that are highly restrictive of personal freedom, recalled a famous ruling:

> I did not expect that, during my service, I would see the *Communist Party Case* sidelined, minimized, doubted and even criticised and denigrated in this court. Given the reasoning expressed by the majority in these proceedings, it appears likely that, had the *Dissolution Act* of 1950 been challenged today, its constitutional validity would have been upheld. This is further evidence of the unfortunate surrender of the present court to demands for more and more governmental powers, federal and state, that exceed or offend the constitutional text and its abiding values. It is another instance of laissez faire through which the court is presently passing.
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> Whereas until now, Australians, including in this court, have generally accepted the foresight, prudence and wisdom of this court, and of Dixon J in particular, in the *Communist Party Case* (and in other constitutional decisions of the same era) they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming. [145]

That Australian judges are relatively deferential to other authorities is a finding supported by a study of the Australian judiciary.[146] Marmo observes that domestic judges in the US and UK are more proactive defenders of human rights than their Australian counterparts. The former more readily decide against the intention of national legislation[147] and government

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[144] *Id.* For their argument on how the majority's view has been influenced by two interrelated misleading views see *Id.* 1094. Justice Bongiorno's ruling can be seen as an exception (see below note 154). However, this type of review falls within what Benveneti refers to as the 'least controversial' judicial review — 'referring an action back to the executive for reconsideration.' Benvenisti, *supra* note 74, at 11.

[145] (2007) 237 ALR 194, 301-2

[146] Marmo, *supra* note 140, at 248.

[147] *Id.*

priorities[148] and assert their institutional jurisdiction, even where this has been dominated by government agencies.[149] In contrast, senior Australian judges have said that the High Court is 'dismissive of progressive legal thinking.' Lower court judges, in the meantime, fail to proactively use human rights out of a fear of being reversed. While they have an 'abstract willingness to protect human rights,' their 'legal upbringing' in Australia provides an impediment including the relative absence of instruction in international legal developments and discouragement from adopting original, innovative or creative interpretations.[150] Although most of the interviewees in the study supported the approach taken by overseas courts, they were compelled by the Dixonian tradition of judicial review and admitted relative weakness compared against courts in the UK and US.[151] That this view may reflect the top echelon of the legal community currently is supported by a study of barristers involved in high profile counter-terrorism prosecutions, who acted on the strong belief that there was no achievable success in challenging the validity of the legislation or arguing for the applicability of international human rights law.[152]

As noted above, there is a groundswell of popular fear and a selection of expert opinion that has influenced political choices to make legislative changes, but Justice Whealy's observation presumes a risk of terrorism in Australia that may not be well substantiated by independent research.[153] Under paragraph

148 *Id.*, at 251

149 *Id.*, at 247

150 *Id.*

151 *Id.*

152 Willem de Lint and Wondwossen D Kassa, *Bent into Security: Barrister Contribution to a skewed Order in Two Terrorism Prosecutions in Australia*, 44(2) JOURNAL OF LAW AND SOCIETY 169 (2017).

153 Michaelsen has argued that as the actual risk of a terrorist attack occurring on Australian soil is rather low, Australia's drastic legislative measures are not justified by the severity of the terrorism threat. Christopher Michaelson, *Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?*, 28(4) STUDIES IN CONFLICT AND TERRORISM 321 (2005). Also See: McDougall, *supra* note 128, at 8-13. There is comparable U.S. research by Mueller and Stewart (JOHN MUELLER AND MARK G. STEWART, CHASING GHOSTS: THE POLICING OF TERRORISM (Oxford University Press, 2016); John Mueller and Mark G. Stewart, *The Terrorism Delusion: America's Overwrought Response to September 11*, 37(1) INTERNATIONAL SECURITY *81* (2012); John Mueller and Mark Stewart, *Terrorism Poses no existential threat to*

91, his Honour has noted 'terrorism is an increasing evil in our world and a country like Australia, with its very openness and trusting nature is likely to fall easy prey to the horrors of terrorist activities.' This claim is made despite that Australia has been described as 'fortunate' in its limited exposure to terrorism.[154] As per Lord Hoffman, even judges in London and Madrid, where catastrophic loss of life has been witnessed, have not taken the equivalent view of their review role and have not adopted such a deferential approach.[155] Yet, Justice Whealy *referred to* London to support his decision to impose severe punishment on Lodhi.[156] Even under precautionary counterterrorism, in common law jurisdictions, deference to the legislature and the executive is not a given.[157] In comparison with other jurisdictions, the Australian court has

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America. We must stop pretending otherwise, THE GUARDIAN (online) 25 February 2015 https://www.theguardian.com/commentisfree/2015/feb/24/terrorism-poses-no-existential-threat-to-america.

154 Stuart Koschade, *Constructing a Historical Framework of Terrorism in Australia: From the Fenian Brotherhood to 21st Century Islamic Extremism,* 2 JOURNAL OF POLICING INTELLIGENCE AND COUNTER-TERRORISM 54 (2007); Nicola McGarrity, *An Example of "Worst Practice"? The Coercive Counter-Terrorism Powers of the Australian Security Intelligence Organisation*, 4 VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 468 (2010).

155 In *A (FC) v Secretary of State for the Home Department,* Lord Hoffman has reasoned as follows.

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not under-estimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation… Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

156 'The need for substantial sentences to reflect the principles of general deterrence are obvious in relation to crimes of this kind. Such crimes are hard to detect; they are likely to be committed by members of our own community and often by persons of prior good character and favourable background. One has only to consider the tragedy of the London bombings in 2005 to recognize this observation as a sad truism.' R v Lodhi [2006] NSWSC 691, para 91.

157 The judiciary is not isolated from the strong sentiment expressed in media outlets and by some security experts that the threat of terrorism demands the reset of a security-liberty balance. However, almost every generation of judges has encountered a forceful challenge to adopt a reset. Some, as below, have offered a forceful response. For example, in *Public Committee Against Torture v Israel*, Justice Barak reasoned as follows:

settled for review quiescence.[158] According to McGarrity and Williams, '[t]he role played by the Australian courts in protecting human rights [while countering terrorism] can, at best, be described as marginal.' [159]

False Justifications or Judicial Quiescence?

The court's failure to defend human rights has been widely attributed to its peculiar legal culture, encompassing its view of institutional opportunities and constraints. There are two major forces on the court that are cited to account for its unwillingness/inability to be critical of counter terrorism measures: the tradition of legal positivism and the absence of a Bill of Rights.

It is the judiciary that is expected to uphold not only the constitution, but also rule of law legality. As per the above, a quiescent or deferential position is one that under-represents court institutional interests in the Australian constitutional system. It smacks of a tautology to insist on a view that a court is indefinitely committed to the less robust view of its institutional place *as the*

> We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. *We are, however, judges. We must decide according to the law.* This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. Therefore, in deciding the law, we must act according to our purest conscience. HCJ 5100/94 [1999] in Marmo, *supra* note 140, at 249 (emphasis added).

[158] However, there was an instance where the Supreme Court of Victoria has given a proactive ruling. In *R v Benbrika et al*, the defendants applied to have their trial stayed on grounds of unfairness. They claimed that the general conditions under which they were being held in detention and transported to court each day was having a detrimental effect on their psychological and physical well-being. The defendants were held in a maximum security outside of Melbourne. Prior to trial, all of the accused had spent at least two years in custody. For the first year, the defendants spent up to 23 hours a day in their cell. They were transported to court in vans divided into small box-like steel compartments with padded steel seats, lit only by artificial light. The defendants were strip-searched prior to their departure from and upon their return to the prison. Bongiorno J held that the conditions under which the defendants were being held and transported rendered the trial unfair and should be stayed unless the unfairness was remedied.

[159] McGarrity and Williams, *supra* note 123, at 45.

basis of the view that the court is not in a position to take a more robust view of its institutional place or position. In addition, the judiciary, through its capacity of review, is what gives particularity or reality to rights, independent of the absence or presence of a dedicated Bill. It is contended here that the two factors are descriptions of the excuses not to be as pragmatic as overseas counterparts, but not justifications.

1. Legal Positivism

It has been noted that the Australian court has developed a longstanding tradition of legal positivism, by which it is to do no more than interpret and enforce limitations on government power as embodied in the constitutional text.[160] The approach is 'rule-driven, precedent focused and greatly prizes certainty in the law.'[161] The court distances itself from questions of policy, accepting that they are best left to the parliament which dictates that judges must only apply the law.[162] Dixon, in his address upon being sworn in as Chief Justice of the High Court of Australia, stated "it may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."[163]

It was to the doctrinal position adopted by Dixon that Kirby attributed a lasting view of Australian judicial restraint. For many, legalism is a doctrine by which 'judges do not make the law.'[164] And whilst some in the judiciary may have "moved beyond the 'Old Testament'" of legalism, there are many in

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160 Stephan Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, 17 FEDERAL LAW REVIEW 164, 175 (1987). The other aspect is that 'federalism necessarily requires the Court to play a unique role in determining the constitutionality of governmental action.' *Id.*

161 Sir Daryl Dawson and Mark Nicholls, *Sir Owen Dixon and Judicial Method*, 15 MELBOURNE UNIVERSITY LAW REVIEW, 543 (1986) in Foley, *supra* note 5, at 292.

162 *Id.*

163 Owen Dixon, *Upon Taking the Oath of the Office as Chief Justice*, quoted in Foley, *supra* note 5, at 293.

164 Kirby, '*supra* note 7, at 3.

the legal profession, as well as politicians, many laypersons and citizens, who still hold fast to a legal positivist view of judicial activity.[165]

Attributing the docile nature of the court to the long existing tradition than to the constitution per se, Fairall and Lacey have noted that

> Beyond the express constitutional limits on executive and legislative action, the principle of legality is applied in an ad hoc and almost discretionary fashion and a shift in the approach of the High Court would appear remote, given the tradition of cautious conservatism on the part of judges in human rights matters.[166]

After explaining the interrelationship between the court's positivist approach and its failure to serve as a guardian to human rights, Fairall and Lacey have concluded 'the limitation of the positivist approach to the protection of civil rights are now blindingly obvious.'[167] Many others,[168] including defence lawyers who were involved in terrorism prosecution[169] have echoed this view.[170]

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165 *Id.*, at 4.

166 Fairall and Lacey, *supra* note 129, at 1092.

167 *Id.*, at 1098.

168 HILARY CHARLESWORTH, WRITING IN RIGHT: AUSTRALIA AND THE PROTECTION OF HUMAN RIGHTS (University of New South Wales Press, 2002); GEORGE WILLIAMS, THE CASE FOR AUSTRALIAN BILL OF RIGHTS: FREEDOM IN THE WAR ON TERROR (University of New South Wales Press, 2004).

169 de Lint and Kassa, *supra* note 152.

170 Fairall and Lacey have attributed the High Court's failure to engage in robust review of legislative measures to 'legal positivism' which they have noted, 'is firmly entrenched as the dominant paradigm in Australian law'. They have observed:

> constitutionalism in Australia is too often understood within the confines of positivism … for the majority of the High Court, the written text of the Constitution is all too readily divorced from the non-express assumptions upon which it rests — the assumptions to which Dixon J referred in the *Communist Party case …* the principle of legality — the notion that judges have an integral role to play in demanding the legality of any executive or legislative action and in minimizing the effect of laws which are designed to remove or erode fundamental rights and freedoms —has been reduced to its minimum in Australia.

2. Absence of Bill of Rights

The Australian Constitution does not include a Bill of Rights, and in this, as Foley observes, Australia is 'an outlier in modern constitutional systems.'[171] This means that in the area of Australian constitutional jurisprudence, there is no 'large body of work in the field of individual rights,'[172] that, instead, the court is primarily concerned with the 'relationships between federal and state parliaments, executives, and courts.'[173] McGarrity and Williams have observed the role of the court in protecting human rights, in the absence of bill of rights, is 'extremely limited.'[174] Similarly, the Australian Human Rights Commission notes that though there is a potential for some counter-terrorism laws to infringe fundamental rights, in the absence of Australian Charter of Rights there is a limited opportunity for a person to challenge decisions that do not comply with human rights.[175]

According to Carne, the existence of bills of rights in other common law jurisdictions including Canada, United Kingdom, the United States and New Zealand 'has set boundaries to the legislative debate and response about

Fairall and Lacey, *supra* note 129, at 1095.

171 Foley, *supra* note 5, at 285.

172 *Id.*

173 *Id.* Also see: McGarrity and Williams, *supra* note 123.

174 McGarrity and Williams, *supra* note 123, at 58. Thus, they argue that parliamentary process 'provides the only meaningful opportunity for assessing …counter-terrorism legislation on human rights grounds.' *Id.*, at 46. However, Davis challenges this alternative arguing that 'absence of a Bill of Rights means Australian governments are uninhibited by concerns about the courts striking anti-terror legislation down. There is no legal framework to give the government pause for thought when it considers how to balance the need for anti-terror laws with human rights.' Fergal Davis, Why Australia is obsessed with anti-terror laws, *the newdaily* (online), 24 June 2015 < http://thenewdaily.com.au/news/2015/06/24/australia-obsessed-overzealous-terror-laws/>.

175 Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008) <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws#fnB64>.

intelligence gathering from individuals for counter-terrorism purposes and has made rights evaluation more prominent in that equation.'[176]

In the aftermath of 9/11 where judges are not inclined to resist the will of the legislature, Fairall and Lacey have noted, the assumption that informal mechanisms such as 'trust in the basic decency of government, an independent and incorruptible judiciary, the transparency of judicial and administrative processes and trial by jury' provide sufficient human rights protection has been proven futile. [177]

Signifying the impact of lack of bill of rights on the role of the court, Fairall and Lacey have noted:

> when faced with legislation that erodes fundamental rights, judges have lacked a positive instrument against which the proportionality of the statute may be measured. Any engagement with human rights issues in the absence of a positive instrument designed to implement such rights carries with it the risk of being perceived as "activist"'.

Furthermore, they observed that

> in the absence of a bill of rights, the system has proven itself incapable of responding to the threat of terrorism without relinquishing many of the fundamental freedoms that Australians have for so long taken for granted. Without a statutory bill of rights, human rights issues will continue to predominantly inform only the opinions of dissenting judges.[178]

Defence lawyers who were involved in terrorism prosecution have echoed this problem. They invoke lack of bill of rights in Australia as one major reason they are in a precarious position while defending their clients. They are confident that the outcome of the cases of their clients would have been different had there been bill of rights. However, owing to this politico-legal environment and the court's degree of involvement in reviewing legislative and executive counter terrorism measures, they do not even think that resort to international human rights law

[176] Greg Carne, *Brigitte and the French Connection,* 9(2) DEAKIN LAW REVIEW 573, 604 (2004).
[177] Fairall and Lacey, *supra* note 129, at 1096.
[178] *Id.*, at 1098.

would help their client.[179] Unlike in other jurisdictions where the anti-terrorism legislation have been challenged by barristers and/or other stake holders and subject to judicial scrutiny, in Australia, despite its proliferation and the prediction that it was likely to be challenged,[180] the validity of anti-terrorism laws have never been seriously challenged before court of law. In 2006, Justice Kirby noted that there had not been a case which involves 'an Australian court considering an explicit challenge arising out of counter-terrorism legislation.'[181] Nor has there been since then. Barristers confessed that they did not think of challenging the validity of the law as feasible and practical option.[182]

Consistent with Epps' explanation on the dependency of judicial proactivity on the availability of a support structure in the jurisdiction that a court functions, lack of interest on the part of the barristers to provoke the court to consider validity of a legislative measure might have its own role in the court's failure to review these measures. Roach has linked the proactive judgments in the United Kingdom and the United States to chamber of barristers, civil society groups.[183]

Conclusion

It is argued that Australia is an outlier in many respects regarding the role of the judiciary in counterterrorism. National courts in comparable jurisdictions have not universally or even generally abdicated responsibility to safeguard fundamental rights.[184] With the notable exception of Justice Kirby, the Australian High Court has not followed this trend, and the lower courts have followed suit.

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179 de Lint and Kassa, *supra* note 152.

180 ABC radio National, 'Expert says States may be sidelined on terror laws', *PM*, 24 October 2005 (Don Rothwell) <http://www.abc.net.au/pm/content/2005/s1489607.htm>.
Michael Kirby, *Judicial Review in a time of Terrorism — Business As Usual*, 22(1) SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 21, 31 (2006).

182 de lint and Kassa, *supra* note 152.

183 Roach, *supra* note 71.

184 As Benvenisti has argued the courts' acquiescence with the executive's demand for deference in counterterrorism amounts to abdication of the courts' responsibility to safeguard basic rights of citizens. Eyal Benvenisti, *The Strategic Uses of Foreign and International Law by National Courts,* 102(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 241, 246 (2008).

The phenomenon of 'hyper legislation' is but a logical outcome of politics of fear,[185] and it is expected that moral panics sometimes need to be countered by actors that have been designedly, if not manifestly, provided with a standpoint at some remove from their heat. Indeed, where the other two branches of government cannot apparently avoid the arguable overreach that is provided in the invocation of precautionary counter-terrorism, the third branch, as guardian of the constitution and rule of law legality, is weak at its own peril. The 'existential threat' is most likely to be an 'own goal': a pretext of requisite deference to the executive and legislature on national security matters causes a rot in the constitution of liberal democratic governance. Institutional pragmatism requires a long view past 'hyper-legislation,' and it is this absence in the court's deference to the two branches of government that makes Australia's counterterrorism different.[186] Contra Justice Whealy, judicial review, as Jenkins argues, 'needs strengthening just when it appears to be at its most problematic and least justifiable.'[187]

In suggesting the use of the term pragmatic review, we merely follow others (Schlesinger, Kirby) in what we believe is descriptive of the correct attitude of the court. We take into consideration that this branch of government must operate to reconcile emergent and established authorities, but must do so in support of its own position, which is always dependent on its willingness and capacity to nullify legislation and outlaw executive action. This capacity draws upon a version of the rule of law that is oftentimes depicted as quixotic or 'quaint',[188] but certainly resonates in international law instruments that we believe the court should not shirk from drawing upon.

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185 Jude McCulloch, *National (in)Security Politics in Australia: Fear and the federal election*, 29(2) ALTERNATIVE LAW JOURNAL 87 (2004).

186 Kirby, *supra* note 178, at 26.

187 Jenkins, *supra* note 64, at 163.

188 Alberto Gonzales wrote a memo to President George W. Bush in which he referred to the Geneva Conventions as possibly 'obsolete' and 'quaint' and non-applicable in the 'new paradigm' of the 'war on terror.' Steven, R Ratner, 'Think Again Geneva Conventions,' *Foreign Policy*, 8 October 2009, <http://foreignpolicy.com/2009/10/08/think-again-geneva-conventions/>.

LAND ACQUISITION FOR INVESTMENT IN ETHIOPIA: ECONOMIC ANALYSIS OF LEGAL OPTIONS

Jetu Edosa Chewaka[*]

Abstract

The idea that public ownership of land restricts the efficient allocation of land mainly because it increases transaction costs and inhibits exchange of land for private investment has been re-examined in land law reforms. Particularly, with the rise of property rights economics as analytical framework, the thesis that land rights can be treated as a bundle of property rights in which the state and the public retains the right to common ownership of the land but legally assign the right to use, transfer, inherit and benefit from land to any person who values it most has been advanced. However, there is no scholarship in the Ethiopian context that provides normative insight on how the different legal rules that enable investors to acquire land for Investment purpose affect transaction costs. This article addresses this issue by examining the modalities of acquiring land for investment purposes under the Ethiopian land law by identifying 'legally desirable' or suitable options available for investors from the vantage point of their capacity to foster the reduction of transaction costs. The article employs law and economic analysis as a method of inquiry to normatively evaluate how legal rules designed to regulate the exchange of property rights to land affect transactions costs during the process of investment land acquisition. The finding of the analysis indicates that the legal rules for acquiring urban land through land auction entail lower transaction costs compared to government land allotment and rural land rental arrangements.

Key-terms: law and economics, investment, land lease, allotment, tender, rental, transaction costs, property rights

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Introduction

Land as a tangible, durable and inextensible good, is a basic factor of production upon which landed investment activities are attached. Scholars of law and economics have long argued that the proclivity to acquire land for investment depends on the existence of secured property rights in land capable of transferability.[1] Acquiring land for investment purposes poses a serious challenge for investors in some developing countries since legal systems restrict property rights to land with land tenure system that hinders easy transferability of land rights beyond the tenure right holders. Above all, the existence of ill-defined property rights to land inevitably affects the effort to facilitate reallocation of production factors to maximize allocative efficiency in resource use.[2] Therefore, making land rights more secure and transferable is viewed as a prerequisite for facilitating land-related investment activities as productive economic endeavours.[3]

In Ethiopia, where land is considered as public property and its transferability is limited to acts of donation and inheritance, allocation of land for investment purposes raises serious concern viewed from the vantage points of transaction cost economics.[4] The 1995 Constitution of Ethiopia limits the right to exercise ownership over both urban and rural land to the state and the people restricting land transfer through sale.[5] The government is also required to ensure the rights of private investors to the use of land on

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1 M Roth et al., *Land Ownership Security and Farm Investment: Comment,* 71 AMERICAN JOURNAL OF AGRICULTURAL ECONOMICS 211 (1989).

2 Claudia R Williamson, *The Two Sides of De Soto: Property Rights, Land Titling, and Development*, in THE ANNUAL PROCEEDINGS OF THE WEALTH AND WELL-BEING OF NATIONS 97 (Emily Chamlee-Wright ed., 2010).

3 Klaus Deininger et al., *Tenure Security and Land-Related Investment: Evidence from Ethiopia*, 50 EUROPEAN ECONOMIC REVIEW 1245-1277 (2006)

4 Rural Land Administration and Land Use Proclamation No. 456/2005, art. 5(2): 'Any person who is member of a peasant farmer, Semi pastoralist and pastoralist family having the right to use rural land may get rural land from his family by donation, inheritance or from the competent authority.' See also art. 8 sec 5: 'Any holder shall have the right to transfer his rural land use right through inheritance to members of his family'.

5 F.D.R.E Const., Proclamation No. 1/1995, art. 40 sec 3.

the basis of payment arrangements established by law.[6] Despite this constitutional guarantee of access to land for private investors, the debate on the need for recognition of private ownership of land still lingers in the public discourse which the State characterizes as a 'neo-liberalist' outfit to bring back 'landlordism' to the Ethiopian mass. The assumption that land is not a commodity par excellence and, hence, should not be subjected to alienation through the channel of land market has long inhibited private investments in urban and rural land.[7] However, individuals can exercise possessory (holding) or usufruct rights to the land while transfer is limited to family members through inheritance or donation.

As opposed to public ownership of land, it is widely argued that the arrangement of restricted ownership rights to land weakens the incentives for the landholders to allocate such valuable resource for the efficient user thereby hindering long-term capital investments over the land.[8] It is argued that the current public ownership of land in Ethiopia profoundly hinders the efficient allocation of land to private investors in order to facilitate economic development.[9] Gradually, the consideration of land markets as pivotal to development policy has gained acceptance in the enactment of urban land lease law in which the imperatives of transferable land use rights either on a temporary or permanent basis are seen as playing a key role in the allocation of land to more efficient users thereby increasing productivity and employment.[10]

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[6] *Id.*, art. 40 sec 6.

[7] FASIL NAHUM, CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT 160 (Red Sea Press, 1997).

[8] Gershon Feder and David Feeny, *Land Tenure and Property Rights: Theory and Implications for Development Policy*, 5 THE WORLD BANK ECONOMIC REVIEW 140 (1991). Land Acquisition for Investment: Economic Analysis of Legal Options

[9] Deininger, K and Jin S, *Tenure Security and Land-Related Investment: Evidence from Ethiopia,* 50:5 EUROPEAN ECONOMIC REVIEW 1245-77 (2006).

[10] Klaus Deininger & Songqing Jin, *Securing property rights in transition: Lessons from implementation of China's rural land contracting law'*, 70 JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION 24 (2009).

Despite the constraints of public ownership of land, the idea that investors could opt for acquiring land for investment purposes by evaluating available legal options capable of reducing transaction cost is gaining wide acceptance.[11] For instance, the 'physicalist definition of property as the exclusive right of possessing, enjoying and disposing of a thing' was revisited paving way to the legal possibility of investing in the different shades of the bundles of rights to land.[12] Therefore, based on such legal possibility of enjoying bundle of property rights to land, private investors in Ethiopia can acquire land through three major alternative legal options.

The first option relates to acquiring a plot of land through tender process as per the urban land lease holding system. This option introduces land lease market in which investors are provided with the opportunity to acquire land from the government through public auction at the 'prevailing transaction value of land'.[13] The second legal option available for investors is through government allotment of urban and rural land for industrial and agricultural investment purposes.[14] The third option for investors to acquire land for investment purpose is through private land rental system from the rural land use right holders.[15]

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[11] Bacry Yusuf *et al.*, Land Lease Policy in Addis Ababa 13 (2009).

[12] Denise R. Johnson, *Reflections on the Bundle of Rights,* 32 VERMONT LAW REVIEW 249 (2007). It is argued that "Ownership can be shared in an almost infinite variety of ways. Thus, the concept of the bundle of separate sticks, with different "owners" holding different sticks, meant that property ownership was a very flexible concept, largely unconcerned with the object itself." (*Id.*, at 254). See also Shitong Qiao & Frank Upham, *The Evolution of Relational Property Rights: A Case of Chinese Rural Land Reform,* 100 IOWA LAW REVIEW 2490 (2015). It is argued that 'the most important implication of the bundle-of-rights metaphor is that it shifts our attention from asking who owns the property to understanding who has what rights to the property and to examining the social relationships around a piece of property that is "beset by conflicting values and competing interests'.

[13] Urban Lands Lease Holding Proclamation No 721/2011, art 4 sec 3.

[14] *Id.*, art 12 sec 1.

[15] Rural Land Administration and Land Use Proclamation, *supra note* 4, art 5 sec 4 *para.* (a), art 8 sec 1 & 8 sec 4.

In all of the three legal options of acquiring land for investment activities, investors face a myriad of transaction costs depending on how the legal rules are designed to govern the transfer of land use rights. However, the issue as to which legal options of acquiring land for investment yield efficient outcome, in terms of minimizing transaction costs, during the transfer of landholding rights requires closer analysis. Such analytical approach helps to create insights on the economic implications of Ethiopian land law designed to regulate the acquisition of land. This research endeavour is vital in normatively assessing the rules governing the modes of acquiring landholding rights as it typically informs investors to make rational choices by weighing the available options to acquire land based on understanding of the existing rules that either reduce or increase transaction costs.

In view of the above background, the article examines the modes of acquiring land for investment purposes under the Ethiopian land law by evaluating the available legal options from the vantage points of reducing transaction costs for investors. The article examines how the different legal modalities of acquiring land for investments purposes facilitates the reduction of transaction costs under the Ethiopian land law. In order to answer this question, the article employs economic analysis of law as a method of inquiry to normatively evaluate how legal rules designed to regulate investment related land markets affect transaction costs in the process of acquiring land for investment purposes.

The article is structured as follows. Following this introduction, Section 1 outlines the research methods by describing how it has employed transaction costs as a normative framework for the economic analysis of the law that regulates the process of acquiring land for investment purposes. Section 2 provides a general overview of property rights to land under the Ethiopian land law by reviewing land rights and the accompanying legal restrictions on their transferability. Section 3 specifically examines legal modalities of acquiring land for investment purposes under Ethiopian land and investment legislation. This section mainly sheds light on how the existing legal frameworks provide alternative legal options to ensure investors access to land for investment activities. Section 4 offers economic

analysis of the three modes of acquiring land for investment purposes to identify whether these alternative legal rules qualitatively foster the reduction of transaction costs. The article closes by providing concluding remarks.

1. Methodological Approaches of the Economic Analysis of Law

The economic analysis of law employs the instruments of microeconomic theory to the analysis of legal rules and institutions.[16] According to David Friedman, there are three distinctive but related features of economic analysis of law that use economic principles and reasoning to analyse legal rules.[17] The first characteristics is economic analysis of law engages 'economics to predict the effects of alternative legal rules.' The second feature relates to 'the use of economics to determine what legal rules are economically efficient in order to recommend what the legal rules ought to be.' The third feature involves 'the use of economics to predict what legal rules will be.' Based on Friedman's characterization, the economic analysis of law may be defined as 'the use of economic principles and reasoning to understand legal materials.'[18]

The economic principle used to analyse existing legal rules is 'rational choice theory' that rests on the assumption that humans are rational beings who behave according to the rules designed to regulate individual behaviours.[19] This economic theory could be used to analyse whether the existing legal rules provide incentives for individual actors in the market to behave in

[16] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 11 (6th ed., Pearson Education, 2012).

[17] David Friedman, *Law and Economics*, in THE NEW PALGRAVE: THE WORLD OF ECONOMICS 371-380, 371 (J Eatwell, M Milgate & P Newman (eds), 1991).

[18] Geoffrey P. Miller, *Law and Economics versus Economic Analysis of Law*, 19 AMERICAN BANKRUPTCY INSTITUTE LAW REVIEW 459 (2011).

[19] *Id.* at 12-13. See also Alessio M. Pacces & Louis Vissche, *Law and Economics: Methodology*, in Interdisciplinary Research into Law 85-107, 86 (B. van Klink, & S. Taekema (eds.), 2011). *See* also Hanna Almlöf & Per-Olof Bjuggren, *A regulation and transaction cost perspective on the design of corporate law,* 47 EUROPEAN JOURNAL OF LAW AND ECONOMICS 403, 411 (2019).

economically rational way.[20] However, the way the existing legal rules are formulated may have effects on the behaviour of relevant actors to act in a socially desirable way.[21] It is widely argued that legal rules that facilitate individuals' actions in economically efficient way is socially desirable.[22] According to Stephen Margolis, an efficient legal system is 'one in which property rights are assigned and liability rules are formulated so that the value of things present in society, as measured by willingness to pay, is maximized over all alternative legal environments, given the costs of contracting.'[23] It is argued that a legal rule that facilitates reduction of transactions costs in every phase of property rights exchange is economically efficient since it maximizes the ability of individuals to efficiently allocate property rights among themselves.[24]

The concept of transaction costs for the purpose of analysing the economic efficiency of legal rules was profoundly illuminated by Ronald Coase.[25] The Coasean notion of transaction cost refers to costs linked to a given transfer of property rights that are necessary for a legal exchange to take place.[26] As

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[20] Thomas S. Ulen, *Rational Choice and the Economic Analysis of Law*, 19 LAW & SOCIAL INQUIRY 487, 488 (1994).

[21] L Kaplow & S Shavell, *Economic Analysis of Law*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1661-1784, 1661 (Alan Auerbach and Martin Feldstein (eds), 2002); see also GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 2 (2016).

[22] Albert Sanchez-Graells, *Economic analysis of law, or economically informed legal research*, in RESEARCH METHODS IN LAW 170-193, 171 (Dawn Watkins and Mandy Burton 2nd (eds), 2018).

[23] Stephen E. Margolis, *Two Definitions of Efficiency in Law and Economics*, 16 THE JOURNAL OF LEGAL STUDIES 471, 473-4 (1987).

[24] Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VIRGINIA LAW REVIEW 471, 472 (1988).

[25] It should be noted that Coase in his 1937 Article use the phrase 'transaction cost' to refer 'the costs of the price mechanism'. see Douglas W Allen, *Transaction Costs,* in ENCYCLOPEDIA OF LAW AND ECONOMICS: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS 894 *(*Bouckaert & De Geest (eds), 2000).

[26] It should be noted that the narrow version of the notion of 'transaction costs' have been presented in the economic literature in terms of 'monetary interpretation' that assumed 'transaction costs as the direct costs that an economic agent incurs when engaging in a

will be discussed in Sub-section 4.2 in detail, these costs include search costs, bargaining costs and enforcement costs incurred by parties during the process of property rights exchange. The economic analysis of law, based on such understanding of transaction costs, emphasizes the normative imperatives that 'law can either provoke transaction costs to rise or it can help to reduce them.'[27]

Having described the approach of economic analysis of law, it is imperative to also explain the justification and limitation of utilizing it as a method of analysing legal rules taking transactions costs as a unit of normative analysis in the process of acquiring land for investment purposes. To begin with the justification, unlike the traditional legal research methods of analysing legal rules on a given issue, carrying out legal research by incorporating the insights from the economic analysis of law provides additional yardsticks against which the social or economic desirability of legal rules are evaluated.[28] It is contended that carrying out legal research without incorporating the insights of economic theory is ultimately unsatisfactory.[29] Hence, it is highly recommended to carry out an 'economically informed' legal research at least by consulting the insights resulting from previous economic analysis of law relevant to the research area.[30]

Like the vast majority of studies that employ economic analysis of law, this article is limited to the normative frameworks of economic analysis of law as

market transaction'. See Tomasz Famulski, *Selected Legal Aspects of Transaction Costs*, 4 JOURNAL OF FINANCE & FINANCIAL LAW 23-27 (2017).

27 *Id.,* at 27.

28 Warren J. Samuels & Steven G. Medema, *Ronald Coase on Economic Policy Analysis: Framework and Implications,* in COASEAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS 162 (Steven G. Medema (eds), 1998). See also Alession M. Pacces, *A law and economics perspective on normative analysis*, in FACTS AND NORMS IN LAW: INTERDISCIPLINARY REFLECTIONS ON LEGAL METHOD 171 (Sanne Taekema, Bart van Klink & Wouter de Been (eds), 2016).

29 Sanchez-Graells, *supra note* 22 at 173. See also Tom R. Tyler, *Methodology in Legal Research* 13 UTRECHT LAW REVIEW 131, 132 (2017); see also ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT:AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING 70 (Cambridge University Press, 2004).

30 Sanchez-Graells, *supra note* 22 at 192.

a methodological approach.[31] Accordingly, it is not the intention of the article to be an empirical work of transaction costs economics involving Ethiopian investment land transactions for two major reasons. The first reason relates to the expertise of the author who is accustomed to the doctrinal methods of legal research which is commonly used in the legal profession. Thus, it is not the intention of the article to directly engage with task of empirically testing the economic methods and theories of transaction costs. The second related reason is attributable to limitations of expertise and resources. It goes without saying that a research work of empirical transaction cost economics requires the mathematical application of econometric techniques with the 'task of linking concepts with observations' that 'demands a great deal of detailed knowledge of the realities of economic life'.[32] In addition, on top of demanding an expertise on mathematical economics, conducting the empirical aspects of transaction costs on the legal regulations of land exchange process requires resources to gather first hand micro analytical data relevant to assess the practices of land transaction contracts.[33]

With these considerations in mind, the article aims to offer a modest explanation as to why economic analysis of legal formulations should not be overlooked given the involvement of transaction costs in each step of process of acquiring investment land. The article aims to examine the existing Ethiopian land law regulating various modes of acquiring land for investment purposes to show the extent to which such legal options facilitate the reduction of transaction costs.

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[31] See generally Edward Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996); *see* also Keith N. Hylton, *Law and economics versus economic analysis of law*, 48 EUROPEAN JOURNAL OF LAW AND ECONOMICS 77, 78 (2019).

[32] Oliver E. Williamson, *Transaction Cost Economics Meets Posnerian Law and Economics,* 149 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 99, 113-14 (1993).

[33] *Id.,* at 114.

2. Property Rights to Land in Ethiopia

2.1. Limitations of Property Rights in Land

The existing legal framework on land maintains the common ownership of rural and urban land as well as natural resources by the state and the people of Ethiopia.[34] In actual terms, while state controls land ownership, urban dwellers, rural peasants, semi-pastoralists and pastoralists are guaranteed only 'landholding' rights. The term 'holding rights' is defined under federal rural land law as,

> the right of any peasant farmer or semi-pastoralist and pastoralist (…) to use rural land for purpose of agriculture and natural resource development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on this land thereon by his labour or capital and to sale, exchange and bequeath same.[35]

In the parlance of property rights, landholders are assigned with the usufruct rights—without alienation right through sale (*abusus*).[36] Implicitly, usufruct rights basically involve the right to use, rent and lease land lawfully acquired by any person. In terms of usufruct land rights transferability, it is important to closely look at the provisions of the Constitution that distinguish between landholding rights *per se* and the rights to immovable property built on the land. The issues of land transferability through alienation, bequeath (donation or inheritance) or transfer of title are explicitly mentioned to refer to the full right to the immovable property built on the land and to the permanent improvements made on the land by the labour and capital of the

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[34] F.D.R.E Const. *supra note* 5, art. 40, sec 3. However, it is important to note that federal rural land administration and land use law expressly refers 'government as being the owner of rural land'. *See* Rural Land Administration and Land Use Proclamation, *supra note* 4, art.5 sec 3.

[35] Rural Land Administration and Land Use Proclamation, *supra note* 4, art.2 sec 4.

[36] The phrase 'shall not be subject to sale or to other means of exchange' in art. 40 sec 3 of the F.D.R.E Const. generally indicates that the *abusus* concept of ownership rights on land is absent, precluding private ownership of land.

landholders. Hence, no mention is made in the Constitution as to whether landholding rights *per se*, could be transferable through donation or inheritance.[37] It is the Rural Land Administration and Land Use Proclamation that mentions the possibility of acquiring rural land through donation or inheritance of family members.[38] It is understandable that the public land ownership regime in Ethiopia imposes significant restrictions on the transferability of landholding rights *per se* affecting the magnitude of allocable property rights. Therefore, this makes it difficult if not impossible for investors to acquire land as a sellable economic good because of such constitutional prescription that eventually hampers alternative economic possibilities of land reallocation.

In the Ethiopian land law literature, scholars widely argue that limitation on property right to land through alienation has some socio-economic reasons which land policymakers forward as justification to maintain state ownership of land.[39] It is argued that the issue of land in Ethiopia touches upon the sensitive cords of the society that transcends from one generation to the next unless it is taken seriously as a constitutional matter in which state takes the responsibilities to protect such right and allocate for the common benefit of the Ethiopian people.[40] There are two important reasons put forward in defence of the constitutional stance of state land ownership in current Ethiopia — social equity and tenure security.[41]

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[37] The cumulative reading of F.D.R.E Const. art. 40 secs. 1 & 7. The Constitution also distinguishes between Ethiopian peasants and pastoralists on the one hand and private investors on the other to obtain land. The former two have 'the right to obtain land without payment' or free land for grazing and cultivation purposes. But the later have the 'right to the use of land on the basis of payment arrangements established by law'. See F.D.R.E Const. art. 40 secs. 4, 5 & 6.

[38] Rural Land Administration and Land Use Proclamation, *supra note* 4, art.5 sec 2.

[39] For detailed nuances on this issue, *see* Muradu Abdo Srur, *State Policy and Law in Relation to Land Alienation in Ethiopia* 15-20 (PhD Thesis University of Warwick, December 2014).

[40] Nahum, *supra note* 7 at 54.

[41] Daniel W Ambaye, *Land Rights in Ethiopia: Ownership, equity, and liberty in land use rights*, TS02D-CUSTOMARY AND GROUP LAND RIGHTS 26-27 (2012).

The social equity argument relates to the obligation of the government to ensure free access to rural land for peasants and pastoralists as provided under the FDRE Constitution and federal and regional rural land legislation.[42] The tenure security argument was advanced in terms of the constitutional prohibition of forced eviction of peasants and pastoralists from their rural land and restrictions on land sale.[43] Hence, public ownership of land in Ethiopia is viewed as the preeminent device to protect the peasants against market forces. The assumption is that creating a property rights regime where the right to alienate land would create incentive for 'poor farmers' to sell their landholding ultimately resulting in 'migration of the farming population' through massive eviction.[44] Nonetheless, scholars widely argued that this assumption was not supported by empirical evidence.[45] For instance, Muradu Abdo opined that what is more important is realizing security of land use rights to the rural community that would facilitates 'agricultural productivity and stimulates local industries'.[46] According to Muradu, such approach requires thinking outside both land ownership debates that 'rest on an underlying narrow conception of land rights which regards land rights simply as a tradable asset.'[47] The emerging trend that land should not necessarily be fully owned to be a tradable asset found its express normative traction ushering a shift in private-public ownership debates. Specifically, the move towards the conception of bundle of property rights to land capable of assignable legal or

[42] As it stands now in rural Ethiopia land redistribution by the state with the view to ensure free access to land would prove difficult if not impossible as it is difficult to find unoccupied farm land. The government considers pastoralists grazing land as untapped arable land.

[43] *See* Daniel, *supra note* 41. Various studies conducted by the World Bank which is in favour of private property in land (often attacked by the ruling part as neo-liberalist economic thinkers) argue otherwise. These donors contend that State ownership of land creates lack of tenure security. They argue that absence of tenure security for land users provides little or no incentive to improve land productivity through long term investment; increase transaction cost because of land dispute; and it hinders the emergence of property market such as credit availability/land mortgage.

[44] *Id.*, at 27.

[45] Muradu, *supra note* 39 at 20.

[46] *Id.*, at 18-19.

[47] *Id.,* at 20-21.

contractual rights received wide policy acceptance opening an enabling environment to acquire land from landholders.

2.2. Types of Property Rights to Land

One can identify three basic types of property rights regime in land in the context of public ownership of land that confer varying degrees of holding rights. The first type of landholding is termed as private landholding that resembles individual property rights to land except the right to sell one's own landholding.[48] The categories of persons entitled to 'minimum private holding' rights to land includes 'farmers, pastoralists and semi-pastoralists and other bodies who are entitled by the law to use rural land.'[49] The framework of property rights in land within this regime relates to the assignment of individual minimum holding rights to use and enjoy the fruits of the land. The second category relates to 'communal holding' which refers to the holding of 'the local residents for common grazing, forestry and other social services.'[50] This category of holding rights allows individuals to use land for the legally assigned purposes on the basis of open access to the local residents. This property regime is susceptible to the 'tragedy of the commons' in the absence of clearly defined communal holding title capable of excluding non-local residents. The third category is 'state holding' which refers to 'demarcated rural land and those lands to be demarcated in the future by the federal and regional governments which includes forest lands, wildlife protected areas, state farms, mining lands, lakes, rivers and other rural lands'.[51] This category should not be conflated with the conception of state or public land ownership as construed under the Constitution. As indicated in the definition of state holding, it rather refers to landholding schemes which are closely controlled and administered by government

[48] *See* F.D.R.E Const., *supra note* 5, art. 40, sec 3 & sec 4. See also Rural Land Administration and Land Use Proclamation, *supra note* 4, art 5 & art. 2 sec 4.

[49] Rural Land Administration and Land Use Proclamation, *supra note* 4, art. 2 sec 11.

[50] *Id*, art. 2 sec 12.

[51] *Id.*, art. 2, sec 13.

agencies in view of their significance to the socio-economic development of the country.

In a nutshell, drawing the proper limits to the legal assignment of property rights on land and distinguishing subjects of these rights would help to closely understand the context of acquiring land for investment purposes in Ethiopia. Moreover, it could be difficult to indulge into the economic analysis of options of acquiring land for investment without clearly identifying potential landholders with which any private investor has to deal with to lawfully acquire land for investment purposes. It is also vital to further discuss the modes of acquiring land rights for investment activities within the indicated frameworks of land property rights regimes.

3. Legal Modalities of Acquiring Land for Investment in Ethiopia

It is argued that economic development policy and strategies of Ethiopia encourages 'commercialization' of land for large-scale agriculture and urban industrial expansion through a massive transfer of land to private investors.[52] In order to realize the transfer of land to private investors, legislative instruments are put in place to facilitate investment land acquisition. As highlighted in the Introduction to this article and as discussed in the following sub-sections in detail, there are three major legal options in which investors acquire land for investment purposes — land lease through tender, government land allotment and private land rental.

3.1. Acquiring Land through Public Auction: Lease Tender

The leasehold tenure system is considered as typical device to 'leasing public land to lessen the tension between the government's desire to uphold public land ownership and the reformists' demand for increasing private property

[52] Dessalegn Rahmato, *Land to Investors: Large-Scale Land Transfers in Ethiopia,* FORUM FOR SOCIAL STUDIES 4 (2011).

rights.[53] It is contended that the existence of credible institution that is committed to lease contracts, guarantees of security for the users and transferability options, and long-term lease rights will promote investment benefits.[54] Likewise, for the first time, the 2002 Urban Land Lease Proclamation in Ethiopia envisioned 'that transferring urban land by lease for a fair price, consistent with the principles of free market' in order to assist the country to 'achieve overall economic and social development'.[55] More specifically, this proclamation emphasizes the necessity 'to develop optimal conditions in which lease will become exclusive urban landholding system and to remove obstacles of and to expedite the process of permitting and holding urban land by lease based upon investment plan.'[56] The Urban Lands Lease Proclamation 721 of 2011 also recapitulates the need to put in place 'appropriate administration that is efficient and responsive to land resource demand' that 'ensures the rights and obligations of the lessor and lessee'.

Given that land is the property of the state and the people of Ethiopia, its use is subject to specific legal rules. According to the Urban Lands Lease Holding Proclamation, 'no person may acquire urban land other than the lease holding system.[57] Under this proclamation, the term 'lease' is defined as 'a system of land tenure by which the right of use of urban land located within an administrative boundary of an urban center is acquired under a contract of a definite period.[58] Furthermore, the term 'tender' is also defined as 'a modality of transferring lease of urban land to a bid winner fulfilling the competition requirements issued based on the rule of market competition of urban land tenure'.[59] Hence, any investor who wants to acquire land for investment undertaking is legally expected to pass through the tender

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53 Y Hong & S Bourassa, *Why Public leasehold? Issues and Concepts*, in LEASING PUBLIC LAND: POLICY DEBATES AND INTERNATIONAL EXPERIENCES (Steven C. Bourassa and Yu-Hung Hong (eds, Lincoln Institute of Land Policy 2003) 3-38.

54 *Id.*

55 Re-Enactment of Urban Lands Lease Holding Proclamation No 272/2002 at preamble.

56 *Id.*

57 Urban Lands Lease Holding Proclamation No. 721/2011, art.5 sec 1.

58 *Id.*, art. 2 secs. 1 & 2.

59 *Id.*, art 2 sec 9.

process administered by the relevant public bodies authorized to allocate urban land.

The effectiveness of acquiring land through tender or public auction depends on fulfilment of four legal preconditions. The first precondition involves the obligation of appropriate government body to prepare land that is free from legal claims of any third party with a clearly delineated and assigned parcel.[60] In the absence of land free from third party claims under state possession within the urban plan, the land prepared for lease tender should be acquired by authorized government bodies through the process of expropriation of urban land upon payment of commensurate compensation in the public interest from lawful possessor.[61] Once the decision of expropriation is made, the lawful possessor of the land is served with a written clearing order stating the time the land has to be vacated, the amount of compensation to be paid and the size and locality of the substitute plot of land to be availed. The other source of land for lease tender could be prepared by clearing order of an illegally occupied urban land by the appropriate body without the payment of compensation by merely serving a written notice of seven working days to the occupant in person or by affixing it to the property situated on the land.[62]

The second precondition to obtain land through the tender system relates to the process of availing information about land prepared for tender that should contain the land grade, the lease benchmark price and other pertinent data.[63] The law requires that such information should further comprise development program and action plan where the urban land prepared requires special development program and implementation action plan.[64]

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60 *Id.*, art. 8 sec 1 para, a & d.

61 *Id.*, art. 26 sec 1.

62 Urban Lands Lease Holding Proclamation, supra note 69, art. 26 sec 4.

63 *Id.*, art. 9 sec 1.

64 *Id.*, art 9 sec 2.

The third precondition relates to publicity of tender plans that requires the relevant authorities to make publicly accessible the demand for urban land and development priorities and their annual plans indicating the quantity of urban land that will be offered for tender.[65] The fourth precondition refers to the timely supply of urban land for the lease tender in accordance with the publicized tender plans.[66]

After the fulfilment of these four preconditions, 'the investor with the highest bidder shall be declared a winner on the basis of his bid price and the amount of advance payment he offers'.[67] Therefore, the leasehold system of acquiring land assists for implementation of the constitutional right of private investors to 'the use of land on the basis of payment arrangements established by law'.[68] The urban land lease hold system ensures the accessibility of land for private investors based on the payment of lease price set by the government.

3.2. Acquiring Land through Government Allotment

The term 'allotment' refers to the 'modality applied for providing urban lands by lease to institutions that could not be accommodated by way of tender'.[69] In this modality, investors are provided with urban land through government allotment for undertaking investment projects which are exceptionally provided under the law. Accordingly, investors who plan to invest in manufacturing industries and investment projects with special national significance may acquire land through allotment upon the 'decisions of the cabinet of the concerned region or the city administration'.[70] The Investment Proclamation 1180 of 2020 further prescribes that pertinent regional bodies are required to allocate land for

[65] *Id.*, art. 10 sec 1, *para.,* a & b.
[66] *Id.*, art. 10 sec 2.
[67] *Id.*, art. 11 sec 5.
[68] F.D.R.E Const. *supra note* 37.
[69] Urban Lands Lease Holding Proclamation, *supra note 69*, art. 2 sec 10) & art.7 sec 2.
[70] *Id.*, art.12(1)(e).

investors holding investment permit in 'the manufacturing' and 'other sectors' within sixty days and ninety days, respectively.[71]

The application of an investor for land allotment should be accompanied by the following three procedural requirements.[72] Firstly, the investor is required to present support letter from the supervising authority of the requesting institution or from pertinent sectoral bodies. Secondly, the investor should provide evidence of a detailed study of the project to be implemented at the requested land site. Thirdly, the investor should present evidence that shows the budget allocated for implementing the project.

In the context of rural land, the 2005 Federal Rural Land Use and Land Administration Proclamation states that 'private investors that engage in agricultural development activities shall have the right to use rural land in accordance with the investment policies and laws at federal and regional levels'.[73] At the federal level, the demand for land to undertake large scale commercial agriculture investment was handled by the Ethiopian Horticulture and Agricultural Investment Authority in collaboration with regional states.[74] The authority is mandated to register, administer and transfer those lands under its land banks on the basis of delegation obtained from regional states.[75] Furthermore, the authority is responsible to collaborate with the regional states in the identification of suitable agricultural investment lands, facilitate supply of investment land, and provide suitable documents that are accessible to the investors.[76] More recently, the Investment Proclamation 1180 of 2020 requires regional states

71 Investment Proclamation No 1180/2020, art. 51.

72 Urban Lands Lease Holding Proclamation, *supra note* 69 art. 13.

73 Rural Land Administration and Land Use Proclamation, *supra note* 4, art. 5 sec 4 *para.* a.

74 Ethiopian Horticulture and Agricultural Investment Authority Establishment Council of Ministers Regulation No. 396/2017, art 5.

75 *Id.,* art 2 sec 6; art 6 sec 4 (see *Amharic* version); For discussion on the constitutionality issues of federal land administration, s*ee* Temesgen Solomon Wabelo, *Legal and Institutional Frameworks Regulating Rural Land Governance in Ethiopia: Towards a Comparative Analysis on the Best Practices of Other African Countries,* 11 BEIJING LAW REVIEW 64, 72-73 (2020).

76 Ethiopian Horticulture and Agricultural Investment Authority Establishment Regulation, *supra note* 74, art., 5 sec 1.

to handle land requests for investments in the manufacturing, agriculture, and other sectors in an efficient, transparent and predictable manner.[77] However, it is not clear as to whether large scale agricultural investment lands are allotted by the Ethiopian Horticulture and Agricultural Investment Authority since the new investment law don't specifically distinguish based on the scale of agriculture investment land.

In brief, the modalities of government allotment and public auction are similar since benchmark lease prices are commonly applicable despite the absence of competition process for acquiring the land in the former case. The modes of acquiring land through government allotment provide opportunity for the investor to bypass the hustle of competitive public auction which may take long duration to complete acquisition of the land.

3.3. Acquiring Investment Land through Rental System

Unlike the previous two modes of acquiring land for investment that are considered as a primary channel for land use transactions through the state land lease system, land rental option depends on secondary contractual arrangements between private landholder and an investor. Accordingly, investors may acquire land through rental system based on at least two contractual arrangements. The first arrangement for an investor to acquire land for investment purposes relates to rental land use rights concluded between the investor and the rural or urban landholder. Any person who lawfully holds urban land may lease or rent his usufruct rights to any investor who wants such land for investment purposes through contractual arrangements. Similarly, investors may also acquire rural land use rights for agricultural investment purpose from farmers or pastoralists on the basis of contractual arrangements.[78] The Rural Land Administration and Land Use Proclamation states,

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[77] Investment Proclamation, *supra note* 71, art 51 sec 1.

[78] Rural Land Administration and Land Use Proclamation, *supra note* 4, art. 8 sec 3: In addition to use rights a landholder may also undertake development activity jointly with the investor in accordance with the contract he concludes.

> Peasant farmers, semi-pastoralist and pastoralist who are given holding certificates can lease to other farmers or investors land from their holding of a size sufficient for, the intended development in a manner that shall not displace them, for a period of time to be determined by rural land administration laws of regions based on particular local conditions.[79]

However, valid transfer of rural land use right to private investors in this situation should fulfil two conditions as an acceptable land lease or rental arrangement in the eyes of the law. First, the rural land rental agreement to be concluded should secure the consent of all the members who have the right to use the land and be approved and registered by the competent authority.[80] Second, any rural land held through lease or rental should be registered by the competent authority.[81]

The second arrangement for an investor to acquire land for investment purpose relates rental or lease of land from another investor who already acquired land through allotment or tender process and holding lease hold title deed but wants to sub-lease together with on-built facilities or landed property.[82] This is clearly provided under the urban land lease law as the lease hold right of an investor who may transfer his leasehold right or use it as collateral or capital contribution.[83] It should be noted that unlike urban land lease holding system that permits investors to sub-let or transfer all the contractual rights over the leased land, an investor who has leased rural land may only present his use right as collateral.[84] This feature of acquiring rural land use rights for investment makes the option of land rental unique from the concept of lease hold system because the former lease arrangement does

[79] *Id.*, art 8 sec 1.

[80] *Id.*, art 8 sec 2.

[81] *Id.*, art. 6 sec 6 & art 8 sec 3.

[82] Urban Lands Lease Holding Proclamation, *supra note* 69, art. 24 sec 1 & 2.

[83] *Id.*

[84] Rural Land Administration and Land Use Proclamation, supra note 4, art. 8 sec 4.

not involve transfer of lease hold title deed which in the rural land context is land 'holding certificate'. [85]

In general land rental system as a mode of acquiring land use rights for investors differs from the avenue of land provision provided through tender process and government allotment since parties to the land rental arrangement are both private parties. The role of government in this case is limited to registration of rental agreements while rental price including terms and conditions are determined based on the mutual agreements of private parties.

4. Economic Analysis of Legal Options for Investment Land Acquisition

In the preceding section, the legal frameworks that set out rules to regulate the three modes of acquiring land for investment operations were examined. This section examines whether these legal options for acquiring land for investment purposes foster the reduction of transactions costs within the law and economics frameworks articulated in Section 1.

4.1. Property Rights Economics and Transaction Costs

In the law and economics scholarship, the recognition of the relationships between property rights and transaction costs lays the normative foundations for analyzing different structures of property ownership. Hence, it is important to evaluate the legal rules that regulate property ownership of land under the agency of state monopoly to unfold the extent to which law helps to realize efficient allocation of resources by reducing transaction costs during the exchange of property rights to land.[86] In the early economic thoughts, efficiency of property rights under public ownership of land was

[85] For more discussions *see* Tesfaye Teklu, *Rural Land, Emerging Rental Land Markets and Public Policy in Ethiopia*, 16 AFRICAN DEVELOPMENT REVIEW 176 (2004).

[86] Peter J Boettke and Rosolino A Candela, *Development and Property Rights* in, EENCYCLOPEDIA OF LAW AND ECONOMICS (Jürgen Backhaus (ed.), Springer 2015).

contended because of the thinking that such property rights regimes are insufficiently protected and not well-defined as is the case in private property rights regime.[87] For scholars of economics, property right regimes 'that do not contain the right of alienation are considered to be ill-defined'.[88] It is a widely held economic view that absence of right of alienation in property right system presumably leads to inefficiency as it impedes the transfer of such property to the highest valued use.[89] Thus, private land ownership is viewed as a typical assignment of property rights that gives the owner of an asset the right to the use and enjoys the fruits of the asset to the exclusion of others and the freedom to transfer these rights to others.[90] It is on the basis of such assumptions that private property rights in land is argued to encourage efficiency of land allocation by facilitating market exchanges through land transferability that 'allows such resources to end up in the hands of producers and consumers with higher valuation'.[91]

With the introduction of new property rights economics, the idea that common or public property regimes are inefficient when compared to private property regimes was revisited. In recently advanced property rights theory, it is contended that most of the property system that are considered common or public property regimes also involve individuals or groups who hold 'sufficient rights to make decisions that promote long-term investment and harvesting from a resource'.[92] Hence, the fact that individuals in public land ownership system do not possess the right to alienate their property

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87 E Ostrom & C Hess, *Private and Common Property Rights,* in ENCYCLOPAEDIA OF LAW AND ECONOMICS 338 (Boudewijn Bouckaert (eds), Edward Elgar 2000).

88 *Id.*, 339.

89 *Id.*

90 Ilya Segal & Michael D Whinston, *Property Rights,* in HANDBOOK OF ORGANIZATIONAL ECONOMICS 100-158 (R. Gibbons & J Roberts (eds), Princeton University Press 2013); Demsetz (1964) and Alchian (1965) also define 'property rights as individuals' rights to the use, income, and transferability of assets, a definition corresponding to the partition in Roman law between usus, fructus, and abusus, respectively'. See Armen A Alchian, *Some Economics of Property Rights,* 30 IL POLITICO 816–829 (1965); H Demsetz, *The Exchange and Enforcement of Property Rights* 7 JOURNAL OF LAW AND ECONOMICS 11 (1964).

91 Demsetz, *supra note* 90, at. 11-26.

92 Ostrom & Hess, *supra note* 87 at 341.

rights does not necessarily mean that they do not have the right to earn income from the resource and the right to determine who may access and harvest from a resource.[93]

The recognition of the idea that public property regime such as public ownership of land could be malleable to multiple use rights leads to bundle of rights capable of contractible rights.[94] According to Ronald Coase, what matters more is not who owns certain thing in the context of full ownership but whether rights on such things could be set up with 'zero transaction cost' making resource allocation system efficient and independent of the pattern of ownership.[95] The Coasean analysis assumes that in a condition of 'costless market transactions', monopolies of full ownership rights may not influence its allocability[96] that makes all property regimes alternatives efficient.[97]

However, in real world, transaction cost may not be zero since property as a bundle of rights is authoritatively prescribed or assigned by the state for each resource. In such situation, it would matter whether property rights assigned by the state are 'broad or narrow, clear or ambiguous, or *in rem* or *in personam*', since it may impose positive transaction costs on participants in the economy.[98] In other words, how legal rules are designed to facilitate transactions of property rights determines the feasibility of exchange of rights. Hence, it could be argued that the ability of a legal institution as a means to facilitate the efficient allocation of resources is evaluated in terms of measures it takes to reduce transaction costs necessary to setup the exchange of property rights. Such is the version of transaction costs notion mainly espoused in the law and economic analysis of property rights thought

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93 *Id.*

94 Arruñada Benito, *Coase and the Departure from Property*, in THE ELGAR COMPANION TO RONALD H. COASE 305-319, 308 (Claude Ménard & Elodie Bertrand (eds), 2016).

95 Ronald H Coase, *The problem of social cost*, 3 J. LAW & ECON. 1, 19 (1960).

96 Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature,* 10 JOURNAL OF ECONOMIC LITERATURE *1139* (1972).

97 Steven NS Cheung, *Transaction costs, risk aversion, and the choice of contractual arrangements,* 12 J. LAW & ECON. 23–42 (1969).

98 Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J. LAW & ECON. S77-S104, S78 (2011).

by Ronald Coase and further elaborated by other scholars. The Coasean transaction costs involve setup costs to carry out exchange of property rights leading to a natural classification of transaction costs that can be obtained from the different phases of the exchange process itself.[99] Coase explains that,

> In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on.[100]

The term 'transaction costs', as emphasized by Coase in the above quote mainly involves search costs, communication costs, bargaining costs, contract drafting costs, and contract monitoring cost as 'the costs involved in the process of exchange of property rights. However, Carl Dahlman further crystallized the concept of transaction costs by classifying them into 'search and information costs, bargaining and decision costs, policing and enforcement costs.'[101]

The concept of transaction costs in the form of search and information cost involves the time and resources incurred to successfully identify appropriate parties in order for an exchange between such parties to be set up as a necessary precondition.[102] Given the existence of imperfect information in the exchange market, costs for conveyance of information may be incurred to reduce uncertainty about property rights subject to transactions.[103] When parties agree to exchange property rights voluntarily, they do so because they believe that what they will obtain from the exchange is worth more than what they offer in return. According to Yoram Barzel, the transaction cost involved is 'the measurement costs of inspecting attributes of goods' in

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99 *Id.*,

100 Coase, *supra note* 95, at 15.

101 Carl J. Dahlman, *The Problem of Externality*, 22 J. LAW & ECON.141, 148 (1979).

102 *Id.,* at 147.

103 *Id.*, at 148.

which a party interested in their acquisition should incur to access information detailing the properties of the goods in question.[104]

Transaction cost incurred in the form of 'bargaining and decision cost' involves costs of decision making during the process of negotiation to determine the positions of the parties leading to the conclusion of the property exchange contract.[105] However, the involvement of several parties in the negotiation process can likely increase the cost of decision making since agreeable contract terms can only be determined after costly bargaining between the interested parties involved.[106]

The last but not least form of transaction cost involves 'policing and enforcement costs' incurred after the conclusion of the agreement for the purpose of policing and monitoring the other party to ensure compliance with the terms and conditions set out in the contract. The behaviors of opportunism that result from non-compliance of one of the parties to the transactions can be prevented by incurring costs for the enforcement of the agreement concluded. [107]

In general, the above discussions show the instrumental role of the laws and institutions that structures property rights in shaping transaction costs that encourages the efficient allocation of resources. In the economic system where exchange of property rights to land underscores the importance of transaction costs, the way legal rules are designed to delineate and enforce property rights influences the ability of rights holder to facilitate transfer.[108] Hence, the law and economic analysis of property rights provides compelling insights on how economically efficient way of acquiring land in public property regimes may be achieved as it associates transaction costs

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[104] Yoram Barzel, *Measurement Costs and the Organization of Markets*, 25 JOURNAL OF LAW AND ECONOMICS 27, 28 (1982).

[105] Dahlman, *supra note* 101 at 148.

[106] *Id.*

[107] *Id.*

[108] Luz M Velencoso, *Economic Questions Concerning the Rules for the Transfer and Publicity of Immovable Property'*, in TRANSFER OF IMMOVEABLE PROPERTY IN EUROPE FROM CONTRACT TO REGISTRATION 4 (Andrea Pradi (ed.), 2012).

with the resources spent on delineating, protecting, and capturing control over resources in use and in exchange'.[109] From such a point of view, vague definitions and unsecure allocation of property rights militate against wealth production mainly because they increase transaction cost and inhibit exchange.[110] Well defined property rights that clearly establish the scope of one's legal rights in any given parcel of land would reduce the transaction costs involved during the process of property rights exchange.[111] Therefore, when the law defines land rights in simple and clear terms, it is easier to exchange property rights since transaction costs would be lower than when they are complicated and uncertain.

The following section normatively evaluates the different options of acquiring land for investment purposes in Ethiopia. Therefore, the three options for acquiring land for investment previously identified under the land and investment laws of Ethiopian laws are analyzed from the perspectives of the three forms of transaction costs involved in the transfer of property rights.

4.2. Normative Assessment of Legal Options for Acquiring Land Use Rights

As discussed in section 2, land market in Ethiopia is characterized by the monopoly of the state where land is allocated through the limited channel provided by the law. In addition, transfer of land through sale is restricted and the lawful means of acquiring land is limited to the three major options—land lease tender, government allotment and land rental by lawful possessor or private landholder. Based on the outline of the three modes of acquiring land for investment purpose made above, the involvement of transaction costs in the process of property rights exchange can be

[109] N.J Foss, *Property Rights Economics.* in ELGAR COMPANION TO TRANSACTION COST ECONOMICS 97 (Peter G. Klein, Michael E. Sykuta (eds), Edward Elgar Publishing, 2010).

[110] CB Kerekes & CR Williamson, *Unveiling de Soto's mystery: property rights, capital formation, and development*, 4 JOURNAL OF INSTITUTIONAL ECONOMICS 300 (2008).

[111] Harold Demsetz, *Towards a Theory of Property Rights*, 57 THE AMERICAN ECONOMIC REVIEW 356 (1967).

categorized into two major segments. The first segment of transactions costs involves the process of land lease transfer rights through lease tender, allotment and rental options between government and the lessee investors. The second segment of transaction costs involve land use right transfer through rental system through the contractual arrangements as between farmers or pastoralists on the one hand and tenant investors on the other. The major difference between the two segments of transaction costs emanates from differences of parties involved in the process of acquiring land use rights. The process of acquiring land use rights for a specified duration in the former segment involves government agency and private investor while the later involves private parties with relatively equal, if not identical, bargaining powers. Thus, the law and economic analysis of transaction costs that involves the exchange process whereby investors acquire land use right in all three options are examined as follows.

4.2.1. Search and Information Costs

The search and information cost with regard to the process of acquiring urban land through the structure of lease tender system relates to the cost of searching for information of potential land auction or bid advertisement including the buying of bid document from the appropriate government office. In addition to the public advertisement of urban lands presented for lease tender, the law sets the rules on how information that relates to the parcel of land including the quantity, and quality of land grade, lease benchmark price and other detailed relevant data are freely accessible to the investors by obligating the appropriate government authority to publicize such information.[112]

Furthermore, the law also tries to minimize the information costs that relate to the attributes of land use property rights by setting rules requiring the government to prepare urban lands that (a) are free from legal claims of any party; (b) are prepared in conformity with the urban plan; (c) have access to basic infrastructure; (d) are parceled, delineated, assigned with unique parcel

[112] Urban Lands Lease Holding Proclamation, *supra note* 69, art. 10 sec 1 para. (a).

identification numbers; and (e) have site plans and fulfil other necessary preconditions prior to advertising urban lands.[113] Thus, since there are specific norms that mandate the government bodies to implement urban land lease tender process following the rules of transparency and accountability, information costs incurred by the investor could be minimized if not totally avoided. This is because investors are still required to deal with the costs of incompleteness and imperfections of information acquired from the public bodies.

The information cost incurred to acquire land through government allotment is different from the information search costs of acquiring land through lease tender because there is no legal requirement on the part of the government to publish important information relating to the properties of land for investment. It requires investors to approach appropriate government bodies to seek similar information on urban land prepared for allotment by presenting feasible investment projects. Hence, one can easily realise that in the absence of accountability and transparent bureaucracy, the effort of acquiring information on allocable urban land without going through the established tender process could be as difficult as acquiring the land itself.[114] Thus, an investor is required to expend much of his time and resource to search for insider information to know more about government's urban land development plan for investments. Furthermore, information search costs incurred in acquiring rural land for agricultural investment through government allotment could be minimal when it comes to the cost of collecting data on the quality of the land since responsible government agency is required to provide appropriate information that document on matters of agro-ecology, soil topography, agricultural products and crop suitability of the agricultural investment lands.[115]

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[113] *Id.*, art. 8.

[114] *Id.*, art. 4 sec 2: Clearly hints these assertion as it states; 'the offer of lease tender and land delivery system shall adhere to the principles of transparency and accountability and thereby preventing corrupt practices and abuses to ensure impartiality in the processes'.

[115] Ethiopian Horticulture and Agricultural Investment Authority Establishment Regulation, *supra note* 74, art. 6 sec 3.

The transaction costs incurred to acquire land through rental system from lease holding investor (who may decide to sub-let his holdings), farmers, semi-pastoralists and pastoralists could involve the search costs about the potential partner with lawful land holding right. It also involves incurring additional cost of information on specific situations of acquiring knowledge that relates to the rental market and quality of land. The FDRE Rural Land Administration and Land Use Proclamation contemplates the need to put in place land information system with the view to gather, analyse and distribute to the users.[116] It also authorizes rural land administration authorities to maintain registration database that describes the holder of the rural land, the holders of the bordering lands, the types of use, and the rights and obligations of the holder.[117] However, in rural land use system where land titling and registration is absent or ambiguous, an investor would inevitably cost time and resources to ensure that he is dealing with lawful possessor of the given parcel of land. In particular, if the investor is a new face to the area, discovering the lawful landholder of a given parcel of land under rental system may result in the high search and information cost. In this situation, 'the return to searching for the true' landholder with valid landholding certificate 'is the value of the increased certainty resulting from the augmented information concerning property rights in the land'.[118] Thus, the investor may find it unproductive or unprofitable to undertake enough searches to acquire enough information to attain absolute certainty, due to diminishing marginal returns to search.[119]

It could be argued that the search costs involved in the identification of legally entitled landholder in the process of acquiring land in the cases of land lease tender and allotment would be relatively low when compared to the case of search costs involved to identify lawful possessor in the process of acquiring rural and urban land rights through lease or other contractual arrangements. In the former cases, investors are dealing with government

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116 Rural Land Administration and Land Use Proclamation, *supra note* 4, art 2 sec 16.

117 *Id.*, art. 6 sec 5. See also Investment Proclamation, *supra note* 71, art. 52.

118 Omotunde E. G. Johnson, *Economic Analysis, the Legal Framework and Land Tenure Systems*, 15 J. LAW & ECON. 261 (1972).

119 *Id.*

bodies legally authorized to transact land use rights unless of course the property title of land prepared for allotment or tender is disputable. In the latter case absence of land registration system and landholding certificate puts investors in the limbo of legal uncertainty as it may be costly to deal with the wrong person who pretends to be the lawful holder of land use rights.

4.2.2. Bargaining and Decision Costs

In both processes of acquiring land through tender process and allotment, the investor bargains with the government on terms and conditions of land lease contract with varying degrees. In the former case, negotiation on further terms and conditions of the lease contract is conditioned upon participating in the bid and winning of the public tender. But in the latter case, the investor is required to persuade the relevant government body by justifying the importance of government land allotment without going through the tender process.[120] In both cases, investors who acquire land are subject to the rules of urban land lease hold system as they are required to sign lease contract with the relevant government body.[121]

The lease contract signed by the government and the lessee investor is adhesive by nature and should 'include the construction start-up time, completion time, payment schedule, grace period, rights and obligations of the parties as well as other appropriate details.[122] Decision making on the terms and conditions of the lease contracts are difficult for the investor since those terms and conditions listed under the contract are further regulated by the mandatory rules of land lease law as the obligations of the lessee investor. However, an investor may incur lawyering or agency cost to facilitate the conclusion of the agreement and appreciate 'the contents of the lease contract' through an informed decision.[123] In addition, there could also be

[120] Urban Lands Lease Holding Proclamation, *supra note* 69, art.2 sec 10 & art. 12.
[121] *Id.*, art. 16(1).
[122] *Id.*, art. 16 sec 2.
[123] *Id.*

re-bargaining costs that inexorably result from the incomplete nature of the contract.[124]

The cost of bargaining and decision to acquire rural and urban land through rental system somewhat presents a unique transaction cost analysis compared to the monopolistic land market dealings with the government revealed in the previous options. First, an investor who wants to acquire land through rental arrangement from rural landholders for 'development activities' deals with multiple potential land renters with the tendency to increase negotiation costs. The cost of negotiation is further exacerbated by the mandatory provisions of the rural land law that require the investor to secure the consent of all the members who have the right to use the rural land and seek the approval and registration of the competent authority.[125] As such, an investor may be required to seek the consent of all family members of the rural landholder who want to rent the land to investors. Furthermore, the contracting cost also relates the costs of drafting the contract and registering the land rental before the competent authority.[126] Though land rental system provides a wide array of opportunities to negotiate land with rural land renters on competitive basis, the diversity of negotiation could be very costly.

[124] It is argued that in the transaction cost economics approach, the complete-contract benchmark is unattainable. The vital question is not incompleteness in itself, but rather 'the reasons for which some contracts are more incomplete than others.' Contracting parties are supposed to be unable to take into account all contingencies that might affect a transaction. Moreover, they do not always know the optimal response to foreseeable contingencies that should be stated in the contract. The completeness level is, therefore, difficult to evaluate. Every provision in a contract is assumed to be imperfect, and specifying a particular provision may be worse than specifying nothing.' See Stéphane Saussier, *Transaction costs and contractual incompleteness: the case of Électricité de France*, 42 JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION 189, 192, (2000).

[125] Rural Land Administration and Land Use Proclamation, *supra note* 4, art. 8 sec 2.

[126] *Id.,* art. 6 sec 6 & art.8 sec 3.

4.2.3. Monitoring and Enforcement Cost

The costs of monitoring and enforcement, in the context of acquiring land through land lease tender and allotment, involves the costs incurred to ensure compliance with the terms and conditions of the lease contract and protection of lease-hold land use rights from third party interference. For instance, prior to advertising urban lands prepared for tender an appropriate government body is required to ascertain that the plot of land prepared for public auction is free from legal claims of any party.[127] The government body who signs land leasehold contract with the investor should comply with this legal obligation in order to reduce the monitoring costs of the investor who acquire land through lease tender and allotment.

Furthermore, to secure the enforcement of the land lease holding rights acquired through tender and allotment, the investor is required to expend resources to renew the land lease contract in addition to the costs incurred to maintain the protection of landholding rights from third party claimants. The interference of third-party claimant could hamper the peaceful enjoyment of land use rights. In particular, the failure of the government to transfer land use right free from third party claims could further exacerbate the enforcement costs of the investor as disputes over a plot of land usually end up with litigation.[128] For instance, the proclamation that regulates, expropriation of landholdings for public purposes, payment of compensation and resettlement of displaced people provides that any person

[127] Urban Lands Lease Holding Proclamation, *supra note* 69, art. 8 sec. 1.

[128] The urban land lease law describes potential land disputes that could arise due to failure of the government to pay commensurate compensation for expropriated land and unlawful land clearance orders. See Urban Lands Lease Holding Proclamation No. 721/2011 Articles 28—30. It should be noted further that a permit holder's urban land right is subjected to expropriation for public interest and upon payment of compensation. In such case cost may be incurred from litigation to defend holding rights by challenging the existence of public interest justifying expropriation. The law stipulates 'the use of land defined as such by the decision of the appropriate body in conformity with urban plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development'. See Urban Lands Lease Proclamation, *supra note* 69, art 2 sec 7.

who received an order of expropriation of his landholding or who has an interest or claim on the property to be expropriated may file an application to the appeal hearing body and to the appeal hearing council.[129] Hence, in the absence of payment of compensation and resettlement of displaced lawful landholders for public purposes, the likelihood of complaint and court litigation may require investors to involve in the process of defending leasehold rights. This is because a landholder who is dissatisfied with the decisions of appellate courts has 'the right to continue his claim' while it is a requirement to 'surrender his landholdings for the continuance of the development'.[130] This indicates that there is a probability for an investor to acquire expropriated land under dispute as the relevant government body may transfer landholdings of displaced persons with the right to continue their claims over such land even after surrendering their landholding.

In the context of rural land allotment, the presumption that certain lands are free from farmers and pastoralists could be misleading and may result in third party claims.[131] Because, what is thought to be a land freed from farmers or pastoralists may not be free actually. According to the study conducted by Dessalegn, land that has been transferred to investors includes arable land, land used for grazing, woodland, forest land, savannah grassland, and wetlands inside a formally designated national park, protected area or wildlife sanctuary.[132] It is noted that the compensation paid to farmers is low when compared to the long term effect of loss of farm land, pasturage and grazing rights, water utilization and the loss of access to firewood and useful plants.[133] Hence, agricultural investment lands allotted

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[129] Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People Proclamation No.1161/2019, arts. 18 & 19.

[130] *Id.*, art. 20 sec. 2.

[131] *See,* for instance, the repealed Ethiopian Agricultural Investment Land Administration Agency Establishment Council of Ministers Regulation No. 283/ 2013, art. 6 sec 1. However, the repealing Regulation, clearly follows more pragmatic approach as it requires the authority to 'make sure land is free from third party possession' before transferring to investors. See Ethiopian Horticulture and Agricultural Investment Authority Establishment Regulation, *supra note* 74, art 6 sec 3.

[132] Dessalegn, *supra note* 52 at 17.

[133] *Id.*

to investors could be insecure since there could be a high probability of peasant encroachments by grazing livestock on the land, disputing boundary limits, taking one's grievances to court, or appealing to higher authorities for redress of grievances.[134]

For instance, the law stipulates that agriculture investment lands to be transferred to investors through allotment are presumed to be 'free from farmers and pastoralists possession and not required by the regional state for any other specific purpose.'

Similarly, the costs of monitoring compliance in the context of both rural and urban land rental system could be manifested in terms of expending time and resources to prevent the opportunistic desire of the private landholder to change land rental price. Particularly, in the absence of appropriate institutions in rural area to enforce non-compliance of terms and conditions indicated in the rental contract, the likelihood of enforcement costs to restore the rights damaged in the course of execution of the contract could be high through the private ordering. The social and cultural values attached to land in the rural community in Ethiopia may also raise the investor's cost of enforcing land use rights acquired through rural land rental arrangement. Besides, it is a well-established proposition in law and economics literature that the high costs of executing written contracts due to illiteracy (which is prevalent in rural Ethiopia)[135] tends to increase the enforcement costs.[136]

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134 *Id.*

135 According to the Ethiopian Welfare Monitoring Survey 2011 report, of the total population in the country 46.8 percent are found to be literate. This survey shows that the literacy rate in urban areas is about two times higher than that of rural areas (78.0 percent against 39.5 percent). See Central Statistics Agency Ethiopian Welfare Monitoring Survey 2011 Summary Report (April 27, 2012) available at: https://catalog.ihsn.org/index.php/catalog/3124/download/46161

136 It is argued that when the legal enforcement of contracts is weak such contracts are discouraged because of too high enforcement costs. Hence, in such situation it opens the door for the costs to be covered by the contracting parties. See Johnson, supra note 118 273.

Concluding Remarks

The idea that the restriction of land sale in state or public land ownership system inhibits allocation of land rights for investment has dominated the law and politics of land governance in Ethiopia. But the solution proposed for the supposed ill of the current land ownership regime is private ownership of land in its classical understanding of bundle of ownership rights. Private property regime was vociferously advocated as optimal property rights regime that facilitates efficient land allocation. However, new insights in the field of law and economics have demystified the idea that 'property rights can be and often are disaggregated' in the sense that property rights are 'web of mutually dependent relationships between people rather than relations between persons and things'. The bundle of land rights with defendable and enforceable property rights has profoundly reshaped our approach towards the institution of public land ownership. Normative insights from transaction cost economics have crystallized a new perspective of how property rights in land could be treated as a bundle of rights that accommodates multiple property rights holders. Accordingly, a government as a custodian of public land can retain ownership right and assign usufruct land rights to private investors. What matters in any property regime to land (public or private) is whether legal rules are efficiently designed in such a way to facilitate the transfer of property rights. Scholars in the law and economics field widely argued that the efficiency of legal rules is measured based on its capability to reduce transaction costs during the exchange of property rights.

The thought that law plays an instrumental role for reducing transaction costs during the exchange of land use rights has greatly influenced the legal contours of public land allocation system in many countries. In the Ethiopian context, the introduction of urban land lease hold system since 1993 indicates the imperatives of designing assignable usufruct rights within the frameworks of public ownership of land in order to attract investment activities. Based on this understanding, this piece analyzed how Ethiopian land law regime that regulates different modes of land rights transfer facilitates the reduction of transaction costs. The tools of transaction cost economics are utilized as normative yardsticks to evaluate the extent to which the rules governing three

modes of land rights transfer affect transaction costs. The three modes of acquiring land for investment purpose — leasehold (lease tender), government allotment and rental system — were identified and analyzed in light of the three elements of transaction costs. Hence, the legal rules regulating these three legal options were analyzed in light of the normative frameworks of search and information costs, bargaining and decisions costs and monitoring and enforcement costs. Accordingly, the findings of the economic analysis of the three legal options are provided as follows.

Firstly, it is found out that the legal rules regulating transfer of land use rights to the investors through lease tender system is more efficient as it adequately prescribes rules that assist investors to minimize the overall transaction costs. Investors who opt for acquiring land through lease tender process are legally entitled to access with appropriate information about the land prepared for lease tender including its quality and price beforehand. The rules that regulate land lease tender process relatively address problems of information asymmetry as the law requires the appropriate government body to advertise bid and publish essential information in relations to the quality, quantity and minimum bid price to the public in relation to the land proffered for tender. This modality provides investors with the opportunity to compare and contrast the price and quality of land before participating in the biding process thereby reducing bargaining and decision costs on price and quality of the tendered land. As regards minimizing monitoring and enforcement costs, the terms and conditions of land lease transactions are regulated by lease contract with a clear back up of default rules under the land lease law. The property right that emanates from land lease system is well defined through two vital mechanisms. The urban land lease requires the government to transfer parcel of land free from third party claimants ensuring security of tenure and minimizing possible future enforcement cost to assert property rights. And once agreement is reached on the terms and conditions of the lease contract, the investor is provided with a leasehold permit certificate.

Secondly, it is also found out that the legal rules regulating transfer of land use rights to the investors through government allotment is less optimal in light of assisting investors to minimize the overall transaction costs when compared to tender-based land lease system. Unlike the modality of acquiring land through

tender-based land lease process, an investor who opts for allotment of land by government is required to search relevant information about the land he requested for investment purposes.

Only those investors who want to compete through tender process are presented with the ease of access to information on the land presented for the public auction. In view of lack of transparency, widespread corruption and political favouritism in Ethiopian land administration system,[137] the cost of dealing with bureaucratic hurdles and bargaining for land allotment could be unbearable exercise for any investor. The costs of monitoring and enforcement of government allotted land rights are higher when compared with the case of acquiring land through public tender. Because, it is less likely that the government would easily allot parcel of urban land free from third party claims. The cost of monitoring compliance with rural agricultural land allotted for investors could be similarly high given the unique constitutional guarantee that prohibits the eviction of farmers and pastoralists from their rural landholding.

Thirdly, the legal rules that regulate the process of transferring land use rights to investors from rural landholders through rental system represents the least optimal alternative compared to the other two land leasehold systems. The legal regime providing for the right of rural landholders to rent or lease their landholding right to the investors is limited by set of mandatory rules such as the requirements of consent of rural land holder's family member, approval and registration of land rent contract by appropriate government authorities and the cap on rental period. Hence, the legal regime that regulates rental land use rights is more gravitated towards the protection of the rights of land renters than to an investor-lessee. More importantly, the costs to search potential rural land renter and negotiating with all of the family members could discourage investors from renting rural land. In the absence of well-developed rural land information system, the rights of the renter could be poorly secured. The absence of well-defined landholding rights provides opportunities for third party encroachment

[137] Misganaw Gashaw Beza, *Corruption in the post-1991 urban land governance of Ethiopia: Tracing major drivers in the law*, 4 AFRICAN JOURNAL ON LAND POLICY AND GEOSPATIAL SCIENCES 42-48 2021.

which will increase the time and resources of the investor to monitor compliance with land rights acquired through rental system.

Based on the above findings, the author strongly argues that the legal frameworks governing land allocation for investment purposes mainly facilitate the transfer of land rights from the public body to private investors. The pivotal role of the law as a means for reducing transactions costs is profoundly limited to the process of transferring land rights between the public bodies and private investors. This in turn limits the possibilities of transferring usufruct rights as between individual land holders to enhance the productive use of land resources of the country. The economic implications of state dominated land allocation system with the objectives of facilitating investment projects cannot be underestimated given the scale of land possession in the hands of individuals who may not value it the most. It is hoped that this modest contribution could provoke further research in the legal and economics academia.

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THE LANGUAGE POLICY OF FEDERAL ETHIOPIA: A CASE FOR REFORM

Getachew Assefa Woldemariam[*]

Abstract

The 1995 Constitution of Ethiopia accords equal state recognition to all Ethiopian languages, designates Amharic as the working language of the federal government and allows members of the federation to determine by law their respective working languages. Following the federal Constitution, regional states have designated their own working languages in their respective constitutions. In some regional states such as the Southern Nations, Nationalities and Peoples regional state, several sub-regional self-governing nationalities are given the power to determine their own working languages. In 1994, the education and training policy of the country set forth broad language in education regulations that have since been generally followed. The federal government and all regional states (except Harari) have constitutionally opted for a monolithic working language. This article, by taking stock of the language policies in some multi-linguistic federal systems, argues that the constitutional monolingualism installed in Ethiopia needs to change. Ethiopia's government service and education language policy must reflect its multi-linguistic societal composition. In order to do this, the article suggests, Ethiopia must adopt a comprehensive language policy, followed by appropriate legal framework.

Key-terms: Ethiopian languages, language policy, multi-ethnic societies, language in education policy

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Introduction

The Ethiopian Constitution declares in its Preamble that the diverse peoples of Ethiopia are committed to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing their economic and social development. It also acknowledges that the peoples of Ethiopia have built up common interests and common outlooks and are desirous of living in one economic community to promote their common interests.

The Constitution puts in place a federal state structure that gives political salience to ethnic identity by making it the loci of sovereign power (Article 8). It gives to the ethno-linguistic communities of the country it calls "nations, nationalities and peoples" (NNPs), an unconditional right to self-determination (including secession). In terms of the language policy, the Constitution contains key provisions. Article 5 of the Constitution declares "All Ethiopian languages shall enjoy equal state recognition". It also designates Amharic as the working language of the federal government and empowers members of the federation to determine their respective working languages by law. The Constitution further stipulates language rights of NNPs under Article 39(2).

It has been rightly claimed that a language policy must endeavor to deliver political goods such as effective communication with public and private institutions around oneself and enable one to get sufficient information for her to fully participate in and make informed choice about all things that matter to her; ensuring the autonomy of the individual by facilitating her participation on a wide variety of choices in society; and accord recognition to the citizens that express themselves in particular languages, thereby enhancing the psychosocial satisfaction of the community of speakers.[1] The realization of these political goods as well as the commitment and understanding put forth in the preambular declaration of the Ethiopian Constitution noted earlier needs to be helped by a language policy that

[1] Lara Smith, *The Politics of Contemporary Language Policy in Ethiopia*, 24(2) JOURNAL OF DEVELOPING SOCIETIES 207, 213-14 (2008).

respects individual groups' cultures and languages, but at the same time provides for common linguistic platform(s) for overall interaction and communications. Studies have shown that the development of a common national identity depends greatly on the ability of citizens to be able to speak to each other through the creation of a 'community of communication'.[2] This article tries to investigate whether or not the language policy of the Ethiopian government is well designed to realize the above-noted political goods and the declarations made in the 1995 Constitution. It will also examine the language policy of the federal and regional governments from the standpoint of ensuring linguistic rights of the linguistic communities and ensuring an uninhibited communication among the peoples of the country.

The article employs a descriptive and analytical synthesis of primary and secondary source materials. Primary sources include governmental policy documents, research and sociolinguistic surveys, census data and websites of relevant organizations. The secondary sources used include a wide range of academic writings such as journal articles, books, monographs, and edited volumes on language policy, language planning and linguistic rights in multi-ethnic societies. I have also made use of my own observations of the language issues in Ethiopia and insights I have gleaned from informal conversations with Ethiopian academics and practitioners with similar concerns.

The article proceeds as follows. Section 1 provides an overview of the theoretical and comparative literature on language policy and planning in order to supply some conceptual clarity to the subject of the article and for ideation purpose. Section 2 deals with the language policy of the past Ethiopian governments where both the overall policy dispensations and language policy in education are descriptively analyzed. Section 3 discusses the language policy of the current Ethiopian government. Section 4 takes a discursive approach and attempts to outline the considerations that should

[2] JON ORMAN, LANGUAGE POLICY AND NATION-BUILDING IN POST-APARTHEID SOUTH AFRICA 121 (Springer, 2008).

guide Ethiopia's language policy. The article closes with a brief conclusion and some suggestions for policy and legal reform in the area.

1. Language Policy: Theoretical and Comparative Overview

In order to fully grasp the trajectories of Ethiopian language policy and planning, it is necessary to clarify the meaning of these notions and create a common understanding around them. This section shall be devoted to creating this conceptual clarification and describing language policy issues in some multi-ethnic jurisdictions.

The term 'language policy' could be understood at different levels of narrowness and broadness. "Employed in its narrowest sense, it usually refers to the formulation of laws, regulations and official positions regarding language usage and the allocation of linguistic resources by some government or other political organization".[3] The broader understanding considers the range of linguistic variables of a language community. Spolsky is widely quoted as having identified three different components that determine the character of a language community's language policy. The first is its language practices, i.e., the habitual pattern of selecting among the varieties that make up its linguistic repertoire. The second component is the community's language beliefs and ideology: its belief about language and language use; and finally, any kind of language intervention, planning or management at play in the community.[4] Language policy exists even where it has not been made explicit or established by authority. Many countries and institutions do not have formal or written language policies and the nature of the language policy must be derived from a study of their language practice or beliefs.[5]

In most instances, language policies are the result of language planning. In this process, officials determine the linguistic needs, wants, and desires of a community and then seek to establish policies that will fulfill those goals. Such

[3] *Id.*, at 39.

[4] *Id.*, at 39-41.

[5] B. SPOLSKY, LANGUAGE POLICY: KEY TOPICS IN SOCIOLINGUISTICS 8 (Cambridge University Press, 2004).

goals might include cultivating language skills needed to meet national priorities; establishing the rights of individuals or groups to learn, use, and maintain languages; promoting the growth of a national lingua franca; and promoting or discouraging multilingualism.[6] Cooper suggests that there are three foci of language planning: (a) status planning (the allocation of a community's language to various functions or uses), (b) corpus planning (graphization or reduction of a language to writing, standardization and codification (writing rules) and modernization where a language is permitted to fulfil new communicative functions by expanding its vocabulary, developing new styles, genres, and registers through the processes of elaboration and cultivation; and (c) acquisition management/planning (planning how to promote and facilitate acquisition of new language(s)).[7]

Language planning in all its three dimensions outlined by Cooper involves deliberate future oriented language change that is aimed at problem solving, among other things.[8] Administrators and politicians primarily undertake status planning, while corpus planning generally involves planners with greater linguistic expertise.[9] In the case of language acquisition management (also known as language education or language-in-education policy[10]), although it is the responsibility of all sectors of society, the educational sector is most often charged with its development, management and implementation.[11] Language acquisition management may be a passive process as well as a matter of active policy planning. An active language acquisition management is often ideologically driven, non-consultative and a

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[6] See J. E. Petrovic, *Language policy*, in THE PRAEGER HANDBOOK OF LATINO EDUCATION IN THE U.S. 239 (L. D. Soto (ed.), Greenwood, 2007).

[7] Joyce B. G. Sukumane, *Issues in Language Policy and Planning: The Case of Namibia*, 30(2) STUDIES IN THE LINGUISTIC SCIENCES 206-07 (2000).

[8] J. RUBIN AND B. H. JERNUDD, CAN LANGUAGE BE PLANNED? SOCIOLINGUISTIC THEORY AND PRACTICE FOR DEVELOPING NATIONS xvi (University Press of Hawaii, 1971)..

[9] GIBSON FERGUSON, LANGUAGE PLANNING & EDUCATION 21 (Edinburgh University Press, 2006).

[10] R. B. Baldauf, Jr., M. Li, and S. Zhao, *Language acquisition management inside and outside the school*, in THE HANDBOOK OF EDUCATIONAL LINGUISTICS 234 (B. Spolsky and F. M. Hult (eds), Wiley- Blackwell, 2010).

[11] *Id.*, at 234

top-down affair.[12] This is the case in many countries around the world especially those that aspire to have a homogenizing national language. An active language acquisition management policy involves a great deal of corpus planning, which includes standardization, codification and modernization of the language to develop its lexical base for purposes such as science and technology.[13] It also involves corpus planning which was noted earlier, that often is undertaken through legislation to ensure the language had predominant roles in the key domains of education and administration with the purpose of moving the entire community in a certain desirable direction.[14] Thus, in terms of their effects or purposes as Cooper states, language policies are often intended "to influence the behavior of others with respect to the acquisition, structure, or functional allocation of their language codes".[15]

From a different perspective, Annamalalai notes that the language policies of governments (in multilingual settings) may broadly be classified into three kinds in terms of the goals of the policy, implicit or explicit: policy of elimination of multilingualism, tolerance of multilingualism, and maintenance of multilingualism. Elimination is sought to be achieved primarily by prohibiting and penalizing the use of minority languages even in private domains. Tolerance is being indifferent to minority languages and their exclusion in the policy formulation about language use in public domains. Maintenance and promotion could be fine-grained into allowing non-governmental efforts and funds for the use of minority languages in public domains, such as education, disallowing discrimination by language, and institutionalizing the use of minority languages in public domains most critical of which are public administration, law enforcement and justice dispensation, and education.[16]

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[12] *Id.*, at 235

[13] SARAN KAUR GILL, LANGUAGE POLICY CHALLENGES IN MULTI-ETHNIC MALAYSIA 11 (Springer, 2014).

[14] *Id.*, at 11.

[15] ROBERT L. COOPER, LANGUAGE PLANNING & SOCIAL CHANGE 45 (New York: Cambridge University Press, 1989).

[16] E. Annamalai, *Reflections on a Language Policy for Multilingualism*, 2 LANGUAGE POLICY, 113, 119, 122 (2003) (citing Skutnabb-Kangas, 1988).

The fact that the policy of elimination, and of even mere tolerance of multilingualism has been unproductive is a well-documented fact, and our own country's history provides sufficient attestation, making it unnecessary to belabour the point.[17] Thus, language planners need to understand that in multilingual societies like Ethiopia, the approach that works best is embracing multilingualism and putting in place a rational policy for status, corpus and acquisition planning of the languages alongside disseminating the advantages of such a policy to the various linguistic communities subsumed within the polity.

Unlike the 1950s and 60s, there seems at the present time to be much more understanding that linguistic pluralism is not a problem in and of itself. The cohesive social and political dispensations in multilingual societies like Switzerland, India and South Africa demonstrate that what is needed is a rational language policy and planning to harmoniously integrate various linguistic communities of a given polity. In fact, the history of states like India tells us that the right balance is struck after a lengthy search of options on the constitutional platform or at sub-constitutional levels. For example, in the case of India, its 1950 Constitution states that the official language of the Union is Hindi in Devanagari script and that English would be replaced 15 years after the Constitution took effect.[18] But, this policy of the framers was greeted with much uproar in the non-Hindi speaking India leading to the passage of the Official Language Act in the 1960s (further refined in the 1970s) that effectively made English the second official language of the Union.[19]

The Indian Constitution also makes provision for having more than one official language at the state level, which "may be for a specific region or for

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[17] See, for example, *United Nation's Human Development Report 2004: Cultural Liberty in Today's Diverse World*, available at http://hdr.undp.org/sites/default/files/reports/265/hdr_2004_complete.pdf; IAN SHAPIRO AND WILL KYMLICKA (EDS), ETHNICITY AND GROUP RIGHTS (New york University Press, 1997); WILL KYMLICKA, POLITICS IN THE VERNACULAR (Oxford University Press, 2001).

[18] *Indian Constitution* (1950), art 343.

[19] Braj B. Kachru, *The Indianization of English – the English Language in India*, 25 (1) WORLD ENGLISHES 167 (1983).

specific purposes".[20] In practice as well, many Indian states have therefore recognized more than one language for official purposes. The language policy in education in India is that children learn in their mother tongue from grades 1-4 or 5. In most states, the medium of instruction is the official language of the state or the child's mother tongue from grades 1-4. For children whose mother tongue is different from the official language of the state, the latter is made the subject of study from grade 3 onwards. With regard to English, students could opt for it as the medium of instruction from standard v onwards.[21] Overall, both for public administration and for education, India has now a policy of 3±1. This means that English and Hindi are languages of business of the Union government, which have to be learnt at the primary education level. The third language is the language of business of the state within which one abodes. In a state where either of the two Union languages is also its working language, one needs to learn just those two Union languages; hence, 3-1. Those whose mother tongue is neither Hindi, English or the state's working language must equip themselves with four languages (3+1): the two Union languages, the state's working language and their own mother tongue.

Switzerland is another country that has a successful multilingual policy. Switzerland made a deliberate policy of turning the multilingual composition of its society into an advantage while the whole early 20th century Europe looked at it as an oddity midst monolingual, unitary state-nation building aspirations of the other European states.[22] It consciously worked on developing a national outlook that embraces the diversity of its society. Referring to the success of its quadrilingual national official policy, Grin states: "What could be perceived as a fatal rift had to be asserted (and was actually proclaimed) as the essence of the Swiss nation: a *Willensnation* ("nation of the will") defined precisely by its linguistic diversity, gaining its

[20] *Indian Constitution* (1950), art 345.

[21] See B. Mallikarjun, *Language policy for education in Indian states: Karnataka*, (2(9) LANGUAGE IN INDIA (2002), available at: http://www.languageinindia.com/dec2002/karnatakaeducationpolicy.html

[22] François Grin, *Language Policy in Multilingual Switzerland: Overview and Recent Developments* (conference paper, Barcelona, 4 December 1998), 2.

sense of national self and expressing its very soul through diversity, not in spite of it".[23]

Switzerland works constantly on language acquisition issues at both levels of government. For example, in 2004 the Cantonal Ministers of Education adopted a national strategy of language teaching with objectives including the reinforcement of language of schooling, the compulsory study of two foreign languages (meaning languages other than the Canton's official language) at primary school level and other (national) language as an option from the ninth school year. The strategy also declares the need to develop the pupils' skills in their first language (if different from the language of schooling in the Canton).[24] In 2009, an agreement on the harmonization of compulsory education between the Cantons came into effect. This agreement asked for new multilingual educational policy documents covering the 2004 national strategy for language teaching and a federal act passed in 2007.

In 2010, the Swiss Constitution was amended to include the following provisions:

1. The official languages of the Confederation are German, French, and Italian. Romansh is also an official language of the Confederation when communicating with persons who speak Romansh.
2. The Cantons shall decide on their official languages. In order to preserve harmony between linguistic communities, the Cantons shall respect the traditional territorial distribution of languages and take into account the indigenous linguistic minorities.
3. The Confederation and the Cantons shall encourage understanding and exchange between the linguistic communities.
4. The Confederation shall support the plurilingual Cantons in the fulfillment of their special duties.

[23] *Id.*

[24] Adrian Lundberg, *Multilingual educational language policies in Switzerland and Sweden A meta-analysis*, available at: https://doi.org/10.1075/lplp.00005.lun|, 52-53.

5. The Confederation shall support measures by the Cantons of Graubünden and Ticino to preserve and promote the Romansh and Italian languages.

As can be seen from the Swiss constitutional amendment, reproduced above, the framers made sure that framework legal principles governing and applying the national, regional (cantonal), and sub-regional governments are provided in the constitution. While ordaining the official languages of the Swiss (con)federation, the amendment allows the cantons to decide their official languages. The amendment contains other important matters. I mention three of them here. The first one is the requirement on both the confederation and the cantons to encourage understanding and exchange between the linguistic communities. Secondly, the amendment requires the cantons to preserve harmony between linguistic communities and to take into account the linguistic minorities. Finally, the amendment reiterates that the confederation shall support the plurilingual cantons to fulfil their special duties.

Plurilingual South Africa has also dealt with its linguistic diversity in an upright manner. It could be a good model for Ethiopia to make its language policy more complete and fairer. The most important document in this regard is the 1996 Constitution. Section 6 of the Constitution is reproduced extensively below in order to show the complete framework of the language policy.

The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

1. Recognizing the historically diminished use and status of the indigenous languages of South Africa, the state must take practical and positive measures to elevate the status and advance the use of these languages.
2. The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and

the balance of the needs and preferences of the population as a whole or in the province concerned.

3. The national government and each provincial government must use at least two official languages.
4. Municipalities must take into account the language usage and preferences of their residents.
5. The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. To this effect, while the state is required to take positive measures to elevate the status and advance the use of these languages, all official languages must enjoy parity of esteem and must be treated equitably.
6. A Pan South African Language Board (PANSALB) established by national legislation shall promote, and create conditions for, the development and use of all official languages; the Khoi, Nama and San languages; and sign language; and promote and ensure respect for all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

PANSALB was established in 1995; mandated to provide language facilitation services to those who need it. [25] Contrary to most of the African countries that made the languages of their colonizers sole official languages, South Africa opted for a different course, promoting indigenous languages of its peoples. But, there obviously could be a lot of practical challenges, including of resources and national and sub-national political dynamics that need to be attended to. [26]

[25] Neville Alexander, *Language Policy and Planning in the New South Africa*, 1(1) AFRICAN SOCIOLOGICAL REVIEW 82, 87 (1997).

[26] See, for example, that Jon Orman argues that enough attention has not been given to Afrikaans which has more speakers than English and therefore serves as a lingua franca more widely than English. See Orman, *supra* note 2.

In Singapore, English is a compulsory medium of instruction in all schools but at the same time it is compulsory for students to learn their mother tongue as a subject.[27] Three other languages of Singapore: Malay, Mandarin and Tamil are official languages of the country.[28]

I would like to end this comparative excursion by mentioning the decision of the European Union in regards to the Union's language policy. During the 2002 European Council meeting in Barcelona, the Heads of State or Government of the EU called for at least two foreign languages to be taught from a very early age. This eventually resulted in the policy objective of "Mother tongue plus two other languages," already described in the European Commission's action plan being implemented beginning of 2004.[29]

2. Language Policy of Past Ethiopian Governments

Ethiopia is one of the most diverse countries in Africa, both culturally and linguistically. Two of the four language phyla in Africa, Afro-Asiatic and Nilo-Saharan, are found in Ethiopia.[30] Out of the six branches of Afro-Asiatic languages, three of them, namely, Cushitic, Omotic and Semitic are spoken in Ethiopia.[31]

Ethiopia's language policy does not have a long pedigree. Anything that could go by that name in a formal sense may, extend as far back as the 1930s, associated with Emperor Haile Selassie.[32] Of course, there had always been a

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[27] Gill, *supra* note 13, at 5.

[28] It is noted that Singapore chose to adopt English as a school language for economic advantages and global competitiveness; *Id.*, at 5, 7.

[29] Lundberg, *supra* note 24, at 48.

[30] Zelealem Leyew, *The Ethiopian Language Policy: A Historical and Typological Overview*, 12(2) ETHIOPIAN JOURNAL OF LANGUAGES AND LITERATURE 2 (2012) (citing Heine and Nurse, 2000).

[31] *Id.*.

[32] It might be worth mentioning that the Fetha Negast ('law of the Kings') believed to be imported from Egypt, (Alexandria) during the 14th century and used both as religious and secular law of the country till 1930, had something to say about considerations that needed

court language through which official communication took place. But, as far as the people were concerned there was not any documented language choice or planning to which they were subjected. During the Axumite kingdom, Ge'ez was the language of official communication of the kings, the language of education of the Ethiopian Orthodox Tewahido Church, and a lingua franca among the various cultural communities inhabiting the Empire. It was gradually succeeded by Amharic as a language of communication of the kings with the coming to power of the Zagwe dynasty from mid 12th century onwards.[33]

In terms of the early origins of Amharic, some literature posits it at the 3rd or 4th century.[34] After the decline of the Axumite Kingdom from the beginning of the 12th century and during the lead up to the reign of the Zagwe kings (1150-1272), Amharic was used as an additional language in the court alongside the mother tongue of the kings. Some evidence suggests that Amharic became a written language from the 14th century onwards by 'inheriting and modifying the writing system from Ge'ez.[35] Emperor Tewodros II (r. 1855-1868) was also credited for keenly overseeing attempts in the standardization of written Amharic.[36] This was continued by his successor, Emperor Yohannes IV, who maintained Amharic as the language of the court and the major lingua franca. Menelik II's time witnessed further spread of Amharic as a language of communications among most of the linguistic communities of present-day Ethiopia with the expansion of central state's power and institutions.

As it is well known, Emperor Haile Selassie clung to the policy of 'one language one nation' especially after the restoration of his government following the defeat of invading Italy in 1941. This policy was given a constitutional status in the 1955 Revised Constitution, which designated

to be made of versetility in languages of judges to be assigned to serve in linguistic communities.

33 Zelalem, *supra* note 30, at 2 (citing Bahiru Zewde, 1991).

34 *Id.*, at 5 (citing Bender, 1983).

35 *Id.*

36 *Id.*, (citing Pankhurst, 1969).

Amharic as the "official language" of the country. This seems to have been hastened in reaction to some of the divisive measures taken by fascist Italy aimed solely at creating discord between the various linguistic and cultural communities of Ethiopia. Of course his language policy was in tune with his drive of centralization of political power forging "one nation" out of the diverse people of Ethiopia, which started from the beginning of his reign. His reference to the Ethiopian people as "አንድ ቤተሰብ" (one family) in his speech on the occasion of his granting of the 1931 Constitution is a testimony to his aspirations. In fact, his views of a "nation" are typically modeled on the Western ideas of nationalism. In the 1950s and 60s, the predominant thinking in the West was that monolingualism and Western-style cultural homogeneity were necessary requirements for social and economic progress, modernization, and national unity.[37] As Kymlicka notes, Western states have historically been 'nation-building' states. [38] They have encouraged and sometimes forced all the citizens on the territory of the state to integrate into common public institutions operating in a common language. They have used various strategies to achieve this goal of linguistic and institutional integration such as citizenship and naturalization laws, education laws, and language laws.[39] There is a striking similarity between the Western states' attempts at nation building and Emperor Haile Selassie's efforts towards the same goal.

Likewise, the desire of forging a nation-state with a common national language characterized the new states of Africa that emerged out of colonialism in the 1960s. In fact, as Basil Davidson observes this had started early in the 1950s during the anti-colonial struggle. The leaders of the struggle considered "Africa's wealth of ethnic cultures both distracting and hard to absorb into their schemes. They regarded it as tribalism".[40] Davidson further stated that the educated elites of Africa, when they took over from the

[37] THOMAS RICENTO (ED), AN INTRODUCTION TO LANGUAGE POLICY: THEORY AND METHOD 15 (Blackwell, 2006).

[38] W. Kymlicka, *supra* note 17, at 2.

[39] *Id.*

[40] BASIL DAVIDSON, THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE 99 (Times Books, 1992).

colonialists, "they demanded a complete flattening of the ethnic landscape"[41] thereby wishing it away and longing for a monocultural society communicating in one official/national language. This engendered the adoption of the languages of former colonial powers as their official languages.

During the Derg, ostensibly more attention was given to local languages other than Amharic. For example, Derg's "National Democratic Revolution Program of Socialist Ethiopia" (1976) provided that the history, culture, language and religion of each nationality were accorded equal recognition and that each nationality had regional autonomy to decide on matters concerning its internal affairs, including the right to determine the contents of its political, economic and social life, and use its own language.[42]

The Derg did not have an ideological opposition to multilingualism and cultural pluralism (and in fact seemed to embrace it). But the practical steps it took to promote linguistic and cultural pluralism were limited. The Academy of Ethiopian Languages, which was first established in 1968 and ceased to operate during 1974-75, was reopened in 1976.[43] The Academy was mandated to, among others, study all Ethiopian languages, create alphabets for those which did not have writing systems, encourage the speakers to read and write in their own languages, study the phonological and morphological systems of all Ethiopian languages and prepare dictionaries and grammar books for all of them in the long run.[44] Interesting to note that the Academy was tasked with the study of the relationship between the different languages so as to find common elements that would aid in developing a national language, drawing on common words from many languages.[45] Through the 1980s, the Academy undertook works such as a contrastive analysis of Amharic and Gedeo phonology, transcribing of nearly 30,000 words in Omotic languages,

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41 *Id.*

42 Cited in M. Lionel Bender, *Ethiopian Language Policy 1974-1981*, 27(3) ANTHROPOLOGICAL LINGUISTICS 273, 273 (1985).

43 *Id.*, at 273.

44 *Id.*, at 274.

45 *Id.*, at 274.

compilation of a bibliography relevant to preparation of writing systems for Afar, Amharic, Gedeo, Hadiya, Kembata, Oromo, Silti, Somali, Tigrignaa, Welaita, and some level of study of a number of languages by engaging experts from the Institute of Language Studies of Addis Ababa University.[46]

Derg also established the Institute for the Study of Ethiopian Nationalities by law in 1983. The Institute was mandated, inter alia, to undertake studies on the nationalities of the country, their territorial locations, and thus document their cultures and languages. Some of the policy decisions in the People's Democratic Republic of Ethiopia (PDRE) Constitution and those that followed it, such as, the establishment of autonomous and administrative regions were said to be informed by it.[47] Article 2(5) of the PDRE Constitution stated that "PDRE shall ensure the equality, development and respectability of the languages of the nationalities" and Article 116 provided: "Without prejudice to Article 2(5) of this Constitution, in the PDRE, the working language of the state shall be Amharic".

The above noted activities of the military government show that some attention was paid to vernacular languages other than Amharic, and the latter was referred to merely as a "working" language and not as an official national language, which was the case under Haile Selassie's language policy. However, when it comes to formal language policy measures and changes, little was done by the Derg. Amharic remained the only language of official business and the medium of primary education, with English as a semi-official second language of limited scope and the medium of secondary and higher education.[48]

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[46] *Id.*, 376. The Academy was transferred from the Ministry of Culture and Sports to the Addis Ababa University in 1997. Currently it exists as the "Academy of Ethiopian Languages and Cultures" as part of the same University; see http://www.aau.edu.et/aelc/.

[47] The fine works of the Institute have also been made use of by the EPRDF following its assumption of power in the 1990s, including for the establishment of ethnic-territorial self-governments.

[48] T. Bloor and Wondwosen Tamrat, *Issues in Ethiopian Language Policy and Education*, 17(5) JOURNAL OF MULTILINGUAL AND MULTICULTURAL DEVELOPMENT321, 327 (1996).

The lack of attention towards and the sidelining of the development of languages of the various Ethiopian NNPs was one of the rallying cries of the ethnic liberation movements that sprouted in many parts of the country in the 1970s and 80s. These movements demanded the official recognition, use and development of their communities' languages.[49] And as is discussed in section 3 of this article, the ethnic liberation movements led by Tigray People Liberation Front (TPLF)/ Ethiopian People's Revolutionary Democratic Front (EPRDF) got the upper hand and assumed state power, thereby changing the state language policy to one that denationalizes Amharic and embraces more working languages at the sub-national levels.

Language Policy-in-Education

Formal education started in Ethiopia in the early 20th century. The earliest effort at formal education by way of literacy campaign was undertaken by Emperor Menelik II around 1898 where Amharic was used for the adult literacy programs.[50] Before the coming to prominence of formal education, however, religiously dominated education was given both by the Ethiopian Orthodox Tewahido Church and Islamic establishments in different parts of the country. Church schools were known to be up and running in the 10th century or even earlier where education ranging from reading and writing to church music, poetry, theology, church history and philosophy were given.[51]

The medium of instruction in the few schools that were opened at the time when formal education started was French, English, Arabic or Italian with Amharic and Ge'ez as subjects of study in primary education. French was

[49] Gedion Cohen, *The Development of Regional and Local Languages in Ethiopia's Federal System*, in ETHNIC FEDERALISM: THE ETHIOPIAN EXPERIENCE IN COMPARATIVE PERSPECTIVE 165, 169 (David Turton (ed), , James Currey, 2006).

[50] See Richard Pankhurst, *The Foundation of Education, Printing, Newspaper, Book Production, Libraries and Literacy in Ethiopia*, 6(3) ETHIOPIAN OBSERVER 241-290 (1963).

[51] See *Id.*

mandatory while the rest were optional.[52] Amharic and Ge'ez started to be offered in 1919 in the two state-run schools at the time. The nascent education system of Ethiopia experienced a fundamental retrogressive change during the Italian occupation (1936-41).

Soon after its occupation of Ethiopia, Italy quickly moved to define its overall educational policy in terms of the race of the students, content of the curriculum, and the language(s) of instruction.[53] While by a law it issued in 1936 it legalized the existence of two separate school systems: "Italian type schools" and schools for "colonial subjects", its implicit policy for the native schools was for them to serve as a "political instrument for the peaceful penetration and moral conquest of the native population".[54] The colonial government decided to replace Amharic with Italian as an official language and to adopt a multiple language policy as far as the indigenous languages were concerned. This latter principle was laid down in the Administrative Ordinance for Italian East Africa of June 1, 1936. Article 32 of the Ordinance stated that the teaching of colonial subjects should be in the main local languages of the six administrative divisions of Italian East Africa, as well as in Arabic in the Muslim areas.[55] Instruction in Eritrea was thus to be in Tigrigna; in Amhara in Amharic; in Addis Ababa in Amharic and Oromifa; in Harar in Harari and Oromifa; in Oromo-Sidama in Oromifa and Kafficho; in Somalia (comprising of the whole Somali population in East Africa) in Somali; and in other additional languages the Governor-General might wish to introduce.[56]

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[52] Ronny Meyer, *Amharic as lingua franca in Ethiopia*, 20 (1/2) LISSAN: JOURNAL OF AFRICAN LANGUAGES & LINGUISTICS, at 120 (2006); Bloor and Tamrat, *supra* note 48, at 321.

[53] Richard Pankhurst, *Education in Ethiopia during the Italian Fascist Occupation (1936-1941)*, 5(3) INTERNATIONAL JOURNAL OF AFRICAN HISTORICAL STUDIES 361, 365 (1972).

[54] *Id.*, at 366.

[55] *Id.*, at 369.

[56] Pankhurst reports that though the use of these languages was thus officially prescribed, the regulation was not strictly followed as could be seen from the "Four Power Commission report on Eritrea" which observed that instruction was in fact "given almost entirely in Italian in the State-operated schools". *Id.*, at 369.

Within the frame of the two types of schools earlier mentioned, educational changes in Addis Ababa were quickly brought about upon the capture of the city: the old Tafari Makonnen School was converted into two "Italian type" schools, the Liceo-Ginnasio Vittorio Emanuele III and the Istituto Tecnico Benito Mussolini, both reserved for European children, while the prewar Empress Menen School for girls was converted into the Regina Elena military hospital. Secondary education for Ethiopians came to an abrupt end, since the prewar schools in Addis Ababa and other parts of the country were largely appropriated for the education of Italian (other European) children or for entirely non-educational purposes.[57] In addition to restricting the education of what it calls 'natives', to primary level where they would be taught mainly in the Italian language and fascist culture and be made suitable for the modest and largely menial role required of them in the Italian colonial empire, and to prepare them for military service in the Italian army.[58]

Undergirded by the "no proper education for the 'natives'" policy of fascist Italy, education of Ethiopians (and Eritreans) during the occupation period was devoid of any proper content but was used as a platform for the indoctrination of the young girls and boys with fascist propaganda. This can be shown clearly by the observation of a British officer, Gandar Dower, who arrived in East Africa soon after the collapse of Mussolini's rule:

> Under the Italians, 'native' education served a political purpose… the text books, expensively produced, were written in Italian, and glorified the Duce on almost every page. Military service was lauded. Boys were encouraged to become 'little soldiers of the Duce'; the Fascist salute was compulsory, and at the morning hoisting of the flag Italian songs were sung.[59]

Thus, by the end of the Italian occupation in 1941, the education system in Ethiopia was practically non-existent. After the restoration of Haile Selassie's

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[57] *Id.*, at 373.

[58] The open anti-educational stance for Ethiopians of the fascist invaders was not only restricted to doing away with proper education of the local people but was also adamant to exterminate (kill, exile and imprison) all the young educated citizens of the country. *Id.*

[59] Quoted in Pankhurst, *supra* note 53, at 395.

government in the same year, attempts to mend the educational system were made. More explicit measures were taken, for example, in regards to the language of education, perhaps as a reaction to the medium of instruction policy that colonial Italy sought to implement. Meyer reports that in 1944 Emperor Haile Selassie decreed Amharic to be the only language used in education, which forced missionary schools to use only Amharic as the medium of instruction instead of other vernaculars. But other literature depicts that the Emperor's 1944 decree on medium of instruction was targeted particularly to the missionary schools in the various parts of the country and was not a decision about the entire medium of instruction.[60]

French remained the medium of instruction until 1947 when it was replaced by English. From 1947-1958 English was made the medium of instruction in all schools while Amharic was offered as a subject of study. In 1958, decision was again taken by the imperial government to make Amharic the medium for primary education throughout the country and that English be taught as a subject of study from as early in the curriculum as possible.[61] Bloor and Wondwossen note that since 1941 English remained the medium of instruction in secondary school with Amharic as a subject of study and also with moral education which was offered in Amharic.[62]

The elementary school curriculum made public in 1963 stated that elementary schools be comprised of six years of study and taught wholly in Amharic with English as a subject as early in the program as possible with a possible delay for non-native speakers of Amharic, extra attention being paid to Amharic.[63] During Haile Selassie's time no Ethiopian language other than Amharic was taught in the school program at any level.

As noted earlier, the military government, which ruled the country from 1974-1991, followed Marxist-Leninist ideology with regards to the languages of nationalities in Ethiopia—which is declaring the equality of all languages—

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60 See, eg., Hirut Woldemariam, *Language Planning Challenged by Identity in a Multilingual Setting: The Case of Gamo*, 8(1) OSLO STUDIES IN LANGUAGE295, 296 (2016).

61 *Id.*, at 296; Bloor and Wondwossen, *supra* note 48, at 327.

62 *Id.*

63 *Id.*, citing Tesfaye Shewaye (1976).

and other matters. Without doubt, there was a clear departure from its predecessor, albeit mostly rhetorically. One noteworthy departure was the introduction of the famous "National Literacy Campaign" which started in 1975. Fourteen local languages other than Amharic were used as medium of instruction in the Literacy Campaign.[64] The literacy programs continued through the 1980s being offered in Amharic, Oromifa, Somali, Tigrigna, and Welaitigna and some other languages as well. But, as noted earlier, formal education continued in Amharic and English throughout the country.

3. Language Policy of the EPRDF Government

In terms of the articulation of language policy, the government of EPRDF that has been in power[65] since May 1991 shows a clear departure from the previous governments of this country. This is not surprising of course, given its political (ideological) position with regard to the rights of NNPs. Following its assumption of power, the EPRDF led-government enacted a transitional period Charter which declared among others that every NNP has the right to use and develop its language.[66] This was followed by a law[67] that established the national/regional self-governments, which established 13 regions (Addis

[64] The languages were Afaan Oromo, Tigrinya, Tigre, Wolaitta, Sidaama, Haddiya, Kambaata, Afar, Saho, Gedeo, Somali, Kafinono, Silte' and Kunama; Zelalem Leyew, *supra* note 30, at 24 (citing Tilahun, 1997; Hailu, 1993).

[65] EPRDF, which was a front of four parties, led and dominated by the Tigriyan Liberation Front (TPLF) underwent a fundamental change between 2019-20 under the reformist Prime Minister, Abiy Ahmed, who came to power on EPRDF's platform but from the Oromo People's Democratic Organization, one of the four parties in the EPRDF. In 2020, EPRDF was transformed into Prosperity party (PP) which embraced the regional ruling parties of the eight (now 10) regions as oppsoed to EPRDF that was a front of only four parties governing in four regions: Amhara, Oromia, Southern Nations, Nationalities and Peoples, and Tigray. Interesting to note that the TPLF rejected the offer to join PP and retreated to Mekelle the capital city of Tigray region, starting from the end of 2019. Since then the relationship between the federal governmnet and TPLF deteriorated and fighting broke out between the two on November 4, 2020 at the instigation of the TPLF that opened a surprise attack on the northern command of the Ethiopian national defense force that was stationed in Tigray.

[66] *Transitional Period Charter of Ethiopia* (1991), art 2.

[67] *Proclamation to Establish National/Regional Self-Governments No. 7/1992.*

Ababa being the 14th region) in which 64 identified nationalities were given self-government status at regional and sub-regional levels.

EPRDF gave its preferred language policy a constitutional status by enshrining it in the 1995 Constitution of Ethiopia. Thus, Article 5 of the Constitution deals with the status of languages in the country. It provides that all Ethiopian languages have equal state recognition while declaring that Amharic is the working language of the federal government and that states (members of the federation) may determine by law their respective working languages. The Constitution also enshrines linguistic rights of nationalities as part of its Bill of Rights provisions (Article 39(2)) by virtue of which "every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language".

The Constitution also establishes language as one of the main considerations in the delimitation of the states of the federation. Further, as part of individual rights protected by the Constitution, Article 19(1-2) stipulates that persons arrested have the right to be informed promptly, in a language they understand, that they have the right to remain silent; to know the reasons for their arrest and any charge against them; and that any statement they make may be used as evidence against them in court. Article 20(7) likewise provides that accused persons have the right to request the assistance of an interpreter at state expense where the court proceedings are conducted in a language they do not understand. Articles 25 and 38 of the Constitution stipulates that language is one of the prohibited grounds for discrimination among persons in providing equal and effective protection of the law and in the exercise of the right to participate in the conduct of public affairs, including the right to elect and be elected.

The above two paragraphs summarize the language policy and language rights in the Ethiopian Constitution. Compared, for example, to the South African Constitution discussed earlier, it says very little and displays several loopholes. Article 5(3) of the Constittuion provides that "members of the Federation may by law determine their respective working languages". This left the decision on regional language choice entirely to the states without giving any policy guidance on how, at least the most diverse ones, should go about this

decision. This seems to have sent a message that like the federal government, states and local governments also need to designate only one language as their working language. This idea of designating one language per government level resulted in either the imposition of the language of the dominant group on smaller groups living within the state or sub-state administration or attempts at harmonization of the languages that are believed to be closely related. The attempts in the Southern NNPs state at forging one language out of Gamo, Gofa and Dawro languages into GaGoDa first, and then Wolaita, Gamo, Gofa and Dawro languages into WoGaGoDa later, both of which ended disastrously, are good examples.[68]

3.1. Policy on Language-in-Education

Soon after the change of government in 1991, some of the newly created regional governments[69] embarked upon the adoption of the languages of the dominant groups as a medium of primary education and government affairs. This followed the adoption by the then Transitional Government of Ethiopia (1991-1995) of its "Education and Training Policy" in July 1991 (officiated in April 1994). The policy dubbed grades 1-8 as 'primary' and grades 9-12 as 'secondary' education.[70] The first two years of secondary education were designed for general secondary education where students would identify their interests for "further education, for specific training and for the world of work" while the second cycle of secondary education (grades 11-12) would "enable students to choose subjects or areas of training which [would] prepare them adequately for higher education and for the world of work".[71] In regards to the medium of instruction, the Policy states the following:

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[68] See, eg., Woldemariam, *supra* note 60.

[69] The regional (transitional) governments were formally established by Proclamation No. 7/1992 which was issued in January 1992 but had existed de facto since July 1991.

[70] Federal Democratic Republic of Ethiopia, *Education and Training Policy* (Addis Ababa, 1994), 14.

[71] *Id.*, at 15.

Recognizing the pedagogical advantage of the child in learning in the mother tongue and the rights of nationalities to promote the use of their languages, primary education will be given in nationality languages.

1) Making the necessary preparation, nations and nationalities can either learn in their own language or can choose from among those selected on the basis of national and countrywide distribution.
2) The language of teacher training for kindergarten and primary education will be the nationality language used in the area.
3) Amharic shall be taught as a language of countrywide communication.
4) English will be the medium of instruction for secondary and higher education.
5) Students can choose and learn at least one nationality language and one foreign language for cultural and international relations.
6) English will be taught as a subject starting from grade one.
7) The necessary steps will be taken to strengthen language teaching at all levels.[72]

Although the Policy reiterated that "Amharic shall be taught as a language of countrywide communication", it did not specify the grade from which it should start to be offered in regions in which primary education is offered in regional/nationality languages. This was so unlike English, which was explicitly stated in the policy that its instruction as a subject starts at grade one. This resulted in a diverse approach to the teaching of Amharic as a subject of study in the regions where in regions like Oromia, Amharic is offered from grade 5 onwards [73] while in others it starts much earlier. Furthermore, the policy is silent about the level where it ceases to be offered as a subject of study.

[72] *Id.*, at 23-24.

[73] Bloor and Wondwossen, *supra* note 48, at 328.

As can be seen from the terms of the policy, education in the mother tongue is not compulsory. In terms of the practice as well, not all regions opted for mother tongue primary education. Regions such as Afar, Beneshangul-Gumuz, Gambella and most nationalities in the SNNPS retained Amharic as the medium of primary education along of course with the Amhara region, and Addis Ababa and Dire Dawa cities. Over the last few years some of these regions have switched to or partially started a mother tongue primary education.

The Education and Training Policy was silent about the graphization of nationality languages for education and indeed for all other purposes. This enabled all the regions to go their separate ways. With the exception of Tigray and Amhara regions and some self-administering zones in the Southern NNP state, all other regions have chosen Latin alphabets for the graphization of their languages. It is to be noted that prior to 1991, regional languages such as Oromifa, Somali and Wolaitigna were written in the Geez (also known as Ethiopic) alphabet, in those limited instances where they were officially used in literacy campaigns and as a print medium in newspapers and magazines.

A recent study by the Ministry of Education found that 85% of children around the country use mother tongue in pre-school education.[74] This, coupled with the stated 94.3% net enrollment in primary education, plays a fundamental role in the realization of the policy of mother tongue primary education and access to education in general. However, the Study depicts that there is a great disparity in access to education between the regions with regions like Afar (59.2%), Somali (81.1%), Benshangul-Gumuz (89.3%) and Dire Dewa (56.9%) lagging behind the others.[75]

[74] Ethiopian Education Development Roadmap 2018-30) (draft for discussion, 2018), available at: https://planipolis.iiep.unesco.org/sites/planipolis/files/ressources/ethiopia_education_development_roadmap_2018-2030.pdf, 14.

[75] *Id.*, at 15.

3.2. The 2020 Draft Language Policy of the Federal Democratic Republic of Ethiopia

In February 2020, a langauge policy that was prepared under the aegis of the Ministry of Culture and Tourism was adopted by the Council of Ministers. The Policy, which is not yet endorsed by the House of Peoples' Representatives (HoPR)[76], attempts to address all aspects of official and public use of langauges such in government services, media and education. As underscored in the policy document, one of the rationales of the Policy is to create a framework that:

> enables the granting of a higher status, role and function at federal government level to those languages that are spoken by a majority of the Ethiopian population that, are being used widely for governmental functions, that promote multilingualism, foster bonds among the people, consolidate multi-nationalism, engender the building of a nation-state, and by virtue of their trans-boundary presence, promote closer ties with neighbouring peoples and regions.[77]

Establishing institutions, structures and operational modalities for realizing the language rights recognized by the Ethiopian Constitution; enhancing the functions of the languages that have significance "for promoting multi-lingualism, strengthening ties between people, and nurturing a socio-politically unified nation" and advancing Ethiopia's relations and cooperation with neighbouring countries; and developing a nation-wide system for language use, language planning, and langauge development are stated as the main objectives of the langauge policy.[78] The Policy covers many specific areas of language policy to be addressed along with strategies to do that. In relation to language rights, the Policy states that any language community in the country regardless of its population size has the right to choose or create new

[76] The Ethiopian Constitution (1995), art 55(10). As provided under this article, general policies and strategies of economic, social and development arenas are approved by the HoPR while the Council of Ministers is mandated to formulate and implement these policies; see also *id.*, art 77(6).

[77] *Ethiopian Language Policy* (as adopted by the Council of Ministers) (February 2020), 15.

[78] *Id.*, at 8-9.

writing system for its language and, at the place of its residence, the right to have public service delivered to it through its mother tongue or through a language of its choice, and the right to have its children receive education in its mother tongue or the langauge of wider communication chosen by it, at least from kindergarten to end of primary school.[79] If a linguistic community chooses a langauge other than its mother tongue as a medium of instruction, it has the right to demand that its mother-tongue be offered to its children as a subject of study. One significant bold statement in the langauge policy is the recognition of the right to education in their mother tongue and other rights noted above to members of linguistic communities that live interpersed in different regions, zones, woredas or among other multilingual communities.

The second critical area that is addressed by the langauge policy is that of working langauges. The Policy designates Amharic, Oromiffa, Tigrigna, Somaligna and Afarigna as the working languages of the federal government and states further that other Ethiopian langauges may in the future be designated as working langauges of the federal governmnet based on available capacity and study of critical factors.[80] Regarding the regional and local governmnets, the Policy does not determine which language or languages should be adopted but provides that the states shall determine their working langauges for the state level and sub-state levels.

The other major area covered by the language policy is langauge in education. It states that curricula that gradually implements multilingualism shall be implemented so that students can learn one federal language in addition to their mother tongue. The Policy also declares that federal working languages will be offered as subjects of study based on the language use practice of the concerned region or locality, among other things.[81] The Policy also asserts that international languages that are beneficial to the strategic interests of the country will be selected and incorporated into the curriculum of education. While the Policy underscores the need to strengthen the teaching of the English language, it also states that English as a medium of instrcution in

[79] *Id.*, at 11-12.
[80] *Id.*, at 14.
[81] *Id.*, at 19-20.

secondary and post-secondary will be replaced by Ethiopian national languages in strategically planned manner.

The langauge policy covers other matters of importance such as the graphaization of langauges that do not have writing systems as yet. It also pays attention to other langauges and communication ways for people with different kinds of disability. It also attempts to give guidance regarding language use of the media, translation services, private organizations, and the use of language for public signs and nomenclatures.

Yet another positive aspect of the Policy is its part dealing with the implementation mechanisms or modalities. Accordingly, the policy declares that the federal governmnet shall establish institutions that will be charged with the responsibility of planning and development of federal working languages while the regional states will do the same in regard to the languages spoken within their jurisdictions in line with the frame work put in place at the federal level. The Policy provides that laws, regulations and directives necessary for implementing the Policy shall be enacted and that a national program of action and policy implementation schedule shall be prepared. The establishment of three institutions—a language affairs council, a national language research institution, and a national translation institution—is also planned for the implementation of the Policy.

In the following section, this langauge policy proposal by the Council of Ministers will be assessed to point out some outstanding gaps and problems and forward suggestions to make it one that resonates well with reality.

4. Looking Ahead: the Appropriate Language Policy for Multilingual Ethiopia

Language policy in Ethiopia cannot be extricated from the whole issue of identity politics. As the comparative examples considered in this article show, this has also been the case in multilinguistic states in Africa and elsewhere in the world although the saliency of ethnic politics is not as pronounced as it is in Ethiopia. Language policy and planning endeavors in Ethiopia needs to be

informed by two fundamental considerations, both of which I believe have their niches in the 1995 Constitution. The first consideration should be the language rights of both individuals and speech communities. The second has to do with the nexus between language and group identity. I shall attempt to explain each in the following paragraphs and, while doing so, will point out some shortfalls of the 2020 language policy adopted by the Council of Ministers.

As rightly characterized by Mazrui and Mazrui, language right refers both to the right of language(s) and the right to language. The notion of the right of language refers to the right of every language in a multilingual society to existence and equality of opportunity for it to develop legal and other technological capabilities and to flourish. The right to language on the other hand refers to the right to use the language one is most proficient in, as well as the right of access to the language(s) of empowerment and socio-economic advancement.[82] In both meanings, therefore, language rights call for a holistic policy and plan to cater for all languages and their users in Ethiopia, including those not coded and sign languages of persons with special needs, to realize the existence and development of the languages and for their users to have access to the political goods referred to earlier in this article. In this regard, as summarized in the preceding section, although it lacks details, the 2020 language policy has attempted to cover broad areas of language rights catering for collective as well as individual rights and needs.

Language rights advocates argue that individuals have to have access not only to their mother tongue but also to the dominant language(s) of school and government business in their countries. This means that linguistic communities, whose languages are not used in schools and government businesses, have the right to protection against forced assimilation, discrimination or segregation. At the same time, such linguistic communities should be enabled to have a high command of the language(s) of work in order to get access to the material and social benefits of the languages. Likewise, members of the dominant groups need protection from forced monolingual

[82] ALI A. MAZRUI AND ALAMIN M. MAZRUI, THE POWER OF BABEL; LANGUAGE AND GOVERNANCE IN THE AFRICAN EXPERIENCE 115 (James Currey, 1998).

reductionism.[83] The language repertoire of the majority linguistic community is that it tends to live with one language while a minority community often uses more than one.[84] This is for the obvious reason that members of the minority community could access economic benefits that often require communicative capability in the language(s) of the majority. On the contrary, the majority would normally be the dominant group and its language often is the language of government business. Language policy must aim at increasing inter-community communications whereby members of both the majority and the minority speech communities are proficient in as many languages as possible. Language policy in education is the main vehicle to do this. As noted earlier, the 2020 language policy of Ethiopia, although it has enunciated something about studying Ethiopian languages as subjects at school, it is extremely lacking on the necessary detail. It does not put in place the minimum number of Ethiopian languages that should be studied as subjects especially at regional and sub-regional levels. It is critically important to be definitive on these issues by clearly stating the minimum number of national languages that need to be learnt in addition to the mother-tongue.

Closely related to the issue of language right is the desirability of promoting multilingualism, as opposed to monolingualism. First, in a society made up of several language communities, embracing multilingualism is a simple and necessary act of democracy. As Recinto avers, in a society that accepts multilingualism, the constituent groups of the state are better positioned to participate as equals since their cultures and languages are respected and afforded legitimacy through institutional recognition and support.[85] Thus, a multilingual language policy has undoubtedly democratic and nation-building importance. As Kymlicka and Patten note "language policy can build identification with, loyalty to, and membership in a particular national political community or it can significantly undermine any efforts in this

[83] See generally MIKLÓS KONTRA ET AL. (EDS), LANGUAGE, A RIGHT AND A RESOURCE: APPROACHING LINGUISTIC HUMAN RIGHTS (Central European University Press, 1999).

[84] Annamalai, *supra* note 16, at 118.

[85] Thomas Ricento, *Theoretical Perspectives in Language Policy: An Overview*, in AN INTRODUCTION TO LANGUAGE POLICY: THEORY AND METHOD 16 (Thomas Ricento (ed), Blackwell, 2006).

direction".[86] Multilingual language policy ensures a cohesive national political community by taking care of the needs of individuals, linguistic communities and the country as a whole. Privileging only certain language communities by making their language a language of government business undermines any effort at nation building because those excluded and disadvantaged will resent the state of affair and may not cherish their membership in such a political community.

Thus, the bottom line is that factually multilingual polities like Ethiopia cannot but embrace multilingualism and work towards harmoniously integrating its diverse languages and cultures. In this case, Ethiopia has come a long way. But there are more critical policy, legal and institutional measures that it needs to take into account in order to create a cohesive multilingual society. South African language policy could serve as a very good model for Ethiopia to take the necessary further steps. As South Africa (and in fact others like Switzerland and India) has done, Ethiopia needs more federal working languages that take into account its major languages. Likewise, the members of the federation and, where diversity warrants, the local governments should adopt more working languages, not just one language, because we know for sure that the states and local governments in reality are mostly linguistically diverse. Municipalities have to be multilingual as well, taking into account the language patterns of their residents.

As documented in the 2007 Population and Housing Census, there are 83 indigenous languages spoken in Ethiopia. As it can also be gleaned from the Census, Oromo, Amhara, Somali, Tigre, Sidama, Wolaita, Gurage, Afar, Haddiya, Gamo and Gedeo have each a population of more than a million. This means that a sizable population of the country speaks one of these 11 languages. Together, they are spoken by close to 90% of the country's population. It seems compelling to think therefore that these languages are considered working languages of the federal government. In the same way the regional states and the urban and rural local governments would elevate major

[86] Will Kymlicka and Alen Patten (eds), Language Rights and Political Theory 11 (Oxford University Press, 2003).

languages in their jurisdictions to the status of working languages. Importantly, accompanying these measures (which are of language status nature), there should be well thought about corpus and acquisition planning for these languages, not only for intra-speech community's purposes but also for inter-speech community communications.

When we look at the 2020 language policy, commendable step has been taken in recognizing four more languages as working languages of the federation. But my view is that more languages, not just five, should be made working languages of the federal government. A participatory decision making on selecting the languages should be adopted. In any case, as per my suggestion above, if we go by the number of minimum speakers of the various Ethiopian languages, at least those that are spoken by 1 million people should be embraced as working languages of the federal government. Openness to as many languages as widely spoken in the regions should also be recognized as working languages and regional and sub-regional levels as well. As to how the languages made the working languages at both federal and regional levels could actually be deployed in reality, detailed policy decision and guidelines and of course a binding law have to be put in place. The language policy under consideration lacks on these matters.

Coming to the question of international languages, as noted in the previous parts of this article, although English was not a colonial language for Ethiopia, Emperor Haile Selassie's government made a policy decision in 1944 where English became the medium of instruction for all levels of school till 1958. And, also from 1958, Amharic was adopted as a medium of instruction for primary education across the country (with English being offered as a subject at that level) while English became a medium of instruction from grade 7 to tertiary education.[87] This state of affairs had been generally maintained under the Derg with a few practical steps taken towards enhancing the positions of other languages of the country.

[87] English is also the language for Ethiopia's international communications and a second language of publication of federal laws and some regional laws.

The position of English as a medium of instruction in Ethiopia remains as controversial as ever. In fact, similar debates on the appropriateness of the official use of the English language in former British colonies in Africa is going on. Alexander argues that in the African countries, despite all the efforts in making the European languages available to their citizens, they have been resounding failures. In countries such as Zambia there are now fewer people able to communicate effectively in English than before that country's independence despite an English-only policy in schools.[88] Consequently, English has succeeded neither as a language to facilitate national unity nor as a language of empowerment for the public at large. It empowers only a shrinking minority. This squarely applies to the situation of English in Ethiopian schooling. There is a unanimous view that the overall English proficiency in all public schools in Ethiopia is at a disastrous stage.

The National Education Roadmap designed by the Ministry of Education based on the study by experts has made some suggestions about language in education. Accordingly, it is recommended that mother tongue, as a medium of instruction has to be offered from grade 1; the teaching of English as a subject should start at grade 1 with a focus on developing the speaking and listening skills of the pupils until grade 3. The study also recommended that Amharic, the working language of the federal government, should be offered as a subject of study from grade 1.

The debate of whether English should continue to be the medium of instruction at secondary and tertiary levels in Ethiopia is not worth having at the moment because English is going to continue as such for an unknown time period.[89] As earlier noted, the 2020 langauge policy speaks about a scheduled phasing out of English as a medium of instruction and its replacement with

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88 Alexander, *supra* note 25, at 86.

89 It is widely accepted that a full-fledged economic and social development of a country is not possible if the great majority of the people are compelled to communicate in a second or third language; *id.*, at 87. All the economically developed nations of the world use their own language for education. Therefore, it seems to me that Ethiopia has to also eventually use its national languages for higher education and scientific research. But preparations for that have to be made in terms of corpus planning of the languages to make them suitable for these purposes and that transition be made smoothly and phase by phase.

national languages without specifying any time frame. But, what is unmistakable at present is that unless the acquisition planning for the English language is given serious attention to raise the level of proficiency in it, the whole educational system is being pushed to the brink of collapse. There needs to be a paradigm shift in the teaching of the English language at the primary level, which is the most defining level for acquiring language proficiency.

The National Education Roadmap (noted earlier) has suggested among others that Ethiopia revisit its language education approach with a view to strengthening it at its teacher education colleges. The Roadmap also advises that Ethiopia has to introduce proficiency strategy for language education to be implemented through development of resource materials, promotion of communication skills, introduction of language labs and other inputs. Particular attention needs also to be given to the training of language education teachers. These suggestions of the Roadmap are worthy of implementation. By investing in the education of primary level teachers and ensuring their high proficiency, it is possible to turn around the current regrettable level of English language proficiency at schools and universities in Ethiopia. This should be one of the priorities of language policy in education for the Ethiopian authorities as immediately as possible. It is consoling to see that the 2020 language policy avers that attention will be given to the teaching of the English language by designing effective methodology.

Since 1953 when the United Nations Education, Scientific and Cultural Organization first clearly advocated for children's education in their mother tongue at least during the early years of school, there is no disagreement on the propriety of this idea. Furthermore, many scientific and professional studies suggest that young learners learn more effectively if taught in their mother tongue.[90] But, its practical implementation has not been so easy. In

[90] See, for example, Demelash Zenebe Woldu, *The Issue of Mother Tongue Education in Ethiopia* 16(2) IER FLAMBEAU 1 (2009); Gamuchirai Tsitsi Ndamba et al., *Competing Purposes: Mother Tongue Education Benefits Versus Economic Interests in Rural Zimbabwe*, 8(1) INTERNATIONAL INDIGENOUS POLICY JOURNAL 1 (2017); Angelina N Kioko et al., *Mother tongue and education in Africa: Publicising the reality*, 4 MULTILINGUAL EDUCATION 18 (2014).

Ethiopia too, since the now defunct EPRDF came to power in 1991, it has resoundingly endorsed this idea but due to several challenges including that most of the languages of the speech communities do not have literary forms, it has not been fully realized. But a noteworthy additional problem is that there does not seem to be any public body or institution (at federal or regional level) that is charged with the responsibility to resolve the issue of graphization of the languages that do not have writing systems and oversee the preparation of human and material resources required for the purpose. It is also necessary to call to our attention that no concerted efforts are visible in regards to languages that are inching towards extinction with a view to save them.

An equally important issue of language in education policy is that of providing access to the knowledge of dominant languages necessary for higher education and the world of work. In countries where there are some dominant languages and several minority languages, it is pivotal that mother tongue medium of instruction (MoI) is paired with high quality instruction in the languages widely used in the country or the region: as working languages of governments and MoI of higher education and maybe secondary education as well. Lack of access to such instruction is an important source of economic, social, and political inequality in many settings. Thus, in such settings, the right to high quality instruction in second and third (and even more) languages should be treated as the right of the pupils. Ethiopia's education policy seems to have paid attention to this when referring to English to be taught from grade 1; Amharic to be studied as a subject at primary level and pupils should learn one additional local language. But, this has not been well planned and articulated and the implementation of the policy so far has been haphazard. The 2020 langauge policy has also restated these important matters. But it has to be followed through with actions.

In this connection, it is necessary to underscore the constitutional mandate of the federal government vis-à-vis the states in regards to language policy in education. As noted earlier in this article, Article 5 of the Constitution empowers the states to determine by law their respective working languages. The Constitution does not contain any clear statement on the power of the

states pertaining to language in education. On the other hand, Article 51 stipulates in respect to the federal government's power that, "It shall establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies". Thus, this means that establishment and implementation of national standards and policy matters on education and training including language policy in education falls within the federal competence. Although this seems to be the understanding with which the 1994 Education and Training Policy of Ethiopia was enacted with country-wide application, there is also a widely shared understanding that primary education is within the constitutional competence of the states. This understanding, in my view is engendered by the provisions of Article 5(3) of the Constitution and one may argue that it is a valid position.

However, my contention is to the contrary. Article 51 of the Constitution specifically bestows the power to establish and implement standards and policies on education to the federal government. This includes policies and standards, including language policy in education, for primary education. If this reading of the Constitution is correct, the federal government has to therefore step up its efforts towards the standardization of acquisition of both mother tongue primary education and high quality instruction in English and other languages of the country, which should be determined based on practical considerations and preferences of the speech communities. This is particularly important in the selection of additional local languages that should be acquired at school.[91] In this regard, the 2020 language policy seems to also endorse the interpretation of the Constitution I proffer and cites, as its authority for adopting the Policy at federal level, article 51(2) of the Ethiopian Constitution, amomg others. But, the Policy does not go to the extent one

[91] Researches indicate that there was a limited discussion and debate on the 1994 Language and Training Policy of Ethiopia before it was enacted, and that after its implementations there were both negative and positive reactions to it. See, e.g., G. Cohen, *Identity and Opportunity: The Implications of Using Local Languages in the Primary Education of SNNPR, Ethiopia* (PhD thesis, University of London, SOAS, 2000).

would expect it in providing detailed policy guidance on the matters I alluded to earlier in this article.

Turning to my second consideration in crafting a language policy in Ethiopia, i.e., the nexus between language and group identity, the first obvious thing is that Ethiopia's current constitutional-political dispensation has paid a great deal of attention to group language rights. As noted earlier in this article, the Constitution uses language as one of the main criteria for state boundary delineation (which remains a bone of contention of course) and enshrines bold linguistic rights of NNPs. It has allowed states to adopt their own working languages. Mother tongue primary education has been endorsed in principle. It is clearly enunciated in the 2020 langauge policy that one of the main objectives of the langauge policy is to protect the language rights recognized by the Constitution.[92]

Thus, one can see that the intimate relationship between language and ethnic identity[93] is in principle accepted and cherished in Ethiopia. There is robust understanding that an attempt to undermine a language of an ethnic community in a language policy creates a deep discord among the society. A desire to create a coherent society is possible only through a language policy that treats the languages of its society fairly and equitably. Indeed, it has been shown that the development of a common national identity depends greatly on the ability of citizens to speak to each other through the creation of a 'community of communication'.[94] As Wierzbicka rightly observes, "languages are the best mirror of human mind and cultures, and it is through the vocabulary of human languages that we can discover and identify the culture specific conceptual organizations characteristic of different people of the world." He advises that there should not be an unrealistic expectation of assimilation but instead there should be active measures taken towards

[92] *Ethiopian Language Policy, supra* note 77, 8-12.

[93] Orman, *supra* note 2, at 39.

[94] See S. Wright, *Community and communication: The role of language in nation-state building and European integration*, MULTILINGUAL MATTERS (2000).

establishing integration, with the incorporation of the different ethnic groups as equals into the larger society.[95]

Creating a community of communication and thereby a common national identity is possible by consciously and deliberately working on increasing the repertoire of languages of members of the various cultural-linguistic communities. As Das Gupta notes, language, as the most immediate and salient expression of culture, transcends the ethnic and religious differences, and establishes the bonds across ethnic lines that will provide a means for a sense of national identity. This, he says, is because it is language that enables a person to be culturally ethnically rooted and yet reach out communicatively to a national level—it provides the bridge between the "segmental attachment" and the "civil ties of the nation".[96] Mastery of a repertoire of languages is a human capital benefit for the citizen, viewed as assets.[97]

Thus, from the point of view of both language rights and the recognition of language as a marker of ethnic identity, it is compelling to believe that Ethiopia needs to step up and craft a language policy. A policy, that expands on the constitutional gains and corrects the existing not well thought through dispensations and in the end provide not only that which endorses multilingualism at national and sub-national levels but also takes concrete planning steps to implement the policy. The best instrument for this as earlier noted is the language in education policy to enable pupils to acquire high quality proficiency not only in their mother tongue but in as many Ethiopian languages as possible and in the English language as well. As repeatedly referenced, the 2020 langauge policy of Ethiopia is in the right direction on this but some important details that it lacks is a matter of concern.

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95 M WIERZBICKA, SEMANTICS, CULTURE AND COGNITION 22 (Oxford University Press, 1992).

96 J. Das Gupta, *Language diversity and national development* in LANGUAGE PROBLEMS OF DEVELOPING NATIONS 19 (J. A. Fishman, C. A. Ferguson, & J. Das Gupta (eds.), John Willey and Sons, 1968).

97 Grin 1999, cited in Gill, *supra* note 13, at 21.

Conclusion and Suggestions

With the backdrop of theoretical and comparative literature on language policy and planning, this article has attempted to analyze the past language policy and practices of Ethiopia and those currently in operation. It has shown that Emperor Haile Selassie's regime worked actively to build the national identity of the country with the Amharic language while the Derg, although it in principle dissociated itself from the policy of monolingualism, did very little in terms of transforming the country into a genuine multilingual landscape. The language policy of the EPRDF government (till April 2018) took more concrete steps towards enhancing the status of many Ethiopian languages. The new Prosperity Party which controls state power both at the federal and regional levels has not only continued the previous commitment but has shown the tendency to expand on the steps previously taken.

Under section 4 the article argued that in order to build a cohesive and well-integrated political community, Ethiopia has to revise and enhance its multilingual language policy. To this effect, it has to further revise its current position on the status of the major languages at federal, regional and sub-regional levels. It should undertake corpus planning for the languages equitably for all languages but particularly for the major ones. Concomitantly, there should be a paradigm shift in regards to language acquisition approach, especially at the primary education level so that the pupils acquire high level proficiency in both the local languages and in English. The need for the language communities to be versed in as many Ethiopian languages as possible cannot be overemphasized. The beauty and empowering capability of code switching by citizens wherever they go can easily be seen. But, over and above the benefits to the individuals, the trust and level of cultural understanding and synergy this generates serves as glue to the political community that is Ethiopia.

We should be able to say for Ethiopia what the Secretary General of the Federal Assembly of the Swiss Confederation, Mr. P. Schwab, said about Switzerland in 2014, that "plurilingualism is an integral part of Switzerland's

identity and is a key element of the national culture".[98] To refer to another momentous event in Canada, when the Canadian Official Languages Act was presented to the House of Commons for adoption in 1969, a Minister who expressed the view of the Canadian government said: "The measure is extremely important.... because it touches the very foundation of Canadian unity ... this bill is a gesture of faith in the future of Canada"[99]. It is my claim that a language policy in Ethiopia must be regarded with that sense of importance: as a policy direction that is essential for strengthening the foundation of Ethiopian unity.

Along the line of the arguments I made in this article, I suggest the following measures in order to help the endeavor towards making Ethiopia an ever more cohesive and well-integrated multilingual political society.

1. In Ethiopia the current situation is devoid of multilingualism in some sense although it does adopt a policy of multilingualism in another sense. As discussed, a typical multilingual policy is sourced from Article 5 of the Constitution, which declares the equality of all Ethiopian languages and grants the states the power to choose their own working languages. But Article 5 of the Constitution also decides that Amharic is the working language of the federal government thereby adopting a monolingual language policy for the public domain. The states have followed suit. This needs to change. The overall language policy and the language in education policy of Ethiopia should be revised in order to elevate the major languages of the country to the status of working languages at federal, regional and sub-regional levels. In this regard, four additional langauges are designated as working langauges in addition to Amharic by the 2020 language policy of Ethiopia. This is a great step. But, it is my contention that this number be raised to include other major national langauges of Ethiopia, and that multilingualism is also required at state and sub-state levels. And the decision on the status of the languages must be dovetailed with language

[98] Quoted in Lundberg, *supra* note 24, at 52.

[99] Donald G. Cartwright and Colin H. Williams, *Bilingual Districts as an Instrument in Canadian Language Policy*, 7(4) TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 474, 475 (1982).

acquisition planning that ensures citizens acquire high-level proficiency in the mother tongue and as many Ethiopian languages as possible and as preferred. Along with this, members of the society must also be widely educated about the advantages of being multi-lingual, both for strengthening national cohesion and for personal economic and social benefits.

2. Related to the above point is the need to ensure access to the federal, state and sub-state working languages of the linguistic communities whose languages are not the medium of government business and education. It is rightly claimed by linguistic rights advocates that minorities need to be ensured access to their mother tongue and the official/working languages of the various levels of their governments. Therefore, language policy in Ethiopia needs to be informed by these concerns and work towards ensuring that minority linguistic communities are not left behind.

3. As noted ealier in this article, the 2020 language policy endorses the establishment of three bodies: a langauge affairs council, a national language institution, and a national translation services institution. These are welcome ideas. However, in my view, a statutory body that goes by the name "Ethiopian languages commission" may be better suited than a "council". A council with stakeholders membership may not be an effective body. But a government body in the traditional agency format as a commission may be more effective. The Commission should be established with mandates to oversee the development and implementation of language policy and planning of the country, and work with the Ministry of Education and other relevant organs to design best practices for the acquisition of languages at schools. It can also serve as a body to oversee the equitable treatment of the languages of the country.

4. As noted in this article, the study conducted as an input to the Ministry of Education's National Education Roadmap has confirmed that the lack of competence of English langauge teachers is actually a very crucial problem for the education of students in English. There should be a national plan to work on bringing to acceptable levels the English language proficiency of Ethiopian English teachers, particularly those at the primary education

level. One way of doing this can be to prepare in collaboration with donors to bring English language teachers and experts from the UK, US, Australia, New Zealand, and/or Canada to give intensive training to a robust number of Ethiopian English language teachers who will then cascade the training to other teachers.

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RETHINKING LITIGATION GROUNDED ENFORCEMENT OF CONSTITUTIONAL RIGHTS IN ETHIOPIA

Mizanie Abate Tadesse[*]

Abstract

In its Preamble, the Constitution of the Federal Democratic Republic of Ethiopia states that full respect of human rights is key in achieving the Ethiopian national objective of building a political community founded on rule of law and democratic order. Cognizant of this, the Constitution guarantees a broad range of human rights in its Bill of Rights chapter. However, constitutional remedies for infringement of constitutional rights are rarely applied notwithstanding that the Constitution has been in force for close to twenty-six years. Most scholarly works on the matter conclude that entrusting the power of constitutional interpretation to the House of Federation in lieu of ordinary courts is the root cause for this problem. This article contends that lack of clear and comprehensive Bill of Rights litigation procedure as well as redress for violation of constitutional rights could also contribute to the current unacceptably low enforcement level of the Bill of Rights of the Constitution via constitutional litigation. To augment his position and show the legal gaps and challenges as well as put forward recommendations for constitutional and legal reform, the author has analyzed the Constitution and relevant laws and leading cases of the House of Federation and the Council of Constitutional Inquiry. The author has also consulted the laws and cases of other countries and

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relevant literature with a view to identifying normative standards and practices from which Ethiopia could learn.

Key-terms: Enforcement, constitutional rights, constitutional remedies, Ethiopia

Introduction

In its Preamble, the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) underscores the key role full respect of human rights could play in achieving the Ethiopian national objective of building a political community founded on rule of law and democratic order.[1] Accordingly, the Constitution guarantees a broad range of human rights in its chapter three. Chapter three of the Constitution guarantees not only the traditional civil and political rights but also socio-economic and collective rights. The Constitution incorporates a commendable interpretation clause which necessitates the interpretation of the fundamental rights and freedoms specified in chapter three in conformity with pertinent international human rights standards and jurisprudence.[2] By conferring international human rights treaties ratified by Ethiopia the status of the law of the country, the Constitution has also created an avenue through which the treaties could be invoked before domestic courts by individuals aggrieved of invasion of their rights with a view to get redress.[3] While it is not justiciable in in its own right, the National Policy Principles and Objectives chapter could also serve as a guidance in the interpretation of the constitutionally recognized socio-economic, cultural and environmental rights.[4]

[1] The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Preamble.

[2] *Id.*, art. 13(2).

[3] *Id.*, art. 9(4).

[4] *Id.*, arts. 89-92.

Academics who criticize the institutional arrangement for the enforcement of constitutional rights commence their analysis by appraising the Constitution as a 'progressive' and 'impressive' instrument protecting human rights 'in conformity with international human rights laws and principles'.[5] These kinds of affirmations are overstatements and arise from lack of a meticulous reading of the Constitution. Notwithstanding that it incorporates a long list of rights, the Constitution is fraught with a number of maladies the most notable ones being: lack of explicit recognition of certain human rights;[6] an uncommon classification of constitutional rights into human and democratic rights whose application has resulted in exclusion of non-Ethiopians from exercising a handful of human rights;[7] attachment of claw back clauses to a number of civil and political rights and ambiguous limitations to certain human rights;[8] making the right to life derogable;[9] and bad formulation of socio-economic rights.[10]

Although the Constitution has gaps in terms of articulation of constitutional rights, this could have been remedied had we have a strong judicial activism. As a matter of reality, litigation based on the Bill of Rights of the Constitution

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[5] See, for example, Chi Mgbako *et al*, *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights*, 32(1) FORDHAM INTERNATIONAL LAW JOURNAL 259 (2008).

[6] Examples of rights not recognized in the FDRE Constitution are the right to remedy for violations of constitutional rights and the right not to be arrested for failure to pay a civil debt.

[7] The Constitution unusually classifies rights as human rights (articles 14-28) and democratic rights (articles 29-44). For grounds of this calcification and the effect thereof, see Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth*, 4(2) MIZAN LAW REVIEW 208-213 (2010).

[8] See Adem Kssie, *Human Rights in the Ethiopian Constitution: A Descriptive Overview*, 5(1) MIZAN LAW REVIEW 58 (2011). A typical example of these kinds of limitations can be found under article 30(1) which subjects the exercise of the right to assembly and peaceful demonstration to public convenience.

[9] The right to life is not listed among the list of non-derogable rights during state of emergency under article 93(4)(C).

[10] Articles 41, captioned as Economic, Social and Cultural Rights, neither explicitly guarantees all socio-economic rights nor specify the normative contents of the rights. See Sisay Alemahu Yeshanew, *The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia*, 8 (2) AFRICAN HUMAN RIGHTS LAW JOURNAL, 276 (2008).

is extremely rare compared to the magnitude of human rights violation in the country. Admittedly, constitutional rights litigation is not the only avenue for the enforcement of human rights. It is equally true that it is through litigation before judicial and quasi-judicial bodies that individuals aggrieved of violation of their constitutionally guaranteed rights could get appropriate remedies. As Sisay rightly argued, the argument that the constitution is symbolic and incorporates broad human rights standards that are not in themselves amenable to litigation and hence should be applied through other subordinate laws is flawed for two reasons. First, the 'Constitution enshrines provisions specific enough to be applied by courts' and, second, 'there are constitutional rights which do not have a perfect substitute in ordinary legislation'.[11] The centrality of domestic remedy for infringement of human rights in Ethiopia must also be viewed against the backdrop of individuals' limited access to international treaty bodies mandated to receive complaints of human rights violations. Apart from the fact that access to these bodies is contingent up on exhaustion of all available domestic remedies and remedies before international bodies are more expensive, infective and time taking, Ethiopia has not generally accepted the competence of treaty bodies to entertain individuals' claims of human rights infringement.[12]

It is interesting to note the paradox of widespread violation of human rights infringement in Ethiopia but limited invocation of the Bill of Rights of the Constitution to seek remedy. The Ethiopian People's Revolutionary Democratic Front (EPRDF) that stayed in government power for more than 27 years is infamous for lack of respect of fundamental rights and freedoms. Widespread and systematic violations perpetrated with impunity during its era include, but not limited to, arbitrary killings; disappearances; torture and other cruel, inhuman or degrading treatment or punishment; humiliating treatment of prisoners; arbitrary arrest, detention without charge, and lengthy pretrial detention; severe restrictions on civil and political rights; and

[11] *Id.*, at 283-84.

[12] The only exceptions to this are African Commission on Human and Peoples' Rights and African Committee of Experts on the Rights and Welfare of the Child.

interference in religious affairs.[13] Driven by a revolutionary democracy ideology that prioritizes economic development over protection of human rights, the government was persistently unwilling to respond to call by national and international actors to give up its policies and practices that perpetuate human rights violations.

It is the coming in to power of Abiy Ahmed as prime minister in April 2, 2018 that has resulted in change of human rights policy and practice of the government. The new leadership took a range of crucial measures which it believes would improve human rights protection.[14] To expedite legal reforms, the government has established a Legal and Justice Affairs Advisory Council composed of 13 prominent legal professionals.[15] The Council is mandated to advise the Office of the Attorney General in its effort to undertake a

[13] *Country Reports on Human Rights Practices for 2016 and 2017*, United States Department of State, Bureau of Democracy, Human Rights and Labor.

[14] For more on this, see Human Rights Watch, *Ethiopia Events of 2018*, https://www.hrw.org/world-report/2019/country-chapters/ethiopia (last accessed, 16 January 2020); Mahlet Fasil and Yared Tsegaye, *Analysis: Ethiopia Crackdown on Corruption, Human Right Abuses, Everything You Need to Know*, Addis Standard/ November 16, 2018, http://addisstandard.com/analysis-ethiopia-crackdown-corruption-human-right-abuses-everything-need-know/ (last accessed, 16 January 2020); Felix Horne, June 26, 2018 9:33AM EDT Torture and Ethiopia's Culture of Impunity, https://www.hrw.org/news/2018/06/26/torture-and-ethiopias-culture-impunity (last accessed, 16 January 2020); Freedom House, *Policy Brief Reform in Ethiopia: Turning Promise into Progress*, September 2018 By Yoseph Badwaza and Jon Temin, https://freedomhouse.org/report/special-reports/reform-ethiopia-turning-promise-progress (last accessed, 12 January 2020); Nega Gerbaba Tolesa, OP:ED: *Dealing With Past Human Rights Abuses In Ethiopia: Building the Bridge Between Justice and Peace*, Addis Standard / December 10, 2018, http://addisstandard.com/oped-dealing-with-past-human-rights-abuses-in-ethiopia-building-the-bridge-between-justice-and-peace/(last accessed, 16 January 2020); Wondwossen Demissie, *OP:ED: The Government's Approach to Past Human Rights Violations Needs to Be Transparent*, Addis Standard / January 25, 2019, https://addisstandard.com/oped-the-governments-approach-to-past-human-rights-violations-needs-to-be transparent/ (last accessed, 16 January 2020); and Kjetil Tronvoll, *Admitting guilt in Ethiopia: Towards a truth and reconciliation commission?* June 22, 2018, https://www.ethiopiaobserver.com/2018/06/22/admitting-guilt-in-ethiopia-towards-a-truth-and-reconciliation-commission/ (last accessed, 16 January 2020).

[15] Road Map of the Justice and Legal Affairs Advisory Council.

comprehensive reform of the legal and justice system.[16] So far, the Council has spearheaded the repeal and replacement of the two most human rights unfriendly laws; namely, the 2009 Charities and Societies Proclamation and the Anti-Terrorism Proclamation.

Evidently, government sponsored atrocities of human rights violations have declined since Abiy Ahmed came to power. However, the human rights violation has changed its face after the political transition. Partly due to the inability of the government to enforce law and order and partly due to ethnic tensions fueled by abuse of the democratic and political space by intolerant and hate preaching activists and politicians coupled with high rate of youth unemployment and limited access to public funded services, human rights abuses by individuals and informally organized youth groups have become a matter of daily life in many parts of Ethiopia. Such state of affairs has resulted in massive internal displacements, brutal killings, beatings and destruction of properties and religious establishments, among others.

Understandably, we cannot abate the cycle of human rights abuses in Ethiopia unless we ensure legal accountability and remedy for infringement. For that to happen, the enforcement of the Bill of Rights of the Constitution is indispensable. The most shattering deficiency of the FDRE Constitution, however, is the institutional architecture for the enforcement of constitutional rights protection. Largely enthused about putting in place at most protection to the group interests and rights of nations, nationalities and peoples (NNP), arguably at the expense of individual rights, not only does it snatch the power of constitutional interpretation[17] from ordinary courts but also put it in wrong hands. The Constitution entrusts litigation-based enforcement of its Bill of Rights to the House of Federation (HF): a non-judicial second house of parliament.[18]

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[16] Ibid.

[17] In the context of Bill of Rights litigation, constitutional review, (constitutional) judicial review or constitutional interpretation, interchangeably used in this work, refers to the power to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision.

[18] See articles 62 and 83(1) of the FDRE Constitution.

Constitutional remedies for infringement of constitutional rights are rarely applied notwithstanding that the Constitution has been in enforce for close to twenty-six years. Most scholarly works on the subject matter concluded that entrusting the power of constitutional interpretation to the House of Federation in lieu of ordinary courts is the root cause for this problem.[19] Little attention has been paid by scholars to the impact of lack of clear and comprehensive Constitutional Bill of Rights litigation procedure as well as redress for violation of constitutional rights for the current unacceptably low level of enforcement of the Bill of Rights of the Constitution via constitutional litigation. This article is an attempt to address this gap by instigating debate and contributing to the discourse on human rights and access to constitutional remedies in Ethiopia. Thus, it seeks to canvass whether and the degree to which lack of detail rules and procedures on constitutional remedies could adversely affect litigation-based enforcement of the Bill of Rights of the Constitution even under the existing institutional arrangement. In doing so, the article does not attempt to cover all issue surrounding the substantive and procedural aspects of constitutional remedies. Instead, it focuses on areas where there is a dearth of scholarly analysis or the author would like to inject his perspectives.[20]

As the research objective necessitates analysis of the law and the prevailing practice, the author has employed a doctrinal research methodology that blended analysis of laws and cases. The author has analyzed the Constitution

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[19] See, for example, Yonatan Tesfaye Fessha, *Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia*, 22 J. ETHIOPIAN L. 128, 141 (2008); Takele Soboka Bulto, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory*, 19(1) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 115-16 (2011): Chi Mgbako, *supra* note 5, 278; Getachew Assefa, *All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, 24 J. ETHIOPIAN L. 139, 140 (2010); Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (Hof)*, 1(1) MIZAN LAW REVIEW10 (2007); and FASIL NAHUM, CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT 59 (The Red Sea Press, Inc. 1997).

[20] Related procedural issues not covered in this work include the legal rules on *amici curiae*, oral hearing (procedural fairness), legal aid, court fees (costs), principles of constitutional interpretation and applications of limitations.

and relevant laws and leading cases of the HF and the Council of Constitutional Inquiry (CCI). The cases the author selected for analysis are the ones that involve violation of constitutional rights by the government through its official0s and institutions.

1. An Overview of the Right to Effective Remedy and Associated State Obligation

Be it in the context of a domestic legislation or international human rights treaties, the purpose of submission of complaints of human rights violations by individuals is to seek appropriate remedy. To emphasize on the significance of remedy for human rights infringements, national and international tribunals have referred to a maxim 'a right without a remedy is no right at all' in their dictum.[21] The right to an effective remedy for a human rights violation is also provided for in numerous global and regional human rights instruments including article 8 of the Universal Declaration of Human Rights (UDHR) and article 2(3)(a)-(c) of the International Covenant on Civil and Political Rights (ICCPR) to which Ethiopia is a party. Moreover, there is a wider recognition that the right to effective remedy is part of customary international law.[22]

Generally, the term 'remedy' can be understood to refer to 'the range of measures that may be taken in response to an actual or threatened violation of human rights'.[23] In *Jawara v The Gambia*, the African Commission on Human and Peoples' Rights set out the three important elements of a remedy;

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[21] See, for example, what Lord Denning said in *Gouriet v Union of Post Office Workers* [1978] AC 435; and Chief Justice Marshall of the United States Supreme Court affirmed in *Marbury v. Madison. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). See also African Commission on Human and Peoples' Rights, *Free Legal Assistance Group and Others v Zaire*, (2000) AHRLR 74 (ACHPR 1995) Para. 37.

[22] See Cantoral Benavides Case [ACHtR Series C 88 (2001]: 11 IHRR 469 (2004).

[23] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 17 (Third Edition, 2015). See also The United Nations Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, Principle V, Guideline 8.

namely, availability, effectiveness and sufficiency. [24] The Commission further clarified that a remedy is considered to be 'effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.'[25]

Remedy has substantive as well as procedural facets. While remedy connotes the outcome of proceedings, and the relief afforded to the claimant in its substantive sense, it, in its procedural dimension, refers to the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies.[26] The procedural aspect of the right to an effective remedy, the right of access to justice, demands that the remedy or remedies in question must be accessible by victims.[27] It, *inter alia,* requires an accessible, independent and competent tribunal; broader standing standards, legal aid services; and fair, timely and expeditious proceedings.[28]

2. Key Procedural Issues in Bill of Rights Litigation

2.1 Bill of Rights Litigation Procedural Gap

The fundamental human rights and freedoms recognized in the chapter three of the FRDE Constitution would be illusionary unless they are supported by enforcement procedural rules. It is extremely important to flash out at the outset that the Bill of Rights of the Constitution in Ethiopia is not accompanied by full-fledged enforcement rules dedicated to it. The procedure for litigation of the Bill of Rights can be found scattered in the

[24] (2000) AHRLR 107 (ACHPR 2000) para 32.

[25] *Ibid.* See also African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia, Para.23.

[26] Dinah Shelton, *supra* note 23, 16 and the UN Basic Principles and Guidelines.

[27] UN *Basic Principles and Guidelines*, *supra* note 23, Principle 12.

[28] Dinah Shelton, *supra* note 23, 17 and UN Basic Principles and Guidelines, *supra* note 23, Principle 12.

Constitution, Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, Proclamation No. 251/2001 (HF Proclamation) and Council of Constitutional Inquiry Proclamation, Proclamation No. 798/2013 (CCI Proclamation). As explained below, these laws are far from being complete.

Generally, individuals' or groups' grievances of violations of any of their rights recognized in chapter three of Constitution may arise in or outside judicial proceedings. Where an issue of constitutional interpretation arises in a pending court case, the court or the litigant may refer the issue that needs constitutional interpretation to CCI.[29] Furthermore, any individual who allege that his/her fundamental right and freedom recognized in the Constitution have been violated may directly submit the case to the CCI after exhausting all available remedies.[30] In both cases, the CCI shall consider the matter and if it finds that the matter does not need constitutional interpretation, it shall reject the case or remand it to the court, and, if, on the other hand, it believes there is a need for constitutional interpretation, it shall submit its recommendations to the HF for a final decision.[31] A party dissatisfied with the decision of the CCI is entitled to lodge his/her appeal to the HF.[32] Apart from procedural rules regulating the manner of submission of complaints of constitutional human rights violations discussed above, other procedural rules set out in the aforementioned laws, albeit with enormous ambiguity, include: standing,[33] exhaustion of other remedies,[34] order of suspension of judicial proceeding until the CCI decides on the matter referred for constitutional interpretation,[35] gathering of professional opinions and

[29] Art. 84(2) of the Constitution and article 4 of the Council of Constitutional Inquiry Proclamation, Proclamation No. 798/2013 [CCI Proclamation].

[30] *Id.*, art. 5(1).

[31] FDRE Constitution, art. 84(3).

[32] *Ibid.*

[33] Art. 4 of CCI Proclamation.

[34] *Id.*, art. 3.

[35] *Id.*, art. 6.

production of evidence,[36] decision making procedure,[37] the precedent effect of the decision of the HF on constitutional interpretation,[38] the time span within which the HF should make a decision,[39] and service fee.[40] Other procedural matters that are not or barely regulated encompass: joinder of parties, admission of amicus curiae; oral hearing, period of limitation, withdrawal or discontinuance of applications, rules of constitutional interpretation and types of redress for infringement of constitutional rights except declaration of invalidity of law or conduct.

At this point, it is important to note that the Constitution entitles the CCI to 'draft its rules of procedure and submit them to the House of the Federation; and implement them upon approval.'[41] Moreover, the CCI Proclamation empowers the CCI to lay down specific rules regarding application procedure for constitutional interpretation,[42] the procedure of deliberation and making decision or submitting recommendation,[43] the time limit within which the Council notifies its decision to the applicant,[44] and manner and conditions of public hearing.[45] The HF Proclamation, on its part, gives the HF a specific mandate of identifying and implementing principles of constitutional interpretation[46] and a general mandate of enacting regulations for the implementation of the HF Proclamation.[47] In view of the fact that procedural rules, such as on remedies, period of limitation, fairness and timely disposition of proceedings and standing have a serious repercussion on

[36] Art. 9 of CCI Proclamation & arts. 8 and 10 of Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, Proclamation No. 251/2001 [HF Proclamation].

[37] Art. 11 of the CCI Proclamation and art. 14 of the HF Proclamation.

[38] Art. 11 of the HF Proclamation.

[39] Art. 1 of the HF Proclamation.

[40] Art. 14 of the CCI Proclamation and art. 17 of the HF Proclamation.

[41] Art. 84(3) of the FDRE Constitution.

[42] Art. 7(1) of the CCI Proclamation.

[43] *Id.*, art. 10.

[44] *Id.*, art. 12(2).

[45] *Id.*, art. 10 (4).

[46] Art. 7(1) of the HF Proclamation.

[47] Art. 58 of the HF Proclamation. So far, neither the HF nor the CCI have adopted a rule of procedure or directive.

substantive human rights, it is submitted that these matters should be regulated by a law to be passed by the federal parliament as opposed to the CCI or HF. The power of this organ to issue a comprehensive Constitutional Bill of Rights enforcement law springs from articles 13(1), 9(2), 51(1) and 55(1) of the Constitution.

As discussed in the next sub-section, the author of this article is of the opinion that ordinary courts do not have the power to interpret the Constitution in general and the Bill of Rights chapter in particular. Thus, when a dispute arises in respect of whether a statute, customary practice and conduct of a government are in violation of constitutional rights, the matter needs to be adjudicated by the HF. However, the fact that the HF has the power to adjudicate constitutional dispute does not necessarily mean that it will fully resolve a case in which constitutional interpretation arises. In particular, where an issue that needs constitutional interpretation arises in a case pending before court, the CCI Proclamation enjoins the court and litigant to submit only a matter that needs constitutional interpretation.[48] After the issue of constitutional interpretation is resolved, the concerned court will then decide on the entire case and order remedy if infringement of constitutional rights is found. Courts have also a role to apply the Constitution in concrete cases even if a constitutional issue arises if this is a matter on which the HF has already handed down interpretation. This is so because the final decision of the HF creates a binding precedent which courts should follow.[49] In these circumstances, courts have an opportunity to resolve cases where the violations of constitutional rights are alleged. However, they cannot effectively play their role due to the absence of Constitutional Bill of Rights enforcement rules. Distinct rules of procedure that are different from criminal and civil procedural rules are needed that take in to account the nature of constitutional litigation in terms of standing, litigation proceeding and remedies.

In this regard, the experience of Nigeria and Uganda could be instructive for Ethiopia. Similar to the FDRE Constitution, the 1999 Constitution of the Federal Republic of Nigeria contains a list of fundamental rights in Chapter

[48] Art. 4(4) and (6) of the CCI Proclamation.

[49] Art. 11(1) of the HF Proclamation.

IV without laying down the specific rules of enforcement. The detailed enforcement matters were laid down later in the 2009 Fundamental Rights (Enforcement Procedure) Rules made by the Chief Justice of Nigeria pursuant to the authority conferred on him by section 46(3) of this Constitution. The 2009 Rules, which replaced the 1979 and 2008 rules, have overriding objectives of ensuring 'expansive and purposeful interpretation, access to justice; public interest litigation, abolition of objections on ground of *locus standi*; and expeditious trial of human rights suits among others.'[50]

Similarly, the 1995 Constitution of the Republic of Uganda, in article 50 provides for the enforcement of rights and freedoms recognized under its chapter four by courts of law. In its sub-article 1, it provides that: '[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.' Sub-article 4 of the same article enjoins Parliament to make laws for the enforcement of rights and freedoms under Chapter Four of the Constitution. By virtue of this authority, the parliament adopted the 2019 Ugandan Human Rights (Enforcement) Act. After laying down the principal procedural rules, such as standing, prohibition of rejection by the competent court merely for failure to comply with any procedure, form or any technicality, redress for violation of human rights including compensation and rehabilitation, personal liability of government officials and period of limitation,[51] the Act leaves other detailed procedural rules for other subsidiary laws.[52]

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[50] Onakoya Olusegun, *Fundamental Rights (Enforcement Procedure) Rules 2009: A Paradigm Shift in Human Rights Protection in Nigeria*, 10 US-CHINA L. REV. 494 (2013). See also Jacob Abiodun Ada, *Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal*, 10 J.L. POL'Y & GLOBALIZATION 1, 7 (2013).

[51] Carmel Rickard, Uganda's Human Rights Law Takes Enforcement to New Level, Jul 11, 2019.

[52] The 2019 Ugandan Human Rights (Enforcement) Act, article 18.

2.2 Independence and Competence of the Tribunal

The bulk of legal scholarly works on the FDRE Constitution revolve around the institutional arrangement for constitutional interpretation. The main controversy among scholars is on the propriety of vesting this power to the HF and whether regular courts have some roles. This work is not meant to comprehensively review these diverse views. Instead, it seeks to focus on the independence and competence of the body entrusted with the power of constitutional interpretation and its impact on individuals' ability to get remedy for infringement of their fundamental rights guaranteed in chapter thee of the Constitution. To address the issue thoroughly, a brief background about jurisdiction as it relates to constitutional interpretation will be provided below.

2.2.1 The Institutional Arrangement on Constitutional Interpretation

The Constitution, under article 62(1) and 83(1), entrusts the power of constitutional interpretation to the HF. Despite what these provisions say, some argue that regular courts have some role to play in regard to constitutional interpretation. Generally, arguments in favor of residual judicial power of constitutional interpretation are based on article 79(1) of the Constitution which vests judicial power in courts; article 13(1) of the Constitution which imposed responsibility and duty on courts to respect and enforce the Constitutional Bill of Rights; article 3(1) of the Federal Courts Proclamation,[53] and the Amharic version of article 84(2) of the Constitution which is understood to limit the power of the HF to interpret the constitution only where laws enacted by the federal parliament or regional state councils are contested as being unconstitutional.[54] The position that courts have a power to interpret the constitution where the constitutionality of laws other

[53] Federal Courts Proclamation, Proclamation, No. 25/1996.

[54] See Assefa Fiseha, *supra* note 19, at 16. It is argued that since there is a discrepancy between the Amharic and English version of article 84(2), the former should prevail based on article 106 of the Constitution.

than primary legislation, customary practices and administrative decisions is challenged is also buttressed by the nature of parliamentary systems where, due to the supremacy of the parliament, courts are disallowed to invalidate its laws.[55]

Those who argue that regular courts do not have the power to interpret the constitution admit the responsibility of courts to enforce the Constitution; but contend that this responsibility does not involve constitutional interpretation for articles 62(1) and 83(1) of the Constitution made this the exclusive mandate of the HF.[56] To reinforce their argument, they referred to its drafting history which testified that the framers consciously excluded courts from the task of constitutional interpretation for two reasons; viz,, the desire to entrust the HF to exercise this power and fear of the undemocratic nature of the judiciary.[57]

The HF was made the favorite candidate owing to the fact that it is a body composed of representatives of NNP and the Constitution is taken to be a political pact among NNP.[58] Thus, it is important to note that the motivation for selection of the institution for constitutional interpretation is not protection of constitutional rights. Instead, the decision was driven by the aspiration to give utmost protection to the interests and rights of NNP. The Constitution's preoccupation for the rights of NNP could also be detected

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55 *Ibid.*

56 Yonatan Tesfaye Fessha, *supra* note 19, at 141; Adem Kssie, *supra* note 8, at 67; Sisay Alemahu Yeshanew, *supra* note at 10; Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNATIONAL LAW REVIEW 45-46; K. I. Vibhute, *Right to Access to Justice In Ethiopia: An Illusory Fundamental Right?*, 54(1) JOURNAL OF THE INDIAN LAW INSTITUTE 82 (2012); Takele Soboka Bulto, *supra* note 19, at 115-16; Chi Mgbako, *supra* note 5, at 278; Fasil Nahum, *supra* note 19; and Getachew Assefa, *supra* note 19, at 140.

57 Assefa Fiseha, *supra* note 19, at 10; Fasil Nahum, *supra* note 19; and Getachew Assefa, *supra* note 19.

58 See the preamble and arts. 8 and 61 of the FDRE Constitution.

from the constitutional recognition of their unconditional and non-derogable right to self-determination including secession.[59]

The second motive for denial of the judiciary from interpreting the constitution in general is the belief that doing so would undermine democracy. This ground, also called counter-majoritarian argument in the literature, posits that unelected and unaccountable few judges should not be given the chance to annul a law passed by democratically elected legislatures. The counter-majoritarian argument or parliamentary supremacy has been used by a number of countries including France and UK to oust the judiciary from constitutional interpretation. In its 1958 Constitution, France adopted an extreme version of European concentrated system form of judicial review as opposed to the US diffused system of review where all courts have the power to interpret the constitution and mixed system of judicial review adopted by some Latin American and European countries.[60] In the French system, only the Constitutional Council (*Conseil Constitutionn*el) is mandated to 'conduct an objective examination of statutes newly passed by the legislature during a brief window before they enter into force to determine whether the statute is consistent with the Constitution.' [61] Under this *a priori* abstract review arrangement, a statute cannot be challenged after it entered into force.[62] In the UK, there was no practice of constitutional judicial review for Britain does not have a written constitution.[63] The role of the UK Supreme

[59] Article 39 of Constitution does not attach any substantive condition for the enjoyment of the right to self-determination of nations, nationalities and peoples. This is more progressive position compared to international law. Article 93 of Constitution made the right to self-determination among a handful of non-derogable rights. It is interesting to note that, contrary to the position of the ICCPR, the right to life is among the dregoable rights during state of emergency.

[60] ALLEN BREWER- CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 263 (Cambridge University Press, 1989).

[61] Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as a First Resort in France*, 43 (15) INTERNATIONAL LAW AND POLITICS 16 (2010).

[62] *Ibid*.

[63] Albert H.Y. Chen, *The Global Expansion of Constitutional Judicial Review: Some historical and comparative perspectives*, 2, file:///Users/mizanie/Downloads/SSRN-id2210340.pdf (last accessed 23 September 2021).

Court was confined 'to give effect to, and not to challenge, the will of Parliament.'[64]

While Ethiopia is stuck with its parliamentary sovereignty stance, countries from which it has transplanted this notion have made tremendous reforms in favor of constitutional judicial review. In 2008, France has introduced amendments to the 1958 Constitution. The new article 61-1 of the Constitution provides that '[i]f, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms, guaranteed by the Constitution, the matter may be referred by the *Conseil d'Etat '* or by the *Cour de Cassation* to the Constitutional Council.'[65] The United Kingdom (UK) has also injected judicial review as a consequence of the influence of the European Union (EU) and the European Convention on Human Rights (ECHR) and the commitment to strengthening the enforcement of human rights.[66] The legal obligation to provide domestic remedy for and the possibility of adjudication of human rights violations by the supranational European Court of Human Rights has prompted member states to provide judicial redress at domestic level at least in the first instance. It is partly this fact that led to the enactment of both the 1998 UK's Human Rights Act and the French constitutional amendments in 2008.[67]

Even if the debate among academicians and practitioners is far from over, recent developments exposed in no uncertain terms that ordinary courts are entirely sidelined from constitutional interpretation in Ethiopia. Contrary to how article 84(2) is understood, the 2013 CCI Proclamation clarified that constitutional interpretation by the HF is necessitated not only where the constitutionality of a statute is challenged but also where the constitutionality of 'customary practice or decision of government organ or decision of

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[64] Murkens, Jo Eric Khushal, *Judicious Review: The Constitutional Practice of the UK Supreme Court*, 77 (2) CAMBRIDGE LAW JOURNAL (2018).

[65] For more detailed discussions on this, Gerald L. Neuman, *supra* note 61, at 19-20.

[66] Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62(3) THE AMERICAN JOURNAL OF COMPARATIVE LAW 624 (2014).

[67] *Ibid*. See also Albert H.Y. Chen, *supra* note 63, at 12-13.

government official' is an issue.[68] In the *Wessen et al* Case,[69] the HF assumed jurisdiction over a case in which a decision of a government institution is challenged as an unconstitutional and which ultimately decided that the decision is unconstitutional.

Entrusting the power of constitutional judicial review to the HF in the Ethiopian Constitution is proven to have a debilitating negative impact on enforcement of constitutional rights of individuals by shielding the legislature and the executive from any meaningful scrutiny. In the case of *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority (Ashenafi and Others Case),*[70] the CCI was called for to make a recommendation to the HF on the complaint that a regulation issued by the Council of Ministers (Regulation No. 155/2007) that give the head of governmental authority to dismiss its employees without any possibility for judicial scrutiny is a violation of the right of access to justice provided under article 37 (2) of the Constitution. In its analysis, the CCI held that as parliament that operates in parliamentary system, it has the power to decide which cases are justiciable before courts. The CCI went on to contend that it does have the power to challenge law passed by the parliament as long as the power is exercised within its constitutional limits. It finally decided that this matter does not merit constitutional interpretation. Although the CCI has acknowledged constitutional limits to the parliament, its final decision and reasoning in general tend to show its implicit recognition of the inviolability of what the parliament says regardless of its effect on constitutional rights. Lack of judicial control has encouraged the parliament to enact laws that hampered the enjoyment constitutional rights and takeaway judicial power from courts. The latter, in turn, has resulted in further degrading judicial power over control of executive delegated laws and conduct.

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[68] Art. 3(1) of CCI Proclamation.

[69] *Wessen Alemu and Dawit Oticho vs. the Amhara National Regional State Justice Professional Training and Legal Studies Institute and Judicial Administration Council* (Decision of HOF file no. 019/08, decided on Tikimit 2, 2009 Ethiopian Calendar (E.C.) (September 2016)).

[70] Decided on 6/1/2002 E.C (December 2009).

2.2.2 Independence and Competence of the HF and CCI

Although horizontally applicable, the Bill of Rights of the Constitution is primarily designed to protect fundamental rights and freedoms of individuals and groups from arbitrary conduct of government. As raised above, the constitutional protection of human rights could be meaningful where the rights listed could be vindicated by an independent and competent organ in the event of violation. The term independence is used in this article to mean that the constitutional adjudication body and its members should be free from improper influences and biases.

The HF is one of the two houses of the Federal parliament without legislative mandate.[71] The Constitution under article 62 lists the powers and responsibilities of this House one of which is interpretation of the constitution. It is composed of representatives of all NNP elected by state councils for a term of five years.[72] The HF is authorized to organize the CCI[73] which could provide support in constitutional interpretation. Where an interested party or a court is of a belief that an issue requires constitutional interpretation, the matter should first be submitted to the CCI for its investigation.[74] If the CCI finds that the matter needs constitutional interpretation, it shall submit its recommendations to the HF for final decision and if, on the other hand, it reached at a different conclusion, it will reject the request.[75] A party dissatisfied with the decision of the CCI is entitled to appeal to the HF.[76] Organizationally, the CCI is composed of eleven members drawn from the legal community, Federal Supreme Court and HF.[77]

In relation to the HF and CCI, a question raised by many scholars is to what extent these institutions can discharge their responsibilities independently and impartially, in particular, when an issue submitted to them aims at

[71] Arts. 53 of the FDRE Constitution.
[72] *Id.*, arts. 61 & 67(2).
[73] *Id.*, art. 62(2).
[74] *Id.*, art. 84(1).
[75] *Id.*, art. 84.
[76] *Ibid.*
[77] *Id.*, art. 82.

challenging the inconsistency of a law or a decision of the executive with constitutional rights. This question is answered in the negative principally for two reasons.

First, as members of the HF represent their respective ethnic groups and are members of political parties, it is logical to expect their allegiance to the ethnic group they represent and the political party that they belong to in making decisions.[78] The reality that most members of the House have positions in their regional executive and legislative branches of governments coupled with the fact that members of the HF are elected by regional councils themselves is indicia of the possible lack of impartiality and independence of this organ to discharge a constitutional interpretation mandate.[79] Second, the way the CCI is organized and the criteria for appointment of its members also evoke the question of impartiality and independence. Out of its eleven members, six of them are expected to be 'legal experts, 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.'[80] Neither the Constitution nor the CCI Proclamation does require these members to be impartial and independent. In practice, it is not uncommon to see ruling party affiliated individuals serving as a member of this body. Moreover, three members of the CCI which are elected by the HF from its members have similar problems mentioned above.[81] Two of members of the CCI who serve as its president and vice-resident are the president and vice president of the Federal Supreme Court (FSC).[82] 'This has made both members to see cases in the CCI which they have already decided as either FSC or FSC Cassation Bench judge capacity. A study[83] conducted in this area

[78] Adem Kassie Abebe, *The Potential Role of Constitutional Review in the Realization of Human Rights in Ethiopia, LL.D Dissertation*, University of Pretoria, 2012, 81.

[79] Yonatan Tesfaye Fessha, *Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review*, 14 AFR. J. INT'L & COMP. L. 53, 74, 75, 77-78 (2006).

[80] FDRE Constitution, art. 82(2) (C).

[81] *Ibid.*

[82] *Ibid.*

[83] Mustefa Nasser Hassen, *Methods of Constitutional Interpretation in Constitutional Dispute Settlement in Ethiopia*, LL.M Thesis, Addis Ababa University School of Law, 2018,

disclosed that parties aggrieved by the decision of the Cassation Bench of the Federal Supreme Court often file a complaint against the president or vice president not to sit over their case in the CCI. However, the CCI often rejects such complain for the sole reason that members of the CCI assume responsibility in a different capacity. It is important to note that the relevant laws do not have a provision on recusal of CCI or HF members due to possible bias or personal interest. One can also see similar problem with three members of the HF who are selected to serve as member of the CCI and at the same time take part in the decision of the House.

So far, the trend shows that applications to the CCI challenging the laws and decisions of the government as a violation of constitutional rights are exceptions to the general trend of litigation between and among private parties. In the overwhelming majority of cases, the applications are submitted to the CCI against final decisions of federal and regional judicial organs. An important explanation for the unacceptably few number of cases on constitutional violation by the Government could presumably be lack of trust in these institutions due to their perceived lack of freedom from political influence and their biased decisions in previous cases. The CCI is blamed for inappropriately rejecting politically sensitive but legitimate questions of constitutional interpretation. And as a result of this disposition, the CCI and HF are forced to devote a great deal of time adjudicating cases involving property, land and marital rights among and between private parties.[84] The following cases are cited by a number of writers to show how the CCI is biased when it comes to politically delicate issues.

48, http://213.55.95.56/bitstream/handle/123456789/12652/Mustefa%20Nasser.pdf?sequence=1&isAllowed=y (last accessed 23 September 2021).

[84] Merhatsidk Mekonnen Abayneh, *Who should best be preferred for the business of constitutional interpretation?,* Reporter, 5 January 2019, https://www.thereporterethiopia.com/article/who-should-best-be-preferred-business-constitutional-interpretation?__cf_chl_managed_tk__=pmd_4Wd2vRLG4ggwYyYlduwPjrE.lt2FKW.Ig00yFEB_nEo-1632433310-0-gqNtZGzNAxCjcnBszRPR (accessed 23 September 2021) .

In *Seeye Case*,[85] Seeye Abraha, along with other persons accused of corruption, challenged the constitutionality of the Anti-corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001. The applicants contended that retrospective application of this Proclamation which denies the right to bail of individuals accused of corruption is inconsistent with article 22 of the FDRE Constitution that prohibits retroactive application of criminal law. The CCI recommended to the HF to reject the application as the Proclamation in question is not inconsistent with article 22 of the Constitution.

In the 2005 *CUD* Case,[86] Coalition for Unity and Democracy (CUD), the then leading opposition party, challenged the order of the then Prime Minister, Meles Zenawi, banning public demonstrations in Addis Ababa and its neighborhood. The ban was intended to curb massive demonstrations in protest of the ruling party's (EPRDF) alleged manipulation of the election results in the aftermath of the controversial May 2005 parliamentary election. The CUD, among others, argued that the order of the Prime Minister is a violation of the right to peaceful demonstration recognized under article 30 of the FDRE Constitution. The CCI to which the matter was referred to it by a Court decided the case by concluding that the directive issued by the Prime Minister was not unconstitutional. In the *Ashenafi and Others Case,* discussed above, the CCI again made a controversial decision that a regulation issued by the Council of Ministers that gives the head of governmental authority to dismiss its employees without any possibility for judicial scrutiny is not a violation of the right of access to justice provided under article 37 (2) of the Constitution.

However, in its recent decisions, the HF, recommended by the CCI, has made important and bold decisions which involve claims against unconstitutionality of laws and practices of government institutions.

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[85] The case of Prime Minister Meles Zenawi vs Ex-Defense Minister Seeye Abraha (2004) at http://www.aigaforum.com/TheCaseofSiye.pdf (accessed 07 February 2020).

[86] See, *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*, Federal First Instance Court, File 54024, ruling of June 3, 2005.

In the *Melaku Fenta vs. Federal Public Prosecutor case (Melaku Fenta Case)*,[87] the issue before the CCI and HF was whether article 8(1) of the Federal Courts Proclamation[88] and articles 6 and 7(1) of Anti-corruption Proclamation[89] which provides that the Federal Supreme Court shall have first instance jurisdiction on offences for which officials of the Federal Government are held liable is consistent with the right to appeal recognized under article 20(6) of the FDRE Constitution. The HF held that allowing the Federal Supreme Court to assume first instance jurisdiction over such kinds of cases is unconstitutional because it undermines the right to appeal protected under Article 20(6) and discriminatory contrary to article 25 of the Constitution. Consequently, the HF rendered article 8(1) of the Federal Court Proclamation and articles 6 and 7(1) of Anti-corruption Proclamation as an unconstitutional, and ordered that Melaku's corruption case be heard at the Federal High Court.

In the *Wessen et* al Case, the visually impaired applicants, graduates of law, had completed a post-law school judicial training offered for prospective judges and public prosecutes. After completion of the training, judges and public prosecutors were selected by lot system as per the working rules of the institutions. However, in this case, the regional training institute denied the applicants from taking part in the lot placement and directly placed them to be public prosecutors based on the assumption that judgeship is a difficult job for visually impaired persons. Subsequently, the applicant challenged the constitutionality of this decision arguing that it contravenes Article 41(2) which guarantees every Ethiopian the right to choose means of livelihood,

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87 *The Former Director General of the Ethiopian Revenues and Customs Authority, Melaku Fenta V. Anti-Corruption Prosecutor Team* (Decision of HF on Thursday, January 2, 2014 unpublished).

88 Article 8(1) of the Federal Courts Establishment Proclamation No 25/1996 provides that the Federal Supreme Court shall have first instance jurisdiction on offences for which officials of the Federal Government are held liable in connection with their official responsibility.

89 Article 7(1) of the Revised Anti-Corruption, Special Procedure and Rules of Evidence Proclamation No. 434/2005 provides that the Federal High Court will have first instance jurisdiction other than those cases for which the Federal Supreme Court has first instance jurisdiction.

occupation and profession and Article 25 of the Constitution which guarantees the right to equality. The HF, accepting the arguments of the applicants and concurring with the recommendation the CCI, finally decided that the decision that excluded visually impaired persons from serving as a judge is unconstitutional.

In *Administrative Tribunal of the Civil Service Ministry v Ethiopian Revenues and Customs Authority Case*,[90] the CCI and HF reversed their earlier standing in *Ashenafi and Others Case* claiming that the same regulation issued by the Council of Ministers that give the head of governmental authority to dismiss its employees without any possibility for judicial scrutiny violates the right to be heard, access to justice, and equality as enshrined under the FDRE Constitution and ICCPR.

Leaving issues of independence and impartiality aside, the question would be whether the HF and CCI are competent enough to effectively and efficiently discharge a constitutional interpretation mandate.

Currently, the HF has hundred plus members, of which the presence at a meeting of two-thirds of the members of the HF constitutes a quorum.[91] The House can only reach a decision upon the approval of the majority of members present and voting.[92] Given the large number of members of the House, the HF is not an ideal forum to deliberate and decide on issues of constitutional adjudication which often involves complex arguments.[93] Members of the House also lack the requisite legal knowledge and skills to engage in constitutional adjudication.[94] Indeed, strengthening the Secretariat

[90] *Civil Servants Administrative Tribunal vs. FDRE Revenues and Customs Authority*, File No. 2189/09 (Tir 8, 2011 E.C. (2019)); and *Administrative Tribunal of the Civil Service Ministry v Ethiopian Revenues and Customs Authority*, (File No. 72/2019, House of Federation, June 9, 2019).

[91] FDRE Constitution, art. 64(1).

[92] *Id.*, art. 64(1).

[93] Yonatan Tesfaye Fessha, *supra* note 79, at 74. See also Mustefa Nasser Hassen, *supra* note 83, at 49.

[94] Yonatan Tesfaye Fessha, *supra* note 79, at 75.

of the House could to some extent contribute in alleviating the legal expertise deficit in the House.[95]

The limited number of meetings of the HF[96] coupled with the House's engagement in other activities means that it has little time for thorough constitutional interpretation. In his research, Mustefa explicates the gravity of this problem as follows:

> *For instance, the House, in its 5th term, 3rd year and first session in 2017, has passed a decision on 8 cases up on a recommendation of the CCI that merit constitutional interpretation, and rejected some 21 appeal cases for they do not merit constitutional interpretation within half a day. Simply put, the House decided on issues of constitutionality of almost 30 cases in four hours duration. The practice shows that the Constitutional Interpretation and Identity Affairs Standing Committee often read the case with recommendations to the House for a final decision where the House often cast a vote for endorsing the recommendation of CCI. This is done with little deliberation on constitutional matters where acceptance of the recommendation will automatically become the final decision of the HF on the matter.*[97]

The HF's scarcity of time for meetings and deliberations not only does turn it in to a rubberstamp institution but also resulted in delays in making decisions and case backlogs. Indeed, the HF Proclamation enjoins the House to 'pass prompt decisions after investigating constitutional issues and resolve constitutional cases in a short time.'[98] It is required in particular to 'pass decisions, within thirty days, over the recommendation submitted to it by the

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[95] The Secretariat is established by Establishment of the Secretariat of the House of the Federation Proclamation, Proclamation No. 556/2008. One of the responsibilities of the Secretariat mentioned in article 4(8) of this Proclamation is to provide professional opinion in relation to constitutional interpretation when requested by the House.

[96] Article 46(1) of the HF provides that The House shall convene at least twice in a year.

[97] Mustefa Nasser Hassen, *supra* note 83, at 49.

[98] Art. 13(1) of the HF Proclamation.

Council of Constitutional Inquiry.'[99] The reality is, however, different from what the law requires.

Although the CCI meets more frequently than the House, it is still a part-time institution which meets on monthly basis with a possibility to hold a meeting within shorter time when convened by its chair.[100] Needless to say, lack of fulltime engagement has adverse impact on the speediness of its investigation and thereby cause delays. Based on February 3, 2020 data, there were more than 2,500 pending cases awaiting its decision.[101] The status quo is at odds with the law which requires that a case before the Council may not be postponed for repeated appointments unless there has been a good cause.[102] Unlike the HF Proclamation, the CCI proclamation does set the maximum time limit within which the CCI should notify its decision to the applicant or submits its recommendation to the HF. It leaves the matter to be determined by directive to be issued by the Council.[103] It is also doubtful whether the members of the Council have the requisite expertise for constitutional interpretation. Of its eleven members, three of which are to be nominated from members of the House are not even expected to be a lawyer. Even if the Constitution requires that the six legal experts who serve as members of the CCI should possess a proven professional competence and high moral standing, this is not the case as a matter of reality. They seem to be selected owing to their affiliation and sympathy to a ruling party instead of their outstanding competence in constitutional law. As these members are not fulltime employees and are busy to earn a living, they may not have time to read and update themselves.

Lack of or limited competence on the part of the HF and CCI to interpret the Constitution has hampered the crystallization of well-developed and meaningful jurisprudence in the application of the Bill of Rights of the Constitution. The recommendations of the CCI and decisions of the HF are

[99] *Id.*, art. 13(2).
[100] Art. 23 of the CCI Proclamation.
[101] So far, the CCI has received 5,064 applications.
[102] Art. 10(3) of the CCI Proclamation.
[103] *Id.*, art. 12(3).

fraught with lack of consistency and predictability; are essentially based only on text of the Constitution; make little reference to international jurisprudence and best experience of countries; devoid of proper explanation and argumentation to reach at conclusions; and wrongly apply legal provisions knowingly or otherwise.[104]

2.3 Application of the Bill of Rights and the Principle of Avoidance

In principle, the direct application of the Bill of Rights of the Constitution ensues to litigations in which the right of a beneficiary of the Bill of Rights has been violated by an individual, government or other legal person. Unlike the international human rights treaties to which Ethiopian is a party that are applicable where the treaty rights are infringed by the state, the FDRE Constitution made it clear that both the state and other non-state actors have the duty to respect and ensure the observance of the Constitution in general and its Bill of Rights in particular.[105] Put differently, complaints of individuals or groups involving violation of constitutional rights by government laws and decisions as well as conduct of individuals and other non-state actors could be submitted to the HF via the CCI for constitutional interpretation. However, direct application of the Constitution to resolve disputes should be a measure of last resort and must be avoided to the extent possible. Thus, as much possible, decisions on violation of constitutional rights must be resolved through judicial application of ordinary legislation and precedents and avoid direct invocation of constitutional provisions.[106]

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[104] For details on these issues, see Mustefa Nasser Hassen, *supra* note 83; and Habib Abajebel Abasimel, *The Jurisprudence of the Council of Constitutional Inquiry and of the House of Federation on Property Related Claims: A Critical Study*, LL.M Thesis, Addis Ababa University School of Law, January 2018, http://213.55.95.56/handle/123456789/12750 (last accessed, 23 September 2021); Adem Kassie, supra note 78, P. 75; and Anchinesh Shiferaw, *The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia*, 13(3) MIZAN LAW REVIEW 419-441 (2019).

[105] Art. 9(2) of the FDRE Constitution.

[106] Takele Soboka Bulto, *supra* note 19, at 107.

The doctrine of avoidance, recognized and developed in other jurisdictions, such as the US and South Africa, requires that direct application of the Bill of Rights, which is geared towards showing inconsistency between the Bill of Rights and law or conduct, should be pursued only where there are no other alternatives to provide remedy. This, in other words, means that indirect application of the Bill of Rights should first be pursued before applying the Bill of Rights directly to the dispute.[107] The jurisprudence of South Africa, Canada and the US shows that courts adhere to the doctrine of avoidance to circumvent abstract constitutional review; allow the 'constitution the normative deference that it should command, and put it on par with other legislations that are called into application in everyday judicial decision-making'; and 'allow incremental development of norms, and encourage the development and interpretation of other legislations in conformity with the constitution'.[108] In addition to these reasons which could also be relevant to Ethiopia, another more pragmatic justification for a serious application of the doctrine of avoidance by courts and the CCI in Ethiopia is timely disposition of cases. As mentioned above, due to the part time position of the CCI itself and the HF as well involvement in other activities, delays in disposition of cases are not uncommon. Case referral by courts and settlement of cases by the CCI in face of alternative legal basis for settlement of dispute would amount to complicity in denial of justice on the part of these institutions. Thus, where the CCI is convinced that the case submitted to it can be resolved by courts through the application of other laws, it needs to reject the case or refer it back to courts. Likewise, where the court determined that a pending case could be adjudicated based on other laws than the Constitution, it should refrain from referring the case to the CCI. In the specific context of the Bill of Rights of the Constitution, it means that the court should make every possible effort to provide remedy to complaint of constitutional rights by way of applying other domestic legislation; interpreting, instead of invalidating,

[107] IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 24-25 (Fifth Edition, 2005).

[108] Takele Soboka Bulto, *supra* note 19, at 108.

domestic laws in line with the Constitution; and reliance on the precedent of the HF, if any.[109]

The doctrine of avoidance needs to be applied even in case where the applicant invoked the Constitution or the Constitution is applicable in the face of other laws that could be applied and provide remedy. Based on this, the referral of the case by the Federal First Instance Court (FFC) to the CCI in the *CUD Case* was inappropriate. The FFC could have resolved the case by applying Peaceful Demonstration Proclamation No. 3/1991 without referring the matter to the CCI.

In case of human rights violations, in particular, both the human rights treaties to which Ethiopia is a party and the Bill of Rights of the Constitution could be pertinent to contest a law or a decision. Where these options are on the table, countries take different approaches to determine which one to use. In US, a matter should be decided based on human rights conventions in so far as they are judicially enforceable.[110] This approach is the manifestation of the doctrine of avoidance. In France, on the other hand, 'if both treaty and the constitution can be used to challenge a statute, courts need to give priority to the constitutional issue and refer the case to Constitutional Council.'[111] For the reasons already mentioned above, the court in Ethiopia should manage to settle the dispute based on the international treaties and avoid referring the matter to the CCI.

The doctrine of avoidance, although not explicitly provided in the Constitution or the HF or CCI Proclamation, is implicit in articles 83 and 84 of the Constitution which require the intervention of the CCI and HF where there is a need for constitutional interpretation. So, application of the doctrine of avoidance should be entrenched through progressive interpretation of these provisions or legal reform.

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[109] Adem Kassie Abebe, *supra* note 78, pp. at 156-161 and Takele Soboka Bulto, *supra* note 19, at 107.

[110] Gerald L. Neuman, *supra* note 61, at 26.

[111] *Id.*, 23-24.

2.4 Standing

In the context direct application of the Bill of Rights of the Constitution, standing refers to an entitlement to submit a claim of a violation of constitutional rights to an organ with a power to provide remedy. As discussed above, an action to challenge infringement of these rights could be submitted to the CCI either through courts or directly by individuals. Be it a constitutional issue that arises from a pending case or out-of-court submission, it is important to determine who has standing to approach this organ.

As regards an action submitted out-of-courts, the relevant laws governing the matter are the FDRE Constitution, the HF and CCI proclamations. Article 37, entitled as the right of access to justice, is the relevant provision of the FDRE Constitution as regards the constitutional requirements of standing. It reads as:

> 1. *Everyone has 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.*
> 2. *The decision or judgment referred to under sub-Article 1 of this Article may also be sought by:*
>
> a. *Any association representing the collective or individual interest of its members; or*
>
> b. *Any group or person who is a member of, or represents a group with similar interests.*

Article 37 is interpreted differently by different authors. On one side, there are authors who argue that article 37 requires personal vested interest in a particular action.[112] This, in the context of Bill of Rights of the Constitution, means that an action could only be brought by an individual or groups of individuals whose constitutional rights are or threated to be violated.

[112] See, for example, Sisay Alemahu Yeshanew, *supra* note 10, at 291; Adem Kassie Abebe, *Towards more liberal standing rules to enforce constitutional rights in Ethiopia* 10 AFRICAN HUMAN RIGHTS LAW JOURNAL 409 (2010).

According to this position, the apparent recognition of public interest litigation (*actio popularis*), under 37(1) is restricted by the requirements under 37(2) which requires '[t]he person to be a member of the affected group or an association representing the interests of its members.'[113] On the other side, there are writers who took a position that article 37 embraces public interest litigation (PIL).[114] This argument is based on article 37(1) which is construed to allow everyone to bring a justiciable matter in pursuit of their own interests or that of others or article 37 (2) (b) that allows any group or person who represents a group with similar interest to bring justiciable matters before a court of law or any other competent body with judicial power.

In my view, the interpretation that article 37 of the FDRE Constitution also recognizes a broad standing requirement is plausible. From the way the sub-articles are organized, it is clear that article 37(2) is added to article 37 (1) not to clarify or qualify the seemingly broad standing requirement under sub-one. It is instead to add other grounds of standing as it made clear by the caption of article 37(2) which says 'the decision or judgment referred to under sub-Article 1 of this Article may *also* be sought by…' (Emphasis added). Thus, in the absence of an explicit condition on the right of everyone to bring a justiciable matter to their own personal interests in 37(1), this vague provision need to be interpreted broadly so as to include a possibility where by anyone may act on behalf of another person or in public interest.[115] This broad

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[113] See, for example, Sisay Alemahu Yeshanew, *supra* note 10, at 291; Adem K Abebe, *supra* note 111, at 417.

[114] Fasil Nahum, *supra* note 19, at 150; Yenehun Birlie, *Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features*, 11(2) MIZAN LAW REVIEW321-322 (2017); Yoseph Mulugeta Dadwaza, *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?*, unpublished LLM thesis, University of Pretoria, (2005), p. 40-42, https://repository.up.ac.za/handle/2263/1135 (last accessed, 23 September 2021); and Getahun Kassa *Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System*, 20 AFRICA FOCUS 75, 86 (2007).

[115] Constitutions of other countries that embrace broad standing requirements mention five possibilities: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members. See section 85(1) of the 2013 Constitution of Zimbabwe; article 22 of the 2010 Kenyan Constitution; and section 38 (d) of the 1996 South African

understanding makes sense in the light of realizing the object and purpose of the Constitution.[116] One of the object and purpose of the Constitution articulated in the preamble, full respect of individual and people's fundamental freedoms and rights, can be achieved if everyone's constitutional right of access to justice is realized equally regardless of their socio-economic circumstances. To that effect, it is vital to adopt a generous and creative approach to the rules of standing.

The centrality of a liberal approach to the rules of *locus standi* and other procedural requirements in constitutional cases is strongly highlighted by scholars and adopted by courts of many African countries; 'for those whose rights are allegedly trampled upon must not be turned away from the court by procedural hiccups'.[117] A liberal approach to standing in constitutional cases is especially deemed 'necessary where poverty, illiteracy and governmental abuse of power is so prevalent.'[118] As Lugakingira J. in the Tanzanian case of *Mtikila v Attorney General* has noted, the

> *…notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and bona fide litigant even when he has no personal interest in the matter …where the court can provide an effective remedy.*[119]

Consistent with the above interpretation, the term 'interested party' in article 84(2) of the Constitution should be interpreted liberally. It is further submitted that article 5(1) of the CCI Proclamation which limits standing to

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Constitution. See also Paragraph 3(e) of the Nigerian 2009 Fundamental Rights Enforcement Rules.

116 JEFFREY GOLDSWORTHY, INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 130 (Oxford University Press, (2006).

117 JOHN HATCHARD, MUNA NDULO AND PETER SLINN, COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE 176 (Cambridge University Press, 2004).

118 *Ibid.*

119 Hight Court of Tanzania, unreported, 1994, at 11. Cited in John Hatchard, Muna Ndulo and Peter Slinn, *supra* note 116, at 176.

'any person who alleges that his fundamental right and freedom' either be amended or read in line with article 37 and 84(2) of the Constitution. Constitutional rights could be fully vindicated in Ethiopia only where their violations could be brought to the attention of the CCI and the HF by affected individuals and groups as well as public purpose spirited individuals and NGOs.

When an issue of a violation of constitutional rights that requires constitutional interpretation arises in the course of court litigation, it is contended that the same liberal standing rules of article 37 and 84(2) should apply. The term 'interested party' under article 4(1) of the CCI Proclamation should also be understood not only as applicants and respondents during court litigation but also others who wish to take the matter to CCI and the HF for constitutional interpretation. But what rules of standing should the court initially apply where a dispute with a constitutional interpretation potential is submitted to it? The same question arises in cases where the court entertains a matter that necessities the application of the binding precedent of the HF without a need to refer the matter to the CCI or an applicant files a case before a court for an additional remedy, say damage, following a declaration of invalidity of a law or government decision or a decision of the HF that a government conduct violated constitutional right(s). In such cases, the federal court which has the jurisdiction to handle the case has to apply the Civil Procedure Code (CPC) for lack of specific procedural rules applicable for the enforcement of the Bill of Rights of the Constitution.[120] However, the standing requirement in the CPC provided under article 33 and 38 require existence of vested interest. This requirement designed for civil litigations is, however, incompatible with the very nature of Constitutional Bill of Rights litigation. Accordingly, articles 33 and 38 of the CPC should be amended or

[120] Based on article 3 of the Proclamation No.25/96, cases arising under the Constitution fall under the jurisdiction of federal courts. Moreover, article 7 of the same provides that 'the Criminal and Civil Procedure Codes as well as other relevant laws in force shall apply with respect to matters not provided for under this Proclamation insofar as they are not inconsistent therewith'.

courts should interpret them in way that takes into account the broad standing standard of article 37 of the Constitution.

2.5 Exhaustion of Administrative and Judicial Remedies

Individuals or groups who seek to challenge the alleged violation of their human rights by laws, decisions of the government or customary practices before the CCI and HF are required to exhaust available remedies before submitting their pleading to the CCI. Articles 3(2) and 5(2) and (3) of the CCI Proclamation, dedicated to exhaustion, do provide specific requirements. First, 'if it is justiciable matter of court', it could be submitted to the CCI only after 'it has been brought to, and heard by, the court having jurisdiction'. Second, 'if it is justiciable matter of administrative organ', it could be submitted to the CCI only after 'a final decision has been rendered by the competent executive organ with due hierarchy to consider it'. The CCI Proclamation, under article 2(10), defines final decision to mean 'a decision that has been exhausted and against which no appeal lies'. Third, 'where any law issued by federal government or state legislative organs is contested as being unconstitutional, the concerned court or interested party may submit the case to the Council'.[121] Thus, the only case where applicants are exempted from exhausting both administrative and judicial remedies is claim involving allegations of violations of constitutional rights ensued from primary legislation. In this case, the court to which the claim is submitted is required to refer the matter to the CCI for resolving the issue of constitutionality or otherwise of a federal or regional proclamation. In all other matters, exhaustion of other remedies is a perquisite to access the CCI and HF.

As regards exhaustion of judicial remedies, it is required where it is 'justiciable matter of court'. The CCI Proclamation does not, however, give a clue as to what kinds of matters are justiciable before court of law. Based on the inherent power of courts to exercise judicial power, it could be argued that any claim challenging the constitutionality of customary practices, decisions of government organs, regulations and directives is judicially justiciable. If this

[121] Art. 5(3) of the CCI Proclamation.

is so, what are the matters that are not justiciable before courts? The CCI in the *Ashenafi and Others Case* and the Federal Supreme Court Cassation Division in the *Ethiopian Privatization and Public Enterprises Supervising Agency vs. heirs of Ato Nur Beza Terga Case*[122] clarified that a matter is justiciable before courts if their judicial power is not taken away and made administrative decisions are not made final by the parliament. Thus, where judicial power is ousted by law, there is no need to exhaust judicial remedy. In all other matters, prior adjudication by a 'court having jurisdiction' is mandatory. The term 'final decision' used in the CCI Proclamation suggests that the applicant should exhaust appeal or take the matter to a cassation bench as part of the exhaustion requirement.

The requirement of exhaustion of administrative remedies is applicable whether the decision of administrative bodies is final or amenable to further judicial scrutiny. The law makes it clear that this level of remedy includes appellate level remedies within the administrative hierarchy.

As is the case in other jurisdictions,[123] there are three main purposes behind the requirements of exhaustion of administrative remedies. First, it gives agencies a chance to correct their mistakes through an internal complaint handling mechanisms and appeal process. Second, exhaustion fosters the efficiency of institutions by reducing the number of cases to be forwarded to courts and the CCI. Third, exhaustion might also provide the reviewing institution with a more useful record and administrative expertise. These reasons could also be extended to analogously apply why judicial remedies should be exhausted before a constitutional dispute is submitted to the CCI. Resolving a dispute involving violation of constitutional rights by the HF through the direct application of constitutional interpretation should be a remedy of last resort. The principle is meant not only to benefit the

[122] Decision of the Federal Supreme Court Cassation Bench, file No. 23608, decided on November 2, 2010.

[123] Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 NEW YORK UNIVERSITY LAW REVIEW 1241 (2018). The author clarified the issue based on the well know case of *McCarthy v. Madigan*, 503 U.S. 140 (1992). See also Jeffrey S. Lubbers, *Fail to Comment At Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70(1) ADMINISTRATIVE LAW REVIEW 111 (2018).

institutions but also applicants in terms of enabling them to pursue their claims in relatively physically accessible and competent organs and to get timely, cheaper and effective remedies.

While exhaustion of administrative and judicial remedies has a formidable policy rationale, there are times when this requirement could be absurd in which cases it should be set aside. Generally, the exceptions are applied when the interest of the applicant in getting prompt access to remedy outweighs countervailing institutional interests favoring exhaustion.[124] Consequently, it makes sense to waive the requirement of exhaustion of administrative and judicial remedies where exhaustion of administrative and judicial procedures would delay resolution for an unreasonable time; agency's or court's power to provide effective relief is questionable due to the fact that complaint is directed against the adequacy and fairness of the agency or court procedure itself; or it is futile to exhaust remedy because the agency or court has hitherto consistently rejected similar complaints. None of these grounds of exceptions to exhaustion are recognized in the CCI Proclamation though. In a country where denial and undue delay of administrative and judicial remedies is rampant, the lack of their recognition flies in the face of the right of access to justice of applicants.[125]

2.6 Statute of Limitations

Statute of limitations is a law that sets a deadline or stipulates the maximum period of time within which a plaintiff may bring a legal action. Statute of

[124] See Peter A. Devlin, *supra* note 122, at 241 & William Funk, *Exhaustion of Administrative Remedies - New Dimensions since Darby*, 18 PACE ENVTL. L. REV. 1 (2000) Available at: http://digitalcommons.pace.edu/pelr/vol18/iss1/1, P. 2 & 3.

[125] A good example of this is a request for internal self-determination by *Wolqayit* Identity Committee. Although two years had expired after a formal claim was submitted to the Tigray Regional State and the Regional State failed to act up on the request within two years as required in article 20(2) of the HF Proclamation, the HF rejected the appeal on the ground that regional level remedy has not been exhausted. The HF Proclamation, under article 20(3), allows applicants to submit their applications the HF immediately after the expiry of the two years period if the regional government has not decided on the matter.

limitations is normally computed from the time when an offence was committed or an injury has been sustained. Its purpose is to encourage plaintiffs to diligently bring legal action 'while evidence is already available and protect the defendant.'[126] The rules governing limitation of actions and the amount of time prescribed often vary depending on the nature of cases. Generally, unlike civil case, laws set no or longer periods of limitation for criminal cases, due to effect of the offence on the general public and the need to ensure that unnoticed crimes are charged.[127]

While the Criminal Code and Civil Code of Ethiopia have rules governing limitations of actions for criminal and civil cases respectively, the same is not true for cases of violation of constitutional rights. Thus, it is worth wondering: what is the statute of limitation to be applied by the CCI and the HF? It is also indispensable to ask: what period of limitation is applied by a court for damage claims as redress for violation of constitutional rights?

To begin with the first question, neither the FDRE Constitution[128] nor the HF and CCI proclamations prescribe the maximum period from which complaints of constitutional rights should be submitted to the CCI. What does the silence of these laws imply? How should we interpret it? One of the avowed canons of interpretation relevant to human rights is that 'limitation provisions shall be construed and applied in a restrictive way'.[129] Although this principle of interpretation is primary developed in relation to substantive limitations to human rights, it is also possible to extend it to statute of limitations. As substantive limitations do, statute of limitations, if not judiciously applied, have a potential to limit or deny the enjoyment of substantive rights through

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126 Nadia Abed Alali Kathim, *Applicable Rules of Statute of Limitation: Comparative Study of United States & Saudi Arabia*, 4(2) International Journal of Law 200 (2018).

127 Andualem Eshetu Lema, *Revisiting the Application of the Ten-Year General Period of Limitation: Judicial Discretion to Disregard Art 1845 of the Civil Code*, 6 BAHIR DAR U. J. L. 1, 11-13 (2015).

128 The only relevant provision in the Constitution is article 28(1) which provides that 'Criminal liability of persons who commit crimes against humanity… shall not be barred by statute of limitation'.

129 MAGDALENA SEPÚLVEDA *ET AL*, HUMAN RIGHTS REFERENCE HANDBOOK 49 (University for Peace, 2004).

procedural hurdles. Accordingly, it makes sense to interpret the absence of period of limitation for submission of cases of violations of constitutional rights as cases not barred by period of limitations. One can also argue for longer or no period of limitation relying on the effect of violation of constitutional rights on the society at large.

This view is support by the experience of other countries where actions relating to infringement of constitutional rights are not either barred by period of limitation at all or barred after a longer period of time. For example, the 2014 Constitution of Egypt, under article 99, provides that civil and criminal liabilities arising from assault on rights and freedoms guaranteed in the Constitution are not affected by prescription. The 2009 Nigerian Fundamental Rights (Enforcement Procedure) Rules under Order III also states that '[a]n application for the enforcement of Fundamental Rights shall not be affected by any limitation of statute whatsoever'. Likewise, the 2019 Ugandan Human Rights (Enforcement) Act, under article 19, provides that 'actions for enforcement of human rights and freedoms shall be instituted within ten years of the occurrence of the human rights violation.' It goes on to add an exception to this general rule by giving the court a margin of appreciation to allow an action to be brought after the expiry of the 10 years period of limitation 'on being satisfied that the victim of the violation was unable, for any justifiable reasons, to bring such action within the time prescribed' in the rule.

The CCI and HF have dealt with a case in which a statute of limitations was one of the issues. In *Alemitu Gebre vs. Chane Desalegn case*,[130] Alemitu Gebre (the applicant) brought a suit against Chane Desalegn (the respondent)

[130] File No. 913/05, Sene 26, 2007 E.C., 1(1) JOURNAL OF CONSTITUTIONAL CASES 26 (2011 EC). The case originated from Southern Nations, Nationalities and Peoples Region (SNNP), Keffa Zone, Ginbo Wereda Court. In another case, *Andinet Kebede vs. Afar National Regional State Justice Bureau*, the HF held that the dismissal of the applicant by the Regional Prosecutors Administrative Council without giving him the opportunity to be heard and defend himself is inconsistent with article 37 of the FDRE Constitution. In its decision, the House did not give due regard to the prior rejection of the applicant's appeal by the regional Supreme Court due to the expiry of the appeal period. The cased was decided on 29/02/2010 E.C (2017).

requesting the court to order a return of two acres of agricultural land which, according to her, she has rented to the respondent for a period of five years. The respondent, on his part, argued that he has a title deed over the disputed land and has rented it from the applicant for 50 years. The lower court ruled that since the respondent was in possession of the land for 16 years supported by a legal document of possession adducing to that effect, the applicant's right to bring legal action is barred by the fifteen years period of limitation provided under article 1168(1) of the Civil Code. The Federal Supreme Court Cassation Bench to which the case was referred also affirmed the decision of the lower court. Accordingly, the matter was submitted by the applicant for constitutional interpretation.

The CCI, after reviewing the case, held that the 50 years agricultural land lease contract has resulted in eviction of the applicant from her possession and further argued that the decision of courts in favor of the respondent based on this contract is contrary to article 40(4) of the FDRE Constitution. In its recommendation, which is also approved by the HF, the CCI has turned down the argument that the suit is barred by period of limitation. What can be implied from this decision is the position of the CCI and the HF on the non-applicability of period of limitation for claims of violation of constitutional rights.

As regards courts, because damage or specific performance claims for violations of constitutional rights can only be entertained under law of extra-contractual liability,[131] they have no choice but to apply article 2143 of the Civil Code which provides for two years of period of limitation. The two exceptions to this are damage claims arising from the commission of a criminal offence and victims claim for the recovery of property in which cases the longer period of limitation in the Criminal Code and provisions relating to unlawful enrichment apply respectively. The exclusion of claims of recovery of property from the two years tort period of limitation is a progressive position in the old Civil Code. It could be invoked by individuals whose constitutional property rights have been infringed as a result of confiscation of their assets by the government. The possible application of the

[131] Art. 2035 and other specific provisions of the Civil Code.

two years period of limitation for damage claims arising from violation of constitutional rights is inconsistent with the nature of Constitutional Bill of Rights proceedings. Moreover, 'victims often need many years to overcome the pain of their abuse and time to obtain the courage needed to speak out about the abuse that they have suffered.'[132] This problem is acute in Ethiopia where people are generally scared to bring an action against the government for lack of awareness and the repressive tendencies of regimes. Moreover, the justification for adopting a short period of limitation in tort cases, difficulty of production of evidence to prove tort claims due to absence of any written agreement unlike the case of contract,[133] is unlikely to apply for most disputes of infringements of constitutional rights. What is more problematic is the potential application of this period of limitation to cases that went through CCI and the HF for constitutional interpretation. A party to whose favor the constitution has been interpreted and may take back the case to courts to enforce a compensation claim ensued from the violation of constitutional right. It is not clear whether the two years period of limitation is strictly applicable without due regard to the time spent at the CCI and HF.

3. Constitutional Remedies: The Outcome

3.1 Purpose and Kinds of Constitutional Remedies

The author of this article argues that Constitutional Bill of Rights litigation should produce constitutional remedies different from civil and criminal law remedies. As the Constitutional Court of South Africa in the *Metrorail case* put it, 'the object in awarding constitutional remedy should be, at least, to

[132] This kind of position was taken by states of the US in liberalizing laws governing civil claims arising from child sexual abuse. I argue that this reason also works for violation of constitutional rights in Ethiopia. See National Center for Prosecution of Child Abuse National District Attorney Association, Statutes of Limitation for Civil Action for Offenses Against Children Compilation, Last Updated May 2013, 1, https://ndaa.org/wp-content/uploads/Statutes-of-Limitations-for-Civil-Actions-for-Offenses-Against-Children-2013-Update.pdf (last accessed 23 September 2021).

[133] For more discussion on this, see Andualem, *supra* note 127, at 16.

vindicate the Constitution and deter future infringements.'[134] Constitutional remedies differ from private law remedies because they are 'forward-looking, community-oriented and structural rather than backward-looking and individualist and retributive'. The Court also observed that 'the use of private law remedies to vindicate public law rights may place heavy financial burdens on the state.[135]

Apart from cases where applicants are denied remedies for violations of constitutional rights by administrative bodies and courts,[136] an award of constitutional remedies by courts and the HF may arise in respect of some constitutional rights that 'do not have substitutes in ordinary legislation'[137] and even if they do have ordinary law detailed counterpart, where the laws do not provide remedies in the event of violation of these laws.[138]

As regards kinds of constitutional remedies, the FDRE Constitution lacks sufficient clarity. However, article 37(1), the right of access to justice clause, affirms everyone's right to bring justiciable matter to competent judicial and quasi-judicial organ and *obtain a decision or judgment* (emphasis added). The phrase 'obtain a decision or judgment' could be construed to capture the different kinds of remedies that may arise from constitutional litigation.[139] There are also other constitutional remedies scattered in other provisions of the Constitution including declaration of invalidity (article 9), compensation

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134 Rail Computers' Action Group v Transnet Ltd/a Metrorail 2005(2) SA 359 (CC) Para. 80.

135 *Ibid.*

136 Courts and administrative bodies may provide remedy to violation of constitutional rights through enforcement of ordinary legislation, such as the labor, tort, criminal, family and electoral laws.

137 Examples include the right not to be victim of non-retroactive application of the law (article 22) and the right not to be victim of double jeopardy (article 23).

138 A common problem that characterizes the laws and policies that seeks to ensure access to health, housing and other social services is their failure to incorporate various types of remedies. They almost exclusively prescribe penalties for perpetrators of the offences and, by inference, stoppage of the unlawful activity, without leaving a room for other types of remedies, such as restitution and rehabilitation. See Mizanie Abate, *Rights-Based Approach to HIV Prevention, Care, Support and Treatment: A Review of Its Implementation in Ethiopia*, Pro quest, USA, 2012, 295.

139 Adem Kssie, *supra* note 8, at 69.

for expropriation of private property (article 40(8), compensation for government assisted development-induced displacements (article 44(2)) and habeas corpus (article 9(4)). Generally, based on these provisions of the FDRE Constitution and that of others,[140] declaration of invalidity, declaration of rights, interdicts, habeas corpus, and constitutional damages are the principal constitutional remedies. What follows in the next sub-sections is a discussion of issues pertaining to declaration of invalidity, interdicts and constitutional damages.

3.2 Declarations of Invalidity

Declaration of invalidity of statutes or inconsistency of administrative decisions or customary practice is the jurisdiction of the HF and perhaps the only remedy it can award. This power has been exercised by the HF in *Melaku case* and *Wessen et al Case* in declaring selected provisions of statutes and decision of the government unconstitutional. Such power emanates from article 9(1), article 62(1) and 83(1) of the FDRE Constitution. Although article 9(1) renders *void ab initio* any law, customary practice or a decision of an organ of state or a public official which contravenes the Constitution, the HF Proclamation made it clear that the decision of the House, presumably with underlying motive to foster public order and the common good, shall have prospective effect and the HF may even give a grace period not exceeding six months with a view to enabling the legislature to amend or repeal the law before it makes the final decision of unconstitutionality.[141] However, nothing prevents the HF from ordering the retrospective effect of its decision as long as this is explicitly stated.[142] In this regard, the law lacks clarity on the test the HF may use to order the retrospective application of its decision. What can be learnt from the experience of other countries is the cautious approach courts

[140] For example, article 23(3) of the 2010 Kenyan Constitution lists the following remedies for violation of constitutional rights: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

[141] Art. 16 of the HF Proclamation.

[142] *Ibid.*

take to limit the retrospective effects of invalidity to exceptional circumstances and their indifference to 'allow sweeping, retrospective effects on the validity of acts previously done'[143]

By accepting the doctrine of severability, a statute is declared invalid to the extent only of its inconsistency with the Constitution.[144] It is only where it is necessary that the entire legislation is declared unconstitutional.[145] This provision has been used by the HF in the *Melaku Fanta Case* in which the constitutionality of article 8(1) of the Federal Courts Proclamation and article 7(1) of the Revised Anti-Corruption Proclamation were challenged as unconstitutional. Consequently, the House has ordered the invalidation of only these provisions of the proclamations as unconstitutional for contravening article 20(6) of the Constitution.

3.3 Interdict

Interdict, also sometimes known by the name mandamus in India and injection in the US, is a constitutional remedy which goes beyond declaration of invalidation and 'orders a party to either do something (mandatory interdict) or to not do something (prohibitory interdict)'.[146] Thus, be it a permanent interdict or an interim interdict, it is 'essentially future oriented as they aim to regulate future conduct'.[147] Without excluding its relevance to other sets of rights, authors emphasize on the effectiveness of this remedy in the context of socio-economic rights cases.[148] While prohibitory interdicts

[143] David Kenny, *Grounding Constitutional Remedies in Reality: The Case for as-Applied Constitutional Challenges in Ireland*, 37 DUBLIN U. L.J. 53, 58-59 (2014).

[144] Art. 12 of the HF Proclamation.

[145] *Ibid.*

[146] M Bishop, *Remedies*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 9–130 (S Woolman, T Roux & M Bishop (eds.), 2 ed., 2014).

[147] S LIEBENBERG, SOCIO-ECONOMIC RIGHTS - ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, 409 (Juta & Co. Ltd., 2010) 409.

[148] C Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 170, file:///Users/mizanie/Downloads/2009_litigating_socio-economic_right_in_South_africa.pdf (last accessed 23 September 2021).

could be ordered in cases where constitutional rights violation occurred as a result of non-observance of a negative obligation, mandatory interdict may be ordered where an infringement to a right arises due to non-observance of a positive human rights obligation.[149]

Interdict orders could specify the timeframe within which it should be executed under court supervision.[150] This form of interdict is known by the name structural interdict.[151] The purpose of structural interdicts is 'to remedy structural violations by focusing on changes that need to be effected in institutional or organizational design and functioning.'[152]

Notwithstanding that interdict is one of the best constitutional remedies, the HF and CCI proclamations have no provision on whether and under what circumstances they could be ordered. The only provision on this issue is article 6 of the CCI Proclamation based on which the CCI may order stay of court proceeding until the HF gives final verdict on matter that needs constitutional interpretation. Thus, the HF and CCI do not have a legal basis and guidance to order structural interdicts and provisional interdict when they feel that the applicant may suffer irreparable damage while the case is pending before it. Interim measures are particularly important where an application is submitted directly to the CCI and HF in which case the applicant does not have the benefit of injunction order by courts.

Although the order is solely made based on the application of the claimant, courts could order temporary injunctions based on articles 154-159 of the CPC. Courts may also order final interdicts based on articles 2118 and 2121 of the Civil Code although the provisions are not detailed enough and inflexible in respect of structural interdicts.

149 *Ibid.*

150 I Currie & J de Waal, *supra* note 106, at 19.

151 S Liebenberg, *supra* note 147, at 424.

152 C Mbazira, *supra* note 148.

3.4 Constitutional Damages

Unlike the constitutions of many other countries,[153] the FDRE Constitution does not explicitly incorporate constitutional damages as a remedy for violation of constitutional rights except in specific cases of compensation in the event of expropriation of private property and development induced displacement; nor did the HF affirmed its implicit recognition in the Constitution based on interpretation of article 37. Although it is almost none in the past, we cannot rule out the possibility for submission of these kinds of claims. Due to the limited role of the HF to award only a remedy of declaration of invalidity, claims of constitutional damages for violation of constitutional rights need to be brought to courts either following the handing down of constitutional interpretation by the HF or directly based on the binding precedent of the HF.

Owing to lack of distinct and detailed rules dedicated for this purpose, the court to which claim of constitutional damage is brought will obviously apply tort law. However, the application of tort law is a misfit given the distinct nature and purpose of constitutional damages compared to ordinary tort in private laws. In the English case of *Anufrijeva*, Lord Woolf distinguished the purpose of damages in the private sphere from that in the public sphere as:[154]

> *[H]uman rights damages should be a remedy of last resort, subject to open-ended judicial discretion, and capable of being denied or reduced according to judicial perceptions of what lies in society's best interests. According to this 'public law' paradigm what is of primary importance*

[153] See, for example, article 23(3) of the 2010 Kenyan Constitution, articles 14(5) and 14(7) of the 1992 Ghanaian Constitution, article 25 of 1992 Estonian Constitution, article 25 of the 1991 Constitution of the Republic of Slovenia and section 35(6) of the 1999 Nigerian Constitution. In other countries, constitutional damages are developed either through judicial decisions or ordinary laws. For example, in Ireland, in *Blasacod Mór Teo v Commissioners of Public Works* (No 4) ([2000] 3 IR 565, 591), Budd J held that damages could be recovered where constitutional rights had been infringed as a result of a piece of invalid legislation once the damage 'is proved to have flowed directly from the effects of the invalidity without intervening imponderables and events.'

[154] *Anufrijeva v Southwark LBC* [2004] QB 1124.

> *is bringing an authority's unlawful conduct to an end, while compensation is of secondary, if any, importance.*[155]

Consequently, forward-looking constitutional remedies, interdicts and declaratory relief, are often more appropriate than backward-looking relief in the form of compensatory damages.[156] Nevertheless, there are two circumstances where constitutional damages could have utmost significance. First, this is a case where 'a declaration of invalidity or an interdict makes little sense and an award of damage is then the only form of relief that will vindicate the fundamental rights and deter future infringements.'[157] This could be, for example, in the case of unlawful restriction of liberty, wrongful conviction, the delay of justice, and property-related infringements. Second, where the court believes that 'the possibility of a substantial award of damages may encourage victims to come forward to litigate, which may in itself serve to vindicate the Constitution and to deter further infringements.'[158] In the latter case, article 2116(3) of the Civil Code could be a bottleneck in Ethiopian for it provides that 'the compensation awarded for moral injury may in no case exceed one thousand Ethiopian Birr'.

In line with the objective of constitutional damages, courts in a number of jurisdictions have a wider discretion on whether to award damages and the quantum thereof, in particular, where the claim is against public bodies and officials. By availing themselves of their power, courts may decide to deny or award meagre damages. Quite often, courts tend to show indifference to order large sum of money against government and its officials. This is justified by 'qualified immunity which enables government officers to go about their business without debilitating fear of damages liability';[159] the need to direct

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155 JASON NE VARUHAS, DAMAGES AND HUMAN RIGHTS (Oxford: Hart Publishing, 2016).

156 Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, University of Georgia School of Law, Research Paper Series, Paper No. 2015-5, March 2015, 113 and 129, file:///Users/mizanie/Downloads/SSRN-id2577483.pdf (Last accessed, 23 September 2021).

157 Iain Currie & Johan de Waal, *supra* note 106, at 209.

158 Ibid.

159 See PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 59-81 (Yale University Press, 1983).

resources away from cash compensation for past injury and toward the prevention of future harm and reform;[160] and the importance of protecting public funds.[161] If used by courts, the Ethiopian tort law has also a room to use this flexibility under article 2090(2) of the Civil Code. Based on article 2090(2), the court may deviate from monetary damages as long as it has a reason to believe that other non-pecuniary measures, such as injunction and reinstitution, could limit damage though preventing its likely occurrence or reoccurrence.[162] However, rules authorizing an award of more than actual damage, intended, for example, to encourage victims to come forward to litigate and deter future violations, are absent from the Ethiopian tort law.[163] It should be noted, however, that punitive or exemplary damages are awarded in legal systems throughout the world 'by way of punishment or deterrence, given entirely without reference to any proved actual loss suffered by the plaintiff.'[164] The general requirement for awarding these kinds of damages is that 'the conduct of the defendant be malicious, reckless, oppressive, abusive, evil, wicked, or so gross that some type of deterrent or punishment is necessary.'[165]

In the event of violations of rights by public officials, there are two options for the victims: an action for constitutional damages could be theoretically brought against the specific delinquent official or the government. A closer look at the Ethiopian Civil Code indicates that government officials and employees are deemed to commit fault and hence incur tort liability[166] on a number of provisions which could be relevant to violation of constitutional rights. These include: the catchall tort of infringement of the law (article 2035), and other specific articles, such as physical assault (article 2038) and interference with the liberty of another (article 2040). However, the scope of liability is quite limited because senior public officials are immune from tort-

[160] John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. (1999).

[161] *Id.*, 8.

[162] GEORGE KRZECZUNOWICZ, THE ETHIOPIAN LAW OF COMPENSATION FOR DAMAGE 34-37 (Addis Ababa University, Faculty of Law, 1977).

[163] *Id.*, 240.

[164] Dinah Shelton, *supra* note 23, at 403.

[165] *Id.*, 405.

[166] See article 2126(1) of the Civil Code.

based liability pursuant to article 2137 of the Civil Code. As regards tort liability of the government, the Civil Code allows the vicarious liability of the state for its civil servants and employees provided that they commit professional fault.[167] Professional fault is said to exist 'where the person who committed it believed in good faith that he acted within the scope of his duties and in the interest of the State'.[168] In reality, it could be difficult to show the commission of professional fault. Having due regard to the nature of human rights, in some jurisdictions, mere infringement of human rights gives rise to damages without proof of harm (pecuniary loss and non-pecuniary losses).[169] Given that damage is the central element of Ethiopian tort law, it would be difficult to imagine payment of damages without the victim enduring material or moral injury.[170]

In relation to constitutional damage, an issue worth raising is whether compensation to violation of constitutional rights applies to all rights or is limited in scope to certain rights only. In countries, such as Germany, Portugal, Italy and the US, 'damages remedies are more broadly admitted for violations of civil and political human rights than for violations of economic, social or cultural human rights'.[171] This is due to the difficulty of direct applicable of socio-economic rights without further statutory contents.[172] In the absence of such explicit or implicit stipulation, one may argue that violation of all constitutional rights in Ethiopia could result in claims for damages as long as the conditions provided in the tort law are fulfilled.

A final point worth considering is the issue of compensation for a multitude of people who suffered massive and systematic violation of human rights in the hands of the Ethiopian Government over the past 27 years or so. The author acknowledges that this is an extremely complicated matter that deserves separate research; but, convinced also that it will not be fair not to

[167] *Id.*, art. 2126(2).

[168] *Id.*, art. 2127(1).

[169] See EWA BAGINSKA, DAMAGES FOR THE INFRINGEMENT OF HUMAN RIGHTS: A COMPARATIVE ANALYSIS 22 & 23 (Springer, 2016).

[170] See arts. 2027 and 2090 of the Civil Code.

[171] Ewa Baginska, *supra* note 168, at 4.

[172] Ibid.

raise the issue altogether in this article. I am of the opinion that the issue of reparation received no attention on the part of the current reformist leadership which came to power in April 2018. This is a strange development in the light of the government's admission of its hitherto enormous involvement in serious massive violations of human rights, including torture, arbitrary deprivation of liberty, extra-judicial killings and lengthy pretrial detention as well as the commitment of the current leadership in taking, albeit slowly and precariously, other measures that would enable the country to deal with the legacy of large-scale human rights abuses through ensuring accountability and achieving reconciliation.[173]

If the current Ethiopian political and democratic transition has to be successful, the government should give priority to the urgent issue of compensation for thousands of victims of serious and widespread violation of human rights similar to the attention it paid to prosecution of perpetrators, institutional reform, peace and reconciliation.[174] Here, it should be noted that the government cannot discharge its constitutional and international human rights obligations through the existing judicial and tort law approach. Judicial compensation to individual claimants may not be possible in this case since it may take too much time and prove too costly.[175] Mass human rights violation is proven to 'present unique challenges regarding evidence, statutes of

[173] United States Department of State, Bureau of Democracy, *Human Rights and Labor, Country Reports on Human Rights Practices for 2016 and 2017*, https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/ (last accessed, 23 September 2021) .

[174] Although it does not have a comprehensive roadmap and measures taken so far are far from success, the Ethiopian government is arguably implementing transitional justice. It has established Reconciliation Commission by Proclamation No.1102 /2018. It has also persecuted some senior officials suspected of serious violation of human rights; and taken a range of institutional reform measures. For a detailed discussion on elements of transitional justice, see Ronli Sifris, *The Four Pillars of Transitional Justice: A Gender-Densitive Analysis*, in RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (Sarah Joseph and Adam McBeth (ed.), Edward Elgar Publishing 2010).

[175] Hae Duy Phan, *Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia*, 4 E. ASIA L. REV. 277, 294 (2009).

limitations, and the identification of perpetrators.'[176] What can be understood from the experience of other countries that implemented transitional justice is that 'an administrative approach, as opposed to judicial approach, and collective measures, as opposed to individual measures, are more feasible and appropriate'.[177] Administrative and collective measures will enable the government to extend reparation to large number of victims; 'have less risk of incorrectly assessing the victims' sufferings'; and could be taken in conjunction with other measures of truth and justice.[178]

Following an administrative and collective model, several countries have enacted special legislation and institution as well as established state reparation funds to compensate victims of human rights abuses including in Austria, in 1990, for payments to Jewish survivors of the Holocaust; in Argentina, in 1991, for compensating human rights victims of disappearances; in Chile, reparations for all peasants excluded from agrarian reforms or expelled from their land; in Germany, to pay victims in post-war reparation; and South Africa, in 1995, for payment of reparations for gross human rights violations committed during the apartheid-era.[179] Aside from state funds, Ethiopia could also enforce perpetrators of human rights violations to pay reparations and seek contribution from the international community.

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[176] Matthew F. Putorti, *The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context*, 34 FORDHAM INT'L L.J. 1131, 1178 (2011).

[177] *Id.*, at 1154.

[178] *Id.*, at 1154-178. See also Inter-American Court of Human Rights, Case of the *Afrodescendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* (2013) Series C No. 270, para. 470.

[179] Hae Duy Phan, *supra* note 175, at 292-94; Hennie Strydom, Sascha-Dominik Bachmann, *Civil Liability for Gross Human Rights Violations*, J. S. AFR. L. 448, 462-463 (2005); and Postamble of the Constitution of the Republic of South Africa Act 200 of 1993 and the Promotion of National Unity and Reconciliation Act 34 of 1993.

Conclusion

Protection of human rights is central to the achievement of the Ethiopia's national objective of building a political community founded on rule of law and democratic order. Cognizant of this, the FDRE Constitution guarantees a broad range of human rights in its Bill of Rights chapter. However, Constitutional Bill of Rights litigation involving the government is unacceptably low notwithstanding that the Constitution has been in enforce for close to twenty-six years and human rights violations have been routinely perpetrated by the government.

Admittedly, no single reason can explain the unacceptably low level of Constitutional Bill of Rights litigation. However, the most shattering deficiency of the FDRE Constitution is the institutional architecture for the enforcement of constitutional rights protection. Largely enthused about putting in place utmost protection to the group interests and rights of NNP arguably at the expense of individual rights, not only does it snatch the power of constitutional interpretation from ordinary courts but also put it in the wrong hands. The HF, and CCI albeit with some degree, lacks freedom from political influence, does not have enough time and is composed of members who are not competent enough to effectively and efficiently carryout a constitutional interpretation mandate.

The problem of lack of competent and independent institution(s) is compounded by absence of clear and comprehensive Bill of Rights litigation procedure as well as redress for violation of constitutional rights. The procedure for litigation of the Bill of Rights of the Constitution and remedies can be found scattered in the Constitution, the HF Proclamation, CCI Proclamation, the Civil Code and CPC. These laws, however, lack comprehensiveness and clarity as well as lay down procedural standards that are not tailored to the specific nature of constitutional litigation. Accordingly, the federal parliament should adopt a comprehensive Constitutional Bill of Rights enforcement law that could be applied by the HF, CCI and courts based on the power vested in it under articles 13(1), 9(2), 51(1) and 55(1) of the Constitution.

The would-be comprehensive Constitutional Bill of Rights enforcement law should explicitly recognize, *inter alia*, the doctrine of avoidance which makes constitutional litigation as a measure of last resort; liberal standing rules including PIL; legitimate exceptions to the requirement of exhaustion of administrative and judicial measures; no or longer statute of limitations for violations of constitutional rights; (structural) interdicts as a remedy with the necessary guidance; judicial discretion in award of constitutional damages; rules that limit the immunity of senior public officials from tort-based liability; and adopt and implement an administrative and collective strategy to compensate the multitude of people who suffered massive and systematic violation of human rights in the hands of the Government over the past 27 years or so.

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THE STATE OF ETHIOPIA'S TRANSNATIONAL ECONOMIC LAW: TRADE, INVESTMENT, AND ARBITRATION

Zewdineh Beyene Haile & Won L. Kidane[*]

Abstract

This article offers a critical appraisal of the evolution and the current state of Ethiopia's transnational economic laws focusing on trade, investment and commercial dispute settlement. It finds with curiosity a considerable degree of departure from established texts for reasons that are not readily evident and recommends limiting such departures to the promotion of legitimate, rational, ascertainable, and defensible economic, social or other types of local objectives.

Key-terms: Investment, arbitration, international trade, BITs, Ethiopia

Introduction

A misnomer though it might sound, a nation's laws that impact its overall cross-border economic interactions of all types could usefully be termed transnational economic law for academic and policy appraisal.[1] In that sense,

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[1] The term "transnational law" is used in the sense that Philp Jessup used it in the 1950s to include "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." Peer Zumbansen, *Transnational Law*, OSGOODE HALL LAW SCHOOL OF YORK UNIVERSITY (2008),

this article canvases the sources of Ethiopia's transnational economic laws, and where meaningful content exists, offers a critical appraisal thereof. The areas of law include trade, investment, commerce, and dispute settlement, particularly, arbitration.

In terms of method the article follows a descriptive analysis of the sources of Ethiopia's transnational economic laws. Municipal laws as well as bilateral and multilateral treaties governing trade, investment and dispute settlement aspects of Ethiopia's transnational economic engagement have been analyzed. Where appropriate laws and jurisprudence of other countries have been referred to for comparative insight.

The article is organized as follows. Following this introduction, Section 1 highlights international legal instruments relevant to Ethiopia's international trade. Section 2 appraises the transnational aspect of Ethiopia's investment law regime. Section 3 examines in detail the Ethiopian regime for the settlement of transnational disputes. Finally, the article provides brief conclusion and recommendation.

1. Ethiopia's Trade Agreements and Regulations

Ethiopia remains by and large outside of the world's complex trading legal regime. Still an aspiring member of the World Trade Organization (WTO), Ethiopia has to date a few formal binding bilateral trade treaties.[2] The known

https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1181&context=clpe [https://perma.cc/D3Q3-ZZ7G].

[2] Ethiopia's WTO accession process that laid dormant for more than a decade was reinitiated in 2019. Its prospects remain unclear as of this writing. *See* International Trade Administration (ITA), *Ethiopia: Country Commercial Guide* [hereinafter *Ethiopia: Country Commercial Guide*], https://www.trade.gov/knowledge-product/ethiopia-trade-agreements [https://perma.cc/4VS3-74QZ]. To be sure, Ethiopia has numerous bilateral trade arrangements with a number of countries operationalized by bilateral trade commissions under the Ministry of Foreign Affairs. The legal instruments are not publicly available.

international legal instruments of trade significance that Ethiopia is a party to are the following:

(1) Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) (Kampala, 5 November 1993)

(2) Agreement Establishing Intergovernmental Authority on Development (IGAD) (Nairobi, March 1996)

(3) African, Caribbean, and Pacific Group States (ACP)-European Union (EU) Economic Partnership Agreement (Cotonou, 23 June 2000)

(4) The African Continental Free Trade Agreement (AfCFTA)

(5) The Abuja Treaty that aims to establish an Africa Economic Community among the continents 54 countries.[3]

Beyond this, as one of the least developed countries, Ethiopia benefits from unilateral concessions from some of its major trading partners including the United States,[4] the European Union,[5] and China.[6]

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[3] These are listed as the only ones by ITA. *Id.* The official website of the Ethiopian Ministry of Trade and Industry does not offer more details. *See* the Ethiopian Ministry of Trade and Industry website at: http://www.motin.gov.et/home [https://perma.cc/CF6C-VWX9].

[4] *See* Office of the United States Trade Representative, *The African Growth and Opportunity Act (AGOA)*, USTR.GOV, https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa [https://perma.cc/Y8JY-C8AH]. ("Since its enactment in 2000, the African Growth and Opportunity Act (AGOA) has been at the core of U.S. economic policy and commercial engagement with Africa. AGOA provides eligible sub-Saharan African countries with duty-free access to the U.S. market for over 1,800 products, in addition to the more than 5,000 products that are eligible for duty-free access under the Generalized System of Preferences program. In 2015, Congress passed legislation modernizing and extending the program to 2025.").

[5] *See* European Commission, *EU Trade Policy and Africa's Exports*, TRADE.EC.EUROPE.EU, https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156399.pdf [https://perma.cc/QE4T-6WQX]). ("The EU is the most open market for African exports. Most African countries have fully free access to the EU market. Other partners offer less favourable conditions for African exports. Europe is by far Africa's largest export market and its main customer. Thanks to EU trade openness, exports of food and manufactured products from Africa to the EU keep increasing.").

[6] *See* Africa Unconstrained, *From China-Africa to Africa-China: A Blueprint for a Green and Inclusive Continent-Wide African Strategy towards China*, available at:

Ethiopia has detailed import tariff schedules[7] but as the International Trade Administration of the United States indicates, the purpose of these regulations seems to be for the purpose of "revenue generation, not protection of local industry."[8] As such, outside commentary on Ethiopia's tariffs regimes paints a picture of unmitigated revenue generation idiosyncrasy with the exception of the few tariffs regimes governed by the regional trade agreements that Ethiopia is a party to.[9]

https://developmentreimagined.com/wp-content/uploads/2021/06/blueprint-final-14.06.pdf [https://perma.cc/ZD7B-CBNY]. In 2010, China agreed to allow imports from Least Developed Countries (LDCs) under a Duty-Free Quota Free Scheme (DFQF). This scheme was renewed in 2015 and is estimated to cover 97% of tariff lines. However, it has had a limited impact so far. For example, while 99% of all LDC imports into China in 2011 were under the DFQF scheme, China has imported little beyond such commodities from African LDCs. The WTO largely attributes under-utilization of these preference schemes to complex Rules Of Origin (ROOs), market access challenges and direct transportation requirements. *Id.* at 21.

[7] *See e.g.*, Ethiopian Customs Commission, *Customs Tariff*, CUSTOMS.ERCA.GOV.ET, https://customs.erca.gov.et/trade/customs-division/tariff?lang=en.

[8] *Ethiopia: Country Commercial Guide*, *supra* note 2.

[9] *See id.* ("Revenue generation, not protection of local industry, appears to be the primary purpose of Ethiopia's tariffs. Goods imported from the Common Market for Eastern and Southern Africa (COMESA) members are granted a 0 to 10% tariff preference, (depending on the type of goods) under the Free Trade Agreement (FTA). Tripartite FTA membership among COMESA, the South African Development Community (SADC), and the East African Community (EAC) members will allow zero tariffs and duties, which will impact Ethiopian trade when it completes the COMESA accession process (timeline for completion is unclear). Customs duties are payable on imports by all persons and entities that have no duty-free privileges. In 2019 Ethiopian customs ceased its policy of reducing, or eliminating, customs duties on imports of knocked-down and semi knocked-down industrial inputs. This new revision has reclassified these products to be treated with basic tariff rates.").

2. Ethiopia's Investment Law Regime

Previous writings have outlined the sources, evolution, and contents of Ethiopian investment law up to the most current proclamation and regulation enacted in 2020.[10] This section focuses on the current state of the law.

2.1. International Treaties

Ethiopia has signed 34 Bilateral Investment Treaties (BITs) of which 21 have come into effect.[11] As a preliminary matter, it is interesting to note that although Ethiopia has signed at least 4 BITs in the last ten years, none has come into effect.[12] It is not clear whether this is an indication of BIT hesitancy along the lines of India[13] and South Africa[14] or a matter of legislative priority, administrative lag time or a function of simple bureaucratic neglect.

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[10] *See* Won Kidane, *The Legal Framework for the Protection of Foreign Direct Investment* in Ethiopia, Chapter 26, *in* THE OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru, et al, ed. OUP, 2019).

[11] *See* the Bilateral Investment Treaties (BITs) that Ethiopia signed at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia [hereinafter Ethiopia BITs] [https://perma.cc/BB72-C4LL]. The database shows 35 BITs but the Ethiopia-German BIT signed in 1964 was terminated and renegotiated in 2004. Besides, the BITs signed with India and South Africa are terminated unilaterally by these respective countries. *Id.*

[12] *See id.* These four BITs have been signed since 2016. Between 2009 and 2016, no BIT has been signed. *Id.*

[13] Disappointed by a series losses of investment arbitral cases, India sought to renounce its existing BITs and came up with new model BITs. For a detailed discussion of the Indian ISDS cases and its effort in renegotiating its BITs with a new model, *see generally* Won Kidane, *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa* [hereinafter *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*], 49 LOY. U. CHI. L.J. 406, 445-461 (2017).

[14] Although South Africa did not have arbitral setbacks like to India, arbitral threats of a similar nature caused serious rethinking of the overall BITs program. For details *see* Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 GEO. WASH. INT'L L. REV. 523, 557-561 (2018).

The history of Ethiopia's BITs[15] program is long. It began in earnest in 1964, a year after Ethiopia adopted its first Investment Code in 1963.[16] The 1964 BIT with Germany[17] was indeed one of the very first BITs in the world.[18] A comparison of the texts of the 1959 Germany-Pakistan BIT, which is considered the very first BIT in the world, and the 1964 Germany-Ethiopia BIT shows that it is in fact identical.

This German model contained some of the most fundamental investor protection principles in their rudimentary form.[19] Unsurprisingly, although it anticipates a state-to-state dispute settlement, it does not contain any form of investor-state dispute settlement (ISDS).[20]

It took exactly three decades for Ethiopia to sign its second BIT in 1994 with Italy.[21] Indeed, the BIT with Italy was the very first ever that came into effect. It did so in May of 1998.[22] Mildly put, legal developments during those

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[15] In addition to BITs UNCTAD lists the following instruments with significant foreign investment implication: MIGA Convention1985, UN Code of Conduct on Transnational Corporations (1983), World Bank Investment Guidelines (1992), ILO Tripartite Declaration on Multinational Enterprises (2006), UN Guiding Principles on Business and Human Rights (2011), Permanent Sovereignty UN Resolution (1962), New International Economic Order UN Resolution (1974), Charter of Economic Rights and Duties of States (1974). *See* Ethiopia BITs, *supra* note 11.

[16] AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LEGAL MATERIALS [hereinafter International Legal Materials] (1963).

[17] Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investments, Ger.-Eth., 1964 [hereinafter Germany-Ethiopia 1964 BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1165/download [https://perma.cc/R49R-SJA2].

[18] The first known BIT is between Germany and Pakistan signed in 1959 and came into effect in April 1962.
Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Ger.-Pak. 1959,
https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1387/download [https://perma.cc/NMT4-AERH].

[19] *See* Germany-Ethiopia 1964 BIT, *supra* note 17, at arts. 2, 3. Article 2: non-discrimination and Article 3: security and protection and non-expropriation.

[20] *See* Germany-Ethiopia 1964 BIT, *supra* note 17, at art 11. Article 11: dispute settlement.

[21] *See* Ethiopia BITs, *supra* note 11.

[22] *See id.*

decades did not prioritize transnational economic matters. The decade of the 1990s and 2000s saw rapid treaty activity as well as corresponding domestic legislative efforts.[23] It was between 1997 and 2010 that all of Ethiopian 21 BITs came into effect.[24]

Substantively, almost all of these treaties contain some of the most basic investment and investor protection rules such as non-discrimination, fair and equitable treatment, non-expropriation, and ISDS.[25]

Investors from these 21 countries[26] enjoy legal protection from these external sources of law. The nature and exact scope of their added benefits are, of course, specific text dependent. It cannot be assumed that just because the texts read similar, the protections are identical. To the contrary, minor variations in taxonomy could have significant implications especially in dispute resolution.

Most notably, Ethiopia's history of BITs defies any discernable patter such as North-South or South-South as almost half are with developing economies such as Yemen, Libya and Sudan and half are with advanced economies such as the Netherlands, Sweden, and Germany.[27] It does not support the notion that Andreas Lowenfeld famously describes as the core of international investment law i.e., replacements for colonial rule, which he describes in the following terms:

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[23] For a discussion of the domestic legislations of most current importance, *see infra* section 2.2.

[24] *See* Ethiopia BITs, *supra* note 11.

[25] A good sampling for comparative review is the earliest English text of Ethiopia-Kuwait (1998) and the last to come into effect the text of Ethiopia-Egypt (2010). Although there is variation in taxonomy, the basic rules appear similar. Ethiopia BITs, *supra* note 11.

[26] Egypt (2010), Finland (2007), Sweden (2005), Austria (2005), Libya (2004), Germany (2006), Israel (2006), Iran (2004), France (2004), Netherlands (2005), Algeria (2005), Denmark (2005), Tunisia (2004), Turkey (2005), Sudan (2001), Yemen (2000), Malaysia (1999), Switzerland (1998), China (2000), Kuwait (1998), and Italy (1997). Ethiopia BITs, *supra* note 11.

[27] *See id.*

> By the early 1960s, following the wave of decolonization in Africa and parts of Asia, and a wave of take- overs of foreign investments throughout the Third World, it had become apparent that it would be very difficult to achieve consensus on the obligations of host countries toward alien investment (read multinational corporations). The leading international aid institution, the World Bank, began to consider how, on the one hand, it could avoid being embroiled in controversies between home and host states concerning expropriations, and on the other hand, how it could assist the resolution of such controversies …[28]

It does not make Lowenfeld's proposition more or less probable inasmuch as it is merely a function perhaps of the paucity of intentionality on the part of Ethiopia in terms of the objectives that these treaties are supposed to accomplish. The abrupt cessation of ratification activity of all signed BITs at around 2010, lacking articulable exogenous explanation, appears to reinforce the conclusion on intentionality. This is not unique to Ethiopia, however. As indicated above, for example, India seems to have been less systematic than China in its ratification and management of its BITs program bearing some serious adverse consequences.[29]

2.2. The Current Investment Proclamation

Ethiopia's most current domestic investment law is Investment Proclamation No. 1180 enacted in 2020 and the Investment Regulation No. 474/2020.[30] It

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[28] *See* ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 536 [hereinafter Lowenfeld] (2nd ed. 2008).

[29] *See China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*, *supra* note 13.

[30] Investment Policy Hub, Ethiopia's Investment Proclamation No. 1180/2020 [hereinafter Investment Proclamation No. 1180/2020], https://investmentpolicy.unctad.org/investment-laws/laws/318/ethiopia-investment-proclamation-no1180-2020 [https://perma.cc/NMT4-AERH]. It replead the most immediately preceding Investment Proclamation No.769/2012 (as amended) and the Ethiopian Investment Board and Ethiopian Investment Commission Establishment Council of Ministers Regulation No. 313/2014. *See id.* at art. 56. See also, Ethiopia's Investment Regulation No. 474/2020, https://bit.ly/investmentregulation. This regulation partly repealed the previous Investment

is a continuation of the gradual modernization of Ethiopia's legislative effort in the area of investment that began with the adoption of the first Investment Code of 1963[31] under the revised Imperial Constitution of 1955.[32] Proclamation 1180/2020 replaced the most immediately preceding Investment Proclamation No.769/2012 (as amended) and the Ethiopian

Incentives and Investment Areas Reserved for Domestic Investors Regulation No. 270/2012. See art. 21.

[31] International Legal Materials, *supra* note 16, at p. 41-44. Chronologically, modern notions of investment protection had already been contained in the Treaty of Amity and Commerce between Ethiopia and the United States of 1951. Treaty of Amity and Economic Relations between the United States of America and Empire of Ethiopia, U.S.-Eth. 1951, https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002815.asp [https://perma.cc/SH29-KEK5]. The Treaty provides in Article VIII:

> 1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.
> 2. Property of nationals and companies of either High Contracting' Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation.

A related notable feature is MFN in the area of admission of each other's citizens: Article VI

> 1. Nationals of either High Contracting Party shall be permitted, subject to immigration laws and regulations, to enter the territories of the other High Contracting Party and to reside therein for the purpose of engaging in industry, carrying on international trade, or pursuing studies, upon terms no less favorable than those accorded to nationals of any third country." This Treaty was updated in 1994. *See* International Trade Administration, *Ethiopia - Country Commercial Guide*, TRADE.GOV., https://www.trade.gov/knowledge-product/ethiopia-trade-agreements [https://perma.cc/X2N3-S77N].

[32] The Ethiopian Constitution of 1955 (Revised) is available at: https://archive.org/stream/TheEthiopianConstitution/EC_djvu.txt [https://perma.cc/9G3M-D4G5].

Investment Board and Ethiopian Investment Commission Establishment Council of Ministers Regulation No. 313/2014.[33]

Two of the eight preambular paragraphs touch and concern Foreign Direct Investment (FDI) and hence by definition set the stage for the transnational investment rules that the Proclamation makes.[34] The law applies to both domestic and foreign investors. In fact, an investor is defined as "[a] Domestic or Foreign investor who has invested capital in Ethiopia".[35]

Foreign investor is further defined as:

a) A Foreign National;

b) An Enterprise in which a Foreign National has an ownership stake;

c) An Enterprise incorporated outside of Ethiopia by any investor;

d) An Enterprise established jointly by any of the investors specified under Sub-article (6) paragraphs (a), (b) or (c) of this Article; or

e) An Ethiopian permanently residing abroad and preferring treatment as a Foreign investor."[36]

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[33] *See* Investment Proclamation No. 1180/2020, *supra* note 30, at art. 56. Legislations that predated the 2012 Proclamation included: Investment Proclamation No. 37/1996; Investment Proclamation No. 280/2002; Proclamation No. 116/1998; Proclamation No. 168/1999; Proclamation No. 375/2003; Proclamation No. 103/1998 (Capital Goods Leasing Business Proclamation) and, Proclamation No. 543/2007 (The Revised Export Trade Duty Incentive Scheme Establishing Proclamation); Investment Proclamation No. 769/2012; Investment Regulation No. 270/2012, and Mining Proclamation No. 678/2010, and Petroleum Operations Proclamation No. 295/1986. Texts of all these are also available at www.hopr.gov.et. A major subsequent legislation is the Industrial Parks Proclamation No. 886/2015. *Id.* For a discussion of legislative activities during the military rule between 1974 and 1991, *see* LIBRARY OF CONGRESS, ETHIOPIA: A COUNTRY STUDY (1991), at 187-190.

[34] *See* Investment Proclamation No. 1180/2020, *supra* note 30. At Preamble: ("WHEREAS it has become necessary to further increase and diversify foreign investment inflow to accelerate inward transfer and diffusion of knowledge, skill, and technology; RECOGNIZING that it has become necessary to maximize linkages between foreign and domestic investments, promote equitable distribution of investments among regions, and leverage foreign capital to promote the competitiveness of domestic investors.").

[35] Investment Proclamation No. 1180/2020, *supra* note 30, art. 2(4).

[36] *Id.* art. 2(6).

The Investment Proclamation provides for the general negative-list rule on the areas of investment reserved for nationals or joint investment and leaves the details for further regulation.[37] The Regulations enacted shortly thereafter supply the actual list.[38]

More relevant to transnational matters are the rules on investment protection and dispute settlement. There is only one provision on investment protection analogous to protections offered by investment treaties and that is the rule against expropriation. Although most investment treaties formulate the rule in the negative such as "neither party shall expropriate unless,…" the Investment Proclamation makes a similar rule albeit in the positive formulation i.e., "The Government may expropriate any investment undertaken under this Proclamation for public interest, in conformity with requirements of the law, and on a non-discriminatory basis."[39] It further provides that "In case of expropriation of an investment effected pursuant to Sub-article (1) of this Article, adequate compensation corresponding to the prevailing value shall be paid in advance."[40]

Few rules of international law are more fraught with controversy than the rule on expropriation. The above provision approximates, but does not exactly duplicate, the most recognized expropriation standard known as the Hull Rule, named after its architect – Secretary of State Cordell Hull.[41] Having

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[37] *Id.* art. 6.

[38] Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Investment Regulation No. 474/2020 arts. 3-6 [hereinafter Investment Regulation No. 474/2020], http://unidoseoul.org/en/files/2020/10/Federal-Negarit-Gazette-New-Investment-Regulation-No.-474-2020.pdf

[39] Investment Proclamation No. 1180/2020, *supra* note 30, art. 19(1).

[40] *Id.* art. 19(2).

[41] Cordell Hull's most famous statement is the following:
"The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. If it were permissible for a government to take the private property of citizens of other countries and pay for it as and when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their

overcome the most acrimonious dissent from the famous Calvo doctrine,[42] the Hull formula is now fully entrenched in its cogent articulation as "prompt, adequate and effective" compensation.[43]

To the extent the Investment Proclamation's formulation defers in any significant way from protection standards provided in applicable BITs, arbitral tribunals or other adjudicators depending on the dispute settlement mechanism that may apply, would have to reckon with priorities of applicable rules. Ordinarily, disputes often pertain to whether an act of expropriation has

ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equality and justice." U.S. Secretary of State communications to Mexican Ambassador to the United States, Jul. 21, 1938. Lowenfeld, *supra* note 28, at 474-475.

[42] The essence of the Calvo doctrine is that "[a]liens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity. The rule that in more than one case it has been attempted to impose on American states is that foreigners meri regard and privilege more marked and extended than those accorded even to the nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations." Donald R. Shea, "The Calvo Clause" (1955), 17–19. *Id.* 473.

[43] For a fuller exposition of the principle, *see generally*, Frank G. Dawson & Burns H. Weston, *Prompt, Adequate and Effective': A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962). The most frequently invoked principle of international law in respect of compensation is the PCIJ's statement in the Chorzow Factory case: "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decision of international arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear." Permanent Court of International Justice, *Case Concerning German Interests in Upper Silesia*, P.C.I.J. Series A, Nos. 7, 9, 17, 19 (1926–1929) at 47.

taken place in the first place. Where such is admitted, however, disputes pertain to the adequacy and timeliness of the compensation. The determination of market value at the time of expropriation or at least when the intent to expropriate was made known is often an exceedingly difficult exercise that adjudicators undertake with the help of quantum experts. In this regard, the Investment Proclamation's rule of "prevailing market value" seems to offer a relatively sufficient guidance although it is not inconceivable that disputing parties could disagree on the timing and related matters that could affect value. A more serious problem could arise if an applicable BIT contains a different quantum or valuation rule. Where such treaty exists, it serves as an external standard that often supplants the domestic standard unless the treaty itself contains a rule of priority or preemption. In any case, this is a matter that would be determined on a case-by-case basis.

That leads to the final and perhaps more important topic of dispute settlement.

3. Ethiopia's Transnational Dispute Settlement Regime

The legal regimes for two broad categories of transnational disputes warrant appraisal: investment disputes and commercial disputes.

3.1. Investment Disputes

Ethiopia's most current legal regime for the resolution of investment disputes comprises dispute settlement provisions in Investment Proclamation No. 1180/2020 and the 21 BITs that have come into effect.

The Investment Proclamation contains a separate provision on dispute settlement. It follows elaborate "grievance procedures."[44] The grievance procedures anticipate such mundane matters as the non-issuance or

[44] *See* Investment Proclamation No. 1180/2020, *supra* note 30, arts. 25-27.

revocation of investment license, denial of incentives etc.[45] These "grievances" could potentially have investors' rights implications whether they be granted in the domestic laws or investment treaties.

The basic principle is stated in Article 25(1) as: "1/ Any investor who has grievance in respect of his investment shall have the right to submit a complaint to the appropriate investment organ." The operative term is defined as "[A]ppropriate Investment Organ" means the Commission, a federal government body carrying out functions delegated by the Commission, or the relevant regional state administration body authorized to issue investment permits or administer investments."[46] The Commission is given strict timeline during which it must resolve the "grievance".[47] The relevant provisions anticipate a mechanism of non-adversarial dispute settlement between the investor and any government agency by empowering the Investment Commission to recommend what seems like a settlement. The most pertinent provision reads:

> 1/ Any investor undertaking investments pursuant to this Proclamation shall have the right to submit a complaint to the Commission against final decisions of any federal government executive body where such decisions significantly affect the investments.
>
> 2/ A written copy of the final decision of any federal Government Executive Body shall be given to the investor within Seven (7) working days from the date of decision.
>
> 3/ Any complaint submitted to the Commission against a final administrative decision of a Federal Government Executive Body shall be lodged within Thirty (30) working days from the date the investor becomes aware of the decision.
>
> 4/ The Commission shall engage with the government body against whom a complaint is lodged under Sub-article (1) of this Article and

[45] *See id.*

[46] *Id.* art 2(16).

[47] *Id.* arts. 26-27.

> propose a recommended solution in writing within Thirty (30) days from the date of submission of the complaint.[48]

The Commission's decisions are appealable to the Investment Board, chaired by the Prime Minister or his designee.[49]

Unsurprisingly, the Board's decision is the final administrative disposition: "Any Federal Government Body whom a decision of the Board concerns shall have the duty to comply with and Execute in accordance with the decision of the Board."[50] Presumably, the decision of the Board could be judicially reviewed under the new Administrative Procedure Proclamation.[51]

Beyond the domestic administrative processes, the Proclamation anticipates ISDS. The relevant provision states as follows:

> 1/ Without prejudice to the right of access to justice through a competent body with judicial power, any dispute between an investor and the Government involving investments effected pursuant to this Proclamation will be resolved through consultation or negotiation.
>
> 2/ The Federal Government may agree to resolve investment disputes involving Foreign investments through arbitration.

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48 *Id.* art. 27(1-4).

49 *Id.* art. 27(6). "6/ The investor may file a complaint to the Board against the Commission's recommended solution proposed under Sub-article (4) of this Article, or where the Commission's recommended solution is not accepted by the government body against whom the complaint was submitted." For the composition of the Board, *see id.* art. 30.

50 *Id.* art. 27(9).

51 Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Federal Administrative Procedure Proclamation No. 1183/2020, https://www.lawethiopia.com/images/federal_proclamation/proclamations_by_number/Administrative%20procedure%20proclamation.pdf. Article 48 states: Without prejudice to the Provisions under Article 46 of this Proclamation: 1/ Any interested person may file a petition requesting a judicial review of a directive; 2/ Anyone whose interest is affected by an administrative decision may file a petition requesting judicial review. *Id.* art. 48.

> 3/ Where a Foreign investor chooses to submit an investment dispute to a competent body with Judicial Power or arbitration, the choice shall be deemed final to the exclusion of the other.[52]

Subsection (3) introduces the classic fork-in-the-road principle in investment law where the investor cannot pursue the same claim on multiple fora. A rather intriguing question could, however, arise within the possible meaning of this provision: whether the decision to seek judicial review of the Board's decision could be interpreted as a selection of forum for purposes of the fork-in-the road provision. That in turn would raise the question of whether or not there was a denial of justice[53] for purposes of determining FET (Fair and Equitable Treatment) violation under certain investment treaties.[54] This kind

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[52] Investment Proclamation No. 1180/2020, *supra* note 30, art. 28.

[53] As Jan Paulsson puts it: "(i) the denial of justice is essentially procedural in nature; (ii) it does not require the State to create a perfect system of justice but rather a system of justice that could correct serious errors; and, more importantly, (iii) the denial of justice requires the exhaustion of local remedies and the showing of a system failure." JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7-8 (2005).

[54] The connection between FET and Denial of Justice is fairly well established. For example, Article 8.10 of the Canada-EU Comprehensive Economic and Trade Agreement, provides in relevant parts:

> "1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.
> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
> (a) *denial of justice in criminal, civil or administrative proceedings*;
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) manifest arbitrariness;
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) abusive treatment of investors, such as coercion, duress and harassment; or
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article." (emphasis added.).
>
> Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Canada– European Union, Oct. 2016, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/, [https://perma.cc/G89K-5R59]. The investment provisions are in Chapter 8.

of exhaustion question is not purely theoretical; it is contested with considerable frequency.

Finally, all 21 ratified BITs provide for ISDS albeit in differing formulations. A sample from each decade could help identify any pattern or the lack thereof of generational evolution of the dispute settlement provisions of the BITs.

The earliest was the terminated Ethiopia-Germany BIT of 1963. The dispute settlement provision reads: "Article 10 (1) Disputes concerning the interpretation or application of the present Treaty should, if possible, be settled by the Governments of the two Contracting Parties. (2) If a dispute cannot thus be settled it shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal."[55] The subsections that follow describe the composition of the arbitral tribunal and the manners of its constitution. This being the only dispute settlement provision in the treaty, it is fair to conclude that at the time this treaty was signed in 1964, the Contracting Parties did not anticipate ISDS.[56]

As indicated above, in the 1970s and 1980s, Ethiopia concluded no BITs. The 1990s saw some activity, most notably, the Ethiopia-China BIT in 1998. It contains what is considered one of China's early generation BITs that only permitted international arbitration for the quantum of damages. It reads in relevant part:

> 9 (2). If the. dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment. . . . 3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to

[55] Germany-Ethiopia 1964 BIT, *supra* note 17, art. 10.

[56] Coincidentally, this BIT was concluded just about a year after the famous World Bank African legal consultative meeting that took place in Addis Ababa between December 16 and 20 in 1963 to discuss the draft ICSID Convention. *See* International Centre for Settlement of Investment Disputes (ICSID), *The History of the ICSID Convention*, ICSIDD.WORLDBANK.ORG, https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention [https://perma.cc/Q2E5-797P]. Indeed, before the ICSID Convention of 1964, ISDS was unknown to international law and might even be considered an aberration as it allows a private person *locus standi* in a lawsuit against a sovereign state.

> negotiations as specified in Paragraph I of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal or arbitration under the auspices of the International Center for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investments Disputes between States and Nationals of Other States opened for signature in Washington on March 18, 1965 once both Contracting Parties become member States thereof. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in the Paragraph 2 of this Article.[57]

This is obviously, a Chinese model that Ethiopia supported. Although China employed this model primarily as a recipient of capital from the Global North in an effort to maintain decisional autonomy in the adjudication of liability by domestic processes, it is remarkable to see that it used the same model even when it is the sender of capital in this particular case. Whether it is a function merely of consistency for its own sake, a matter of principle, path-dependency or administrative rigidity, it is difficult to say. In any case, it offers a good example of Ethiopia's BITs relative to ISDS in the 1990s.

The third sample concluded in the mid-2000s is the Ethiopia-Netherlands BIT. It contains what could be considered modern and rather elaborate ISDS provision.

> (2) If the dispute has not been settled within a period of six months from the date either Party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted to: a) the competent court of the Contracting Party in the territory of which the investment has been made; or b) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under

[57] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments art. 9(2-3), Ethiopia-China, 1998 [hereinafter Ethiopia-China BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/732/download [https://perma.cc/PB9M-VHT7]. For a detailed discussion of the various generations of Chinese BITs, *see generally*, NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES (2009).

> the Convention on the Settlement of Investment Disputes between States and Nationals of other States entered into force on October 14th, 1966 after accession by the Contracting Parties; or c) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility of Rules), if one of the Contracting Parties is not a Contracting State of the Convention as mentioned in paragraph 2 b) of this Article; or d) an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). 13 3) A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States for the purpose of the Convention be treated as a national of the other Contracting Party. 4) The arbitral awards shall be final and binding on both parties to the dispute and shall be executed according to national law. 5) Each Contracting Party hereby consents to submit investment disputes for resolution to the alternative disputes settlement fora mentioned in the preceding paragraphs.[58]

It offers enough details on all aspects of the international arbitral process. Indeed, it is under this provision that Israel Chemical Limited LLC (ICL) initiated an ISDS against Ethiopia in 2017. Although the details of this case remain confidential, its existence is reported by the Permanent Court of Arbitration (PCA).[59]

[58] Agreement on Encouragement and Reciprocal Protection of Investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, art. 9, Ethiopia-Netherlands, 2003 [hereinafter Ethiopia-Netherlands BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1172/download [https://perma.cc/9GYC-ZQBF].

[59] Limited information about the case is available on the PCA website at https://pca-cpa.org/en/cases/153/ [https://perma.cc/455R-BWS2].

The progression from no ISDS to ISDS for quantum purposes only to full-fledged ISDS over a period of more than four decades appears to have stopped in 2010 with no BIT ratification since then.[60]

3.2. International Commercial Dispute Settlement

On 13 February 2020, the Ethiopian parliament took the final domestic step for the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention).[61] On 24 August 2020, Ethiopia officially became a party to the New York Convention. [62] On 2 April 2021, Ethiopia enacted a comprehensive Arbitration Act: Proclamation No. 1237/202: Arbitration and Conciliation Working Procedure Proclamation [Ethiopian Arbitration Proclamation or the Arbitration Proclamation.][63]

The Proclamation itself is essentially a long overdue consolidation and development of rules scattered around Ethiopia's Civil Code of 1960 and Code of Civil Procedure of 1965.[64] The legislator did not exactly have a *tabula rasa*

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[60] *See* Ethiopia BITs, *supra* note 11 (ratification status). The record shows that at least four BITs were signed between 2010 and 2018 but none were ratified as of this writing. These BITs are with Brazil, Qatar, United Arab Emirates and Morocco. *See id.*

[61] *See* New York Arbitration Convention, *Ethiopia Ratifies the New York Convention*, NEWYORKCONVENTION.ORG, https://www.newyorkconvention.org/news/ethiopia+ratifies+the+new+york+convention [https://perma.cc/YFZ6-BGTY].

[62] *See* New York Convention's membership status at https://www.newyorkconvention.org/countries [https://perma.cc/4V2Y-88UJ].

[63] Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Arbitration and Conciliation, Working Procedure Proclamation No. 1237/2020 [hereinafter Ethiopian Arbitration Proclamation], https://chilot.me/wp-content/uploads/2021/06/Arbitration-and-Conciliation-Working-Procedure-Proclamation.pdf.

[64] Although the Proclmation mostly rewrites the existing rules, it also expressly repeals many preexisting rules. *See id.* at art. 78. "Inapplicable Laws 1/ The provisions of Articles 3318 to 3324 of the Civil Code which deals about conciliation and the provisions Articles 3325 to 3346 of the Civil Code which deals about arbitrator shall be repealed by this Proclamation. 2/ The provisions of the civil procedure code from Articles 315 to 319,350,352,355-357 and 461 which deals about arbitrator repealed by this Proclamation. 3/ Other law or customary practices that are inconsistent with this Proclamation shall not

in this case, but a comparative look at what changed, though historically significant, is less useful in the appraisal of the new law on their own.[65] This section focuses on the salient features of the new rules.

It appears that, although it remains unmissably wedded to its Civil Code and Civil Procedure Code roots, the Proclamation, in essence, drew inspiration from multiple sources including primarily the UNCITRAL Model Law [66] inasmuch as it purports to implement the newly ratified New York Convention.[67]

One of the stated objectives of the enactment is the amendment of the existing rules "by taking into account the international practices and principles related to arbitration and conciliation."[68]

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be applicable with respect to matters provided for in this Proclamation. Article 79 states: "Applicable Laws. The Provisions of the Civil Procedure Code that may help the implementation of the conciliation or arbitration proceedings or related to the proceedings and not contravene this Proclamation shall be applicable." *Id.* art. 79.

65 The Proclmation does not apply retroactively. *See id.* art. 77. Article 77 states: "Transitional Provisions 1/ Any arbitration agreement signed before the coming into force of this Proclamation shall be governed by the law that had been in force before the effective date of this Proclamation. 2/ Arbitral proceedings initiated before the coming into force of this Proclamation or cases of arbitration pending before courts, ongoing proceedings and execution of decisions shall be governed by the law in force before the coming into force of this Proclamation, 3/ Contracting parties who have concluded arbitration agreement or in the process concluding an agreement before the coming into force of this Proclamation may agree to be governed by this Proclamation."

66 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration (1985)* [hereinafter UNCITRAL Model Law], UNCITRAL.UN.ORG, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [https://perma.cc/4V2Y-88UJ].

67 Ethiopian Arbitration Proclamation, *supra* note 63, Preamble. "[h]elps in implementing international treaties acceded and ratified by Ethiopia;".

68 *Id.*

i. Scope of Application

The Proclamation applies to both domestic and international arbitration. International arbitration is defined through a combination of the place of business of the contracting parties and/ or the place of performance of the contract.[69]

ii. Formal Requirement, Enforcement of the Arbitral Agreement and Competence-Competence

Consistent with the New York Convention's formal requirement that the arbitration agreement be in writing to be enforceable, the Arbitration Proclamation contains a slightly modified version to account for modern media of preservation of content such as electronic communication.[70] Most notably, it defines electronic communication as: "any exchange of information between the contracting parties through email or the act sending, receiving and storing of information through electronic, magnetic, optical or similar means."[71]

Arbitration agreements are enforceable by the court seized of the matter unless it finds that the agreement is "void or becomes ineffective."[72] Although

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[69] *See* Ethiopian Arbitration Proclamation, *supra* note 63, art. 4. ("1/ An arbitration shall be deemed to be International arbitration if it falls under one of the following: a) Where the principal business place of the contracting parties are in two different countries at the time of the conclusion of the agreement; b) Where the legal place of the arbitration chosen in accordance with the arbitration agreement or the place of the principal business where the substantial part of the obligations of the commercial or contractual relationship is to be performed or the place of business with which the subject-matter of the dispute is [] most closely connected is located in a foreign country; c) Where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. 2/ If a party has more than one place of business for the purpose implementing this Article, the place of business shall be that which has the closest to the arbitration agreement and, where there is no place of business, it will be the principal residence of the contracting parties.") Errors in original.

[70] *Id.* art. 6(1-4).

[71] *Id.* art. 6(5).

[72] *See id.* art 8(2).

the objective appears to be the direct implementation of Article II of the New York Convention on the enforceability of the arbitral agreement, the Proclamation makes changes to the text although it is not clear whether it sets a different standard on the enforceability of the agreement or on the competence of the decision maker. Consider the variation in the taxonomy.

> Where a suit falling under an arbitration agreement is brought before a court and the defendant raises preliminary objection that the parties agreed to resolve their disputes through arbitration agreement, the court shall dismiss the suit and the parties to resolve their dispute in accordance with the arbitration agreement.[73]

Notwithstanding this provision, the said court "shall hear the case where the arbitration agreement is void and becomes ineffective."[74] The exact language of the New York Convention states: "[T]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[75] The meaning of each word of the Convention's "null and void, inoperative or incapable of being performed" has been extensively litigated.[76] There is now some settled jurisprudence on each. Although it is not clear why the Ethiopian legislature made those changes, presumably the same meaning as "null and void, inoperative or incapable of being performed" is intended.

The more serious point of departure from the widely adopted UNCITRAL Model Law that implements the New York Convention pertains to who decides the validity – the court or the arbitral tribunal.

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[73] *Id.* art. 8(1).

[74] *Id.* art. 8(2).

[75] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II (3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

[76] Cases under each topic could be found at New York Arbitration Convention Court Decisions. New York Arbitration Convention, Court Decisions, newyorkconvention.org, https://www.newyorkconvention.org/court+decisions [https://perma.cc/A9QB-42UW].

The Model Law states in relevant part:

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[77]

This provision enshrines both the principles of competence-competence and separability; two doctrines that are considered the cornerstones of the legal regime of arbitration domestic or transnational.

The Ethiopian Proclamation also contains the principle of competence-competence and separability formulated in slightly different language:

> The tribunal shall have the power to determine the existence or non existence of a valid arbitration agreement between the contracting parties including as to whether it has jurisdiction to hear the case or not. For this purpose, arbitration clause which is included in an agreement shall be deemed to be a separate and independent agreement. The fact that the principal agreement becomes null and void shall not make the arbitration clause null and void.[78]

While it remains unclear why the Ethiopian legislature departed from established legal text, the Proclamation under Article 8(1) clearly anticipates the court to make the initial decision on the validity of the arbitration agreement and, hence, its own competence. It would also seem per Article 19(1) that if the party desirous to go to arbitration wins the race to the arbitral panel, the tribunal would decide its own competence. Indeed, this is so whether the question of validity, which is often the same question as the competence of the tribunal (as an invalid agreement cannot give the tribunal jurisdiction) is first presented to the court or not. Indeed, it is also not

[77] UNCITRAL Model Law, *supra* note 66, art. 16(1).

[78] Ethiopian Arbitration Proclamation, *supra* note 63, art. 19(1).

inconceivable that the tribunal could come to a contrary result creating a profound anomaly.[79] The Ethiopian Proclamation's formulation of these principles did not aid the resolution of these perennial dilemmas in the law and jurisprudence of arbitration.[80]

iii. Arbitrability

Since the United States Supreme Court decided the famous *Mitsubishi v. Soler* case in 1984[81] on the arbitrability of public law matters, the worldwide trend on arbitrability of subject matters previously deemed not arbitrable has been on the decline.

In *Mitsubishi,* the Supreme Court permitted the arbitrability of a cause of action based on the US antitrust law called the Sherman Act[82] consolidating a

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[79] This is a situation that the 2nd Cir. Court of Appeals dealt with in the famous case *of Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 986 (2d Cir. 1942). "(b) If the issue of the existence of the charter party were left to the arbitrators and they found that it was never made, they would, unavoidably (unless they were insane), be obliged to conclude that the arbitration agreement had never been made. Such a conclusion would (1) negate the court's prior contrary decision on a subject which, admittedly, the Act commits to the court, and (2) would destroy the arbitrators' authority to decide anything and thus make their decision a nullity." Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258, 1270-1272 (1933); Philip G. Phillips, *A Lawyer's Approach to Commercial Arbitration*, 41 YALE L.J. 31 (1934); GEORGE J. WILLISTON, WILLISTON ON CONTRACTS 5369-5379 (Rev.ed.1938). Although this case's significance is on separability and is now outdated, it's description of the competence-competence anomaly is still instructive.

[80] Profound jurisprudence deals with the allocation of competence between the court and the arbitral tribunal in association with the enforcement of the arbitral agreement. Two most instructive cases for reference are: *Fiona Trust Holding Corp and Ors v. Privalov and Ors* [2006] EWHC 2583 (Comm); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

[81] *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

[82] *See id. at* 473-73. ("There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed

trend towards the encouragement of international arbitration[83] that began with *Bremen v. Zapata*.[84]

The Ethiopian Arbitration Proclamation has adopted the following list as an initial matter:

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that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. V(2)(b), "citations omitted.").

[83] This essentially overrules a long line of cases that found strong expression in *Wilko v. Swan* disallowing the arbitrability of securities laws matters. *See Wilko v. Swan*, 346 U.S. 427, 438 (1953). ("Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical, and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors, and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." Citations omitted.).

[84] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1,9-10 (1972). ("We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect were given to the forum clause in resolving this controversy. For at least two decades, we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that, once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." Citations omitted.).

> The following shall not be submitted for arbitration:
>
> 1/ Divorce, adoption, guardianship, tutorship and succession cases;
>
> 2/ Criminal cases;
>
> 3/ Tax cases;
>
> 4/ Judgment on bankruptcy;
>
> 5/ Decisions on dissolution of business organizations;
>
> 6/ All land cases including lease;
>
> 7/ Administrative contract, except where it is not permitted by law;
>
> 8/ Trade competition and consumers protection;
>
> 9/ Administrative disputes falling under the powers given to relevant administrative organs by law;
>
> 10/ other cases that is not arbitrable under the law.[85]

This list resembles what was common in many jurisdictions in the 1980s and perhaps earlier. As indicated above, subject matters listed under Article 7(8), "trade competition and consumer protection" are the exact same matters that cases with broad worldwide acceptance such as *Mitsubishi v. Soler* and *Rodriguez de Quijas v. Shearson/American Express Inc.*, overruling *Wilko v. Swan*,[86] have deemed arbitrable in the interest of modern transnational commerce. An Act in 2021 that contains principles that were convincingly renounced in the 1980s in most jurisdictions appears to run counter to modern developments[87] and the Ethiopian Proclamation's objective of modernizing the law in this area.

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[85] Ethiopian Arbitration Proclamation, *supra* note 63, art. 7.

[86] *Wilko v. Sawn* was overruled by *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 486 (1989). ("Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.").

[87] For a discussion of these modern trend in the European jurisdictions, *see generally*, Komninos, Assimakis, *Arbitration and EU Competition Law* (April 12, 2009). Available at SSRN: https://ssrn.com/abstract=1520105 ("All these elements of competition law had led in the past to the exclusion of the arbitrability of antitrust-related disputes, because of their public policy (ordre public) nature. This attitude, however, was reversed in the 1980s and early 1990s and it can now be said with certainty that arbitrability of competition law

A similar concern may be expressed about the law's exclusion from arbitration of administrative contracts "except where it is permitted by law" under sub-article 7, and those "disputes falling under the powers given to relevant administrative organs by law" under sub-article 9.

Although further legislative activity or case law may clarify the contours of these restrictions, the arbitrability of administrative contracts had remained a subject of uncertainty in preexisting Ethiopian law.[88] The inarbitrability of administrative contracts is not a uniquely Ethiopian phenomenon. It has its roots in 19th Century French law that inspired many Civil Law jurisdictions. However, modern trends are conclusively in the direction of allowing arbitrability of administrative contracts. As Gary Born aptly summarizes:

> The result of the past four decades' judicial developments in France has been a substantial retrenchment of nonarbitrability limits in the international context. Notwithstanding potentially expansive (and archaic) nonarbitrability provisions of the Civil Code, and almost equally expansive historic judicial interpretations of those provisions, French courts have progressively narrowed the scope of nonarbitrable matters. The end result is that they have apparently categorized matters as nonarbitrable only where mandatory statutory text expressly requires this result. Nothing in the recent revisions of the French arbitration legislation have altered this result.[89]

disputes is generally accepted in all jurisdictions with developed antitrust regimes." Citing numerous useful authorities beyond the US cases cited above. Some more useful authorities cited include: in France CA Paris, 19.5.1993, *Labinal SA v. Mors and Westland Aerospace Ltd.*, (1993) Rev.Arb. 645. In Italy, Corte di Cassazione, 21.8.1996, no. 7733, *Telecolor SpA v. Technocolor SpA*, 47 Giust.Civ. I-1373 (1997). In *England & Wales, ET Plus SA et al. v. Welter et al.* (Comm.), [2006] Lloyd's Rep. 251; [2005] EWHC 2115.

[88] For a detailed discussion of Ethiopian law on under pre-existing law, *see generally*, Zekarias Kenea, Arbitrability in Ethiopia: Posing the Problem, J. OF ETHI. LAW VOL. XVII (1994).

[89] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 964 (2nd ed.). For a more comprehensive treatment of the nonarbitrability doctrine in various legal traditions, *see id.* at 957-1045.

Although not entirely unique,[90] the Ethiopian Arbitration Proclamation took the exact opposite approach of permitting arbitrability of administrative contracts only when specific legislation allows it. The enforceability of arbitration provisions in administrative contracts of a transnational nature, therefore, depends on whether there is a specific legislation that overrides the overall prohibition under the Arbitration Proclamation.

The broadest override comes from the Investment Proclamation which reads in relevant part: "2/ The Federal Government may agree to resolve investment disputes involving Foreign investments through arbitration."[91] This provision read in tandem with the Arbitration Proclamation's Article 7(7) which prohibits the arbitrability of administrative contract "except where it is not permitted by law" clearly shows that all administrative contracts entered into

[90] Compare for example with the approach taken by Egypt in its Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters [hereinafter Egyptian Arbitration Law] available at:
http://www.crcica.org.eg/LawNo271994.pdf [https://perma.cc/3ETQ-64XG].
It renders administrative contracts inarbitrable unless permitted by the relevant Minister at the time of contracting. The pertinent provision reads: "[]With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect." art. 1. For a brief commentary on recent developments in Egypt, *see* Fatma Salah, *New Approval Required for Government Contracts and Arbitration Agreements in Egypt*, Kluwer Arbitration Blog, Feb. 21, 2021,
http://arbitrationblog.kluwerarbitration.com/2021/02/21/new-approval-required-for-government-contracts-and-arbitration-agreements-in-egypt/ [https://perma.cc/7UD4-FUHV]. ("The Egyptian Arbitration Law No. 27 for 1994 (the 'Arbitration Law') generally allows governmental entities and state companies to agree to arbitration of future disputes; only in the case of administrative contracts, the approval of the competent minister is required. Nevertheless, by virtue of the Decree, all governmental entities and state companies are now prevented from signing any arbitration agreement without referring the matter first to the Commission to get its 'no objection' clearance. The Decree therefore comes with an additional layer of approval beside the one required under the Arbitration Law. Such additional approval however is broader in its scope as it applies to all government contracts not only the administrative ones.").

[91] Investment Proclamation No. 1180/2020, *supra* note 30, art. 28(2).

by Federal agencies relating to investment remain arbitrable even after the coming into effect of the Arbitration Proclamation.

Other examples of exceptions are sector specific. Consider Mining Proclamation No. 678/2010.[92] The relevant provision reads: "In the event that agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the agreement. An arbitral award shall be final and binding upon the parties."[93]

Petroleum Operations Proclamation No. 295/1986 likewise provides: "2. In the event that agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the petroleum Agreement."[94]

With investment related administrative contracts and these types of major natural resources sectors excepted, the rule under the new Arbitration Proclamation that disallows the arbitrability of administrative contracts may in reality be the exception at least in high stakes transnational matters.

iv. Arbitrators and Arbitral Institutions

The Proclamation permits the contracting parties to appoint their preferred arbitrators without regard to citizenship, and grants the default appointment

[92] Mining Proclamation No. 678/2010, A Proclamation to Promote Sustainable Development of Mineral Resources, Aug. 4, 2010, http://extwprlegs1.fao.org/docs/pdf/eth183181.pdf [https://perma.cc/4SKP-MG2A].

[93] *Id.* at art. 76(2). The remaining subsections of the same provision read: "76. Settlement of Dispute 1/ Any dispute, controversy or claim between the Licensing Authority and a licensee arising out of, or relating to an agreement for reconnaissance, exploration, retention or mining, or the interpretation breach or termination thereof shall, to the extent possible, be resolved through negotiation…3/ Any party aggrieved by the decision of the arbitration may lodge an appeal to the concerned court.").

[94] Proclamation No. 296/1986, A Proclamation to Regulate Petroleum Operation, art. 25(2), Mar. 26, 1986, available at: http://extwprlegs1.fao.org/docs/pdf/eth85045.pdf [https://perma.cc/VYJ6-Q2NA].

authority to the Federal First Instance Court.[95] The Court's decision on appointment of arbitrators is not appealable.[96] Challenge on grounds of lack of impartiality or independence may first be submitted to the tribunal itself, and where that leads to no resolution, the same challenge could subsequently be brought before the First Instance Court without the possibility of further appeal.[97] The standard of review is the most commonly recognized standard of "justifiable doubt as to impartiality or independence."[98]

One of the most significant additions of the Proclamation is on domestic arbitral institutions. It anticipates the co-existence of publicly and privately established and run centers. To this effect, the relevant provision states:

> 18. Arbitration Centers 1/ An arbitration center may be established by government or private person. 2/ Federal Attorney General shall supervise arbitration centers, issue and renew license and provided for criteria for the establishment of the same. The details shall be determined by Regulation to be issued by the Council of Ministers. 3/ This Proclamation shall not prohibit existing arbitration centers from being operational.[99]

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[95] Ethiopian Arbitration Proclamation, *supra* note 63, art.12(3)"(b) Notwithstanding paragraph (a) of Sub Article 3 of this Article, where one of the contracting parties fail to appoint the coarbitrator within 30 days from the date of receipt of the notice by the other party, or where the two arbitrators fail to agree on the appointment of the third arbitrator within 30 days from the date of their appointment or where the contracting parties fail to agree, in the case of a sole arbitrator, the First Instance Court shall appoint such arbitrator upon the request of one of the parties."

[96] *Id.* art. 12(7).

[97] *Id.* art. 15(4) "A person whose objection is rejected may submit his grievance to the First Instance Court within 30 days from the date such decision is communicated to him. No appeal shall lie from the decision of the court."

[98] *Id.* art. 14. "Objection to Arbitrators 1/ An objection against the appointment of an arbitrator may be made only if there are circumstances which create justifiable doubts as to his impartiality and independence, or fulfillment of the criteria stated in the arbitration agreement."

[99] *Id.* art. 18.

Although the said regulation is not issued as of this writing, it embodies licensure and government supervision requirements that could potentially be taken in any direction in terms of intrusiveness.

v. Interim Measures

The interim measures section possesses all the indicia of the 2006 Revised UNCITRAL Rules with significant details than usual in many domestic *lex arbitri*. Perhaps the most important detail pertains to the enforceability of an interim award treated as analogous to an arbitral award enforceable under the New York Convention including the grounds of refusal.

In the sense, it provides:

> 1/ Without prejudice to recognition and enforcement of foreign awards, an order of interim measure issued by a tribunal shall be binding, irrespective of the country in which it was issued. 2/ Where an order for interim measure cannot be enforced, one of the contracting parties may apply to a court for the enforcement of such order.[100]

Enforcement of the interim measure may, however, be refused on the basis that resemble grounds of refusal of an arbitral award.[101] The Proclamation makes no distinction between domestic and international interim measures. The parties are given the option of seeking interim measures from the arbitral tribunal, which the court is required to enforce baring the grounds of refusal, or go directly to court for the issuance of an interim award in the first place.[102]

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[100] *Id.* art. 25(1-2).

[101] For grounds, *see id.* art. 26.

[102] *Id.* art. 27. "Contracting parties may request a court for an order of interim measure irrespective of the place of the arbitration of the arbitral tribunal." Probably the first international application for an interim measure filed since the enactment of the new arbitration proclamation is the one recently lodged at the Ethiopian Federal Hight Court under File No. 275955 by BGP Inc., China National Petroleum Corporation (BGP) against POLY-GCL Petroleum Investments Limited Ethiopian Branch and POLY-GCL Petroleum Investments Limited (POLY-GCL). The Court granted BGP's request and issued an injunction order suspending POLY-GCL's rights to transfer, sale or attach the exploration

Unlike some other jurisdictions such as China, it appears that the parties are given the option of going to the tribunal, where it is constituted, or go directly to court as a matter of choice. Under the Chinese Arbitration Proclamation, for example, a party has to first petition the relevant arbitral commission, which would pass it onto the court.[103]

Finally, and unsurprisingly, as it is common in most systems, a security deposit may be required for the issuance of such measures.[104] It is discretionary.

vi. Annulment and Enforceability of Arbitral Awards

In ordinary circumstances, matters progress in either one of two directions: a claim for annulment or enforcement – although they could occur simultaneously in multiple fora.

1. Annulment

Two sets of provisions in the Ethiopian Arbitration Proclamation pertain to actions that could fall under annulment of the arbitral award. The first one is

and mining licenses (the concession rights) over Ethiopian petroleum fields in the Ogaden region of Ethiopia, and freezing the bank accounts the respondents have in Commercial Bank of Ethiopia. The Court order clearly says it shall remain in force until such a time the international arbitration tribunal instituted under the Hong Kong International Arbitration Rules gives its final award.

[103] *See* Arbitration Law of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995), arts. 25, 68, 1994 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 8 (China). Available at: http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html [https://perma.cc/KFC8-8435]. (If the parties to a foreign-related arbitration apply for evidence preservation, the foreign arbitration commission shall submit their applications to the intermediate people's court in the place where the evidence is located.").

[104] Ethiopian Arbitration Proclamation, *supra* note 63, art. 21(3).

titled "Objection Raised Against Arbitral Awards."[105] The other one is the most commonly known setting aside procedure.[106] The Proclamation permits a signatory or non-signatory who "should have been" made a party to the arbitral proceeding but was not, to object to the award within 60 days of becoming aware of the award.[107]

This is designed to protect the interests of parties who may be affected by the execution of the award without getting their own due process. In the same vein, the Proclamation disallows a third-party who previously requested to join the proceedings and was permitted to do so by the tribunal.[108] *A contrario* reading would suggest that one who had been denied the opportunity to intervene could still raise the objection against the award assuming that the other requirements for objecting to a judgment under the Civil Procedure Code that the Proclamation refers to in Article 48(5) are met.[109]

Signatories and non-signatories are treated differently for purposes of remedies. Where a signatory, who should have been made a party, objects to the execution of the award, the Proclamation requires the court seized of the matter to remand the case back to the tribunal that issued the award, which would otherwise be technically considered *functus officio* after it had rendered the award.[110]

If the objecting party is a non-signatory, the Proclamation requires the court to essentially exercise adjudicative jurisdiction over the merits of the matter. This would effectively mean the invalidation of the arbitration agreement for failure to join an indispensable party.[111] To the extent this remedy also applies

[105] *See id.* art. 48.

[106] *See id.* art. 50.

[107] *See id.* art. 48(1).

[108] *Id.* art. 48(2): "Where the third party who submits his objection had previously submitted the same to the tribunal that heard the case and had intervened in the arbitration proceedings; he may not submit his objection in accordance with Sub-Article (1) of this Article."

[109] *Id.* art. 48(5).

[110] *Id.* art. 48(3).

[111] *Id.* art. 48(4).

to situations whereby the third party requested to join but was refused by the tribunal, it offers a disproportionate remedy.

In any case, this provision seems to collaterally answer the question of the allocation of power between the tribunal and the court on the issue of third-party joinder. The court gets the last word at the backend of the process.

The second set of provisions relate to the traditional setting aside procedure. Like most jurisdictions, the Ethiopian Proclamation's set aside grounds mimic the grounds of refusal of enforcement under Article V of the New York Convention in considerable ways.[112] That is understandable as the New York Convention leaves grounds of annulment to the domestic laws of the State Parties.

A material ambiguity does, however, exist in art 50(2)(b) of the Proclamation in relation to the applicable law for the determination of the invalidity. It reads: "[T]he arbitration agreement becomes null and void under the applicable law chosen by the contracting parties or by Ethiopian law or such agreement has expired"[113] The supposedly analogous New York Convention provision reads: "[t]he said agreement is not valid under the law to which the

[112] *Id.* art. 50. There appears to be a difference in the actual English language text. It does not appear that different meanings are intended. It seems like it is a function of re-translation from the official Amharic text. "a) The applicant does not have the capacity to conclude an arbitration agreement as provided for in the law in force; b) The arbitration agreement becomes null and void under the applicable law chosen by the contracting parties or by Ethiopian law or such agreement has expired; c) The applicant shows that he has not been given proper notice about the appointment of arbitrators, arbitration proceedings or has not been able to present his case during the proceedings; d) The arbitrators did not make the award by maintaining their impartiality or independence or have delivered the award by receiving bribe; e) The subject matter of the arbitral award is beyond the scope of the arbitration agreement or the award rendered is beyond jurisdiction the tribunal; f) The process of establishment of the tribunal and the procedure applicable in the course of the proceedings contradicts with agreement of the contracting parties and has influenced outcome of the award.")

[113] Ethiopian Arbitration Proclamation, *supra* note 63, art. 50(2)(b).

parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[114]

Although this is for purposes of refusal of enforcement, many states use such grounds as grounds of annulment or set aside. Ethiopia also seems to have done so but the chosen default law is Ethiopian law not the law of the place where the award is made presumably because this is a set aside proceeding and the proceedings must have taken place in Ethiopia. The critical ambiguity does not, however, come from an attempt to adopt grounds of refusal to set aside proceedings but instead from the use of "or" to suggest that the court could in its discretion alternate between the party chosen law and Ethiopian law. It appears that there are two possible laws here, and unfortunately, the official Amharic version does not resolve the problem. The sequence does, however, suggest that the legislature probably meant that the court looks at Ethiopian law where there is no party selected applicable substantive law.

Relatedly, however, it is important to mention that although the New York Convention limits all challenges to a set aside proceeding and otherwise presumes finality, the Ethiopian Proclamation allows appeals against an arbitral award under limited circumstances. It anticipates two possibilities: (1) where the parties agree to have an appeal,[115] or (2) where the parties fail to exclude appeals to the cassation bench for "fundamental or basic error of law."[116] In other words, generally, the default rule is that an arbitral award is considered final and binding unless the parties agree to the possibility of appeal except for the appeal on modes of payment of arbitration costs. The law presumes that all arbitral awards are reviewable for fundamental or basic errors of law as a matter of default, but the parties have the liberty to exclude such appeals by agreement except in three instances: (1) where the decision is made *ex aquae et bono*,[117] (2) the award is made by agreement,[118] and (3)

[114] New York Convention, *supra* note 75, art. V(1)(a).

[115] Ethiopian Arbitration Proclamation, *supra* note 63, art. 40(1).

[116] *Id.* art. 49(2). In addition, under Article 46 (1 &2) the Ethiopian Arbitration Proclmation allows appeal on awards made in relation to the modes of payment of costs necessary for the arbitration and service fees of arbitrators.

[117] *See Id.* art 49(3) cum art. 41(5).

[118] *See Id.* art. 49(3) cum art. 43.

where the parties have agreed for the rendition of an award without opinion.[119]

Overall, although the Proclamation permits the parties great latitude in shaping the post-award landscape; it takes a decisively pro-finality stance. It is, however, unclear whether "fundamental or basic error of law" in Article 49(2)[120] refers to Ethiopian law or foreign law or both. Because the Proclamation permits the applicability of foreign law,[121] it is fair to assume that the reference to law in this provision would also include foreign law.

To the extent foreign law applies, cassation review for error could also be assumed as a matter of default rule i.e., in the absence of exclusion by party agreement. Such assumption is fair as the Proclamation makes no exception to foreign law. If the losing party in an arbitration where foreign law applied challenges the Tribunal's interpretation of foreign law, it is not inconceivable that the Cassation bench would take on the task of ascertaining the correct foreign law interpretation in the manner it ordinarily goes about ascertaining foreign law in civil litigation. If the challenged applicable law is Ethiopian law, it is constitutionally doubtful whether the parties could exclude review by agreement because, under the existing Constitution, the Court of Cassation has the jurisdiction to review basic errors of law. It reads in relevant part: "(a) The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law."[122] Whether the Proclamation's provision that permits parties to exclude

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[119] *See Id.* art. 49(3) cum art. 44(2).

[120] *Id.* art. 49(2). ("2/ Unless there is agreement to the contrary, an application for cassation can be submitted where there is a fundamental or basic error of law.")

[121] *See Id.* art. 41(2&4) ("3/ Where no substantive law has been chosen by agreement in accordance with Sub-Article (1) of this Article, the tribunal may choose a substantive law close and relevant to the subject matter of the dispute. 4/ Where the subject matter of the dispute does not have an element of international arbitration, Ethiopian law shall apply.")

[122] Constitution of the Federal Democratic Republic of Ethiopia, art. 80(3)(a).

Cassation review for error of Ethiopian law is constitutional is a question that needs to be asked.[123]

2. *Recognition and Enforcement of Awards*

As it was originally conceived by the community of nations, the New York Convention was all about the recognition and enforcement of arbitral awards. The enforcement of the arbitral agreement under Article II(3) of the New York Convention, which later came to occupy at least half of arbitral jurisprudence, was indeed a last minute addition. A dramatic story is told about its last-minute inclusion by its drafter, Pieter Sanders:

> My review of the Convention's history will deal in particular with what, during the Conference, was called the "Dutch proposal". It was conceived during the first weekend of the Conference. I spent that weekend at the house of my father- in- law in a suburb of New York. I can still see myself sitting in the garden with my small portable typewriter on my knees. It was there, sitting in the sun, that the "Dutch proposal" was conceived … _at a very late stage of the Conference, a provision on the arbitration agreement was inserted in the Convention, the present article II.[124]

Otherwise, the principal conception and initial design of the Convention was the recognition and enforcement of foreign arbitral awards under Articles III and V. The Proclamation, which follows Ethiopia's belated ratification of the

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[123] The Supreme Court has given an elaborate opinion on the reviewability of errors of law in *Consta Joint Venture v. Ethiopia-Djibouti Railway Company* case under Ethiopian law prior to the passage of the Arbitration Proclamation. *Consta Joint Venture v. Ethiopia-Djibouti Railway Company* [2016] 2013-32. The Petition for Review is available at https://jusmundi.com/en/document/pdf/other/en-consta-joint-venture-v-chemin-de-fer-djibouto-ethiopien-the-ethiopian-djibouti-railway-representing-the-federal-democratic-republic-of-ethiopia-and-the-republic-of-djibouti-petition-for-cassation-review-thursday-26th-may-2016 [https://perma.cc/YP86-DYAW].

[124] Pieter Sanders, *The Making of the Convention*, *in* U.N., ENFORCING ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, U.N. Sales No. E. 99. V. 2, 3-4 (1999), available at: http://www.newyorkconvention.org/travaux+preparatoires [https://perma.cc/P8EB-CTKM].

Convention, implements its core provision with some textual modifications, the purpose of which is unclear. The key provision reads: "Without prejudice to the provisions Articles 50 or 52 of this Proclamation, an arbitral award rendered in Ethiopia or in a foreign country shall be deemed to be binding and shall be executed pursuant to Civil Procedure Code by applying to a court that is empowered to execute the award had the case been heard by a court."[125]

Article 52 (1) of the Proclamation also provides that: "[A]n objection to the enforcement of arbitral award may only be made, where an application made to the court previously to have the award set aside has not been dismissed." Note first that the official Amharic text is accurately translated. It seems to say that one would only have the chance to seek refusal of enforcement only if a set aside attempt has failed. It conceives set aside and refusal of enforcement in a temporally linear sequence. It does not seem to account for the possibility that both proceedings could be commenced concurrently by different parties. In fact, the most common sequence of event would be the losing party goes to court seeking annulment, the wining party goes to court seeking enforcement. The proposition that one may only seek refusal if he failed to succeed in his set aside action suggests that if an award is set aside, there is no point in allowing objections against it as it cannot be enforced anyway.

Another modification is the change of the choice of law for the determination of the validity of the agreement. Under article V(1)(a) of the Convention, enforcement may be refused if "[t]he said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[126] The default applicable law is "the law of the country where the award was made." The Proclamation changes that default law to Ethiopian law, presumably, regardless of where the award might have been made: "if the arbitration agreement is null and void under applicable law chosen by the parties or, in the absence of such agreement, under

[125] Ethiopian Arbitration Proclamation, *supra* note 63, art. 51(1).

[126] New York Convention, *supra* note 75, art. V(1)(a)

Ethiopian law."[127] It is unclear what important values that this is designed to preserve.

Another notable textual change is contained in article 52(2)(f). It reads: "f) The arbitral award has not reached its final stage or is reversed or suspended." This appears to be giving effect to the analogous provision of the New York Convention's article V(1)(2): "(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." The Proclamation splits suspension and set aside in different provisions and adds another ground of refusal called "reversed". It seems to anticipate an appellate reversal that the Convention does not anticipate because of its pro-finality stance. It is also possible that the drafters were using "reversal" to mean set aside. While the terminology could be exchangeable, the existence of another provision on set aside and refusal discussed above suggests that reversal is probably an appellate reversal for error of law or some other consideration under the appeals provisions. Even in that case, it would be stating the obvious.

Although the above discussed provisions are not specifically designated to be applicable only to domestic arbitration, a separate provision titled the "recognition and enforcement of foreign arbitral award" follows under Article 53. This provision also makes certain non-negligible changes to the text of the parallel provision of the New York Convention. To highlight just a couple such changes: the key recognition and enforcement provision is changed from mandatory "shall" to permissive "may" and the refusal of enforcement provision is changed from arguably permissive "may" to "shall". Comparing the actual texts is here the simplest way of exposition.

Text of the Proclamation:

> Where a foreign arbitral award falls under International Treaties ratified by Ethiopia, it ***may be recognized*** or enforced in accordance with such treaties.[128]

[127] Ethiopian Arbitration Proclamation, *supra* note 63, art. 51(2)(b).

[128] *Id.* art. 53(1).

Text of the New York Convention:

> Each Contracting State ***shall recognize*** arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.[129]

The change in refusal of recognition and enforcement provision could also be similarly demonstrated.

Text of the Proclamation:

> Without prejudice to Sub-Article (1) of this Article, a foreign arbitral award ***shall not be recognized or enforced*** only on the following grounds:

Text of the New York Convention:

> Recognition and enforcement of the award ***may be refused***, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

The textual formulation in the Proclamation is not as simple as just changing "may" to "shall" and as such it is likely to give rise to creative arguments down the road, but it is again unclear what policy considerations prompted such changes. While future writings could explore this further, it is fair to say that the textual departures in the grounds of refusal provisions do not improve matters in this regard.

The relevant provision of the New York Convention begins by the following formulation that goes to the heart of what is called the international arbitral order: "1. Recognition and enforcement of the award *may be refused*, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought,

[129] New York Convention, *supra* note 75, art. III.

proof that:"[130] The use of *may* rather than *shall* in this provision has caused profound controversy around the world. If a new law departs from an established text that it seeks to implement, it would be expected to remediate an existing ambiguity. Regrettably, the Proclamation did not only fail to address this issue but might have unwittingly added a new set of ambiguities.

Consider first the controversy surrounding the use of "may be refused" in the operative text of the Convention. It often arises in connection with the question of the enforceability of a foreign arbitral award set aside in the place where it was made.[131] Two opposing schools of thought have emerged. The first considers "may" permissive and enforces an arbitral award regardless of its status in the place where it is made.[132] The second ignores the semantics and refused to enforce any arbitral awards that are set aside in the place where it is made.[133] The matter is so contentious that there is even a disagreement as to which one is more dominant.

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130 *Id.* art. V (1). Emphasis added.

131 The interaction between the general provision under art V (1) with V(1)(e) "(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." *Id.*

132 *See* example *Chromalloy Aeroservices Inc. v. Ministry of Def. of Republic of Egypt*, 939 F. Supp. 907 (D.D.C.1996) (enforcing an arbitral award set aside in Egypt.). The same court later revisited its position. *See Termorio S.A.E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

133 For a description of this school of thought, *see* EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010). Having discussed the various theories, he presents his own preferred one partially as follows: "In the current context of differing laws and diverging ways in which domestic courts apply those laws, the only valid question is whether a single law, irrespective of its degree of conservatism and the manner in which domestic courts decide to apply it, is entitled to govern an arbitration for the sole reason that it happens to be that of the country where the arbitration is taking or has taken place. In terms of order, the benefit is tangible. In terms of justice, hardly so. One simply has to consider the numerous situations in which the courts of the seat have developed idiosyncratic theories with a view to helping one of the parties to the arbitration, often a national of that country. Anti- suit injunctions will be addressed below. At this juncture, it suffices to observe that the centralizing conception of the source of the arbitrator's power

The Ethiopian Proclamation's modifications of the text are clearly not designed to resolve these types of perennial controversies and may have introduced idiosyncrasies of the type that advocates of the supranational arbitral seem to be concerned with.[134]

The Proclamation also makes other changes to the refusal provision. First, it adds an independent reciprocity provision although Ethiopia has already submitted its reciprocity reservations to the New York Convention.[135] It is possible that the legislature had other bilateral and other forms of present or future treaties in mind. In that sense, it may not suffer from redundancy that may appear at first.

Secondly, it changes the provision of the New York Convention under V(1)(d), which reads: "d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"[136] to "Where the arbitral award is based on invalid arbitration agreement or rendered by a tribunal which is not established in accordance with the law of the country in which such award is rendered"[137]

It not only merges the invalidity of the arbitration agreement provision and the legality of the composition of the arbitral tribunal into one but also changes the choice of governing rules for the determination of the validity of the constitution of the tribunal from the parties' choice to the applicable law. It might appear innocuous but is likely to give rise to unnecessary controversy especially in circumstances where the parties choice and the applicable law would lead to different results.

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to adjudicate belongs to a philosophical tradition that readily favors injustice over chaos." *Id.* at 24.

134 *See id.*

135 Ethiopian Arbitration Proclamation, *supra* note 63, art. 53(2)(a).

136 New York Convention, *supra* note 75, art. V(1)(d).

137 Ethiopian Arbitration Proclamation, *supra* note 63, art. 53(2)(b).

Third, it adds an entirely new provision that has no corresponding rule in the New York Convention. It reads: "The arbitral award rendered cannot be enforced in accordance with Ethiopian law"[138] It might at first appear that it is meant to incorporate the public policy exception under Article V(2)(b), but the Proclamation makes for an independent provision for that under 53(2)(f) even adding national security as an aspect of public policy.[139]

These are non-trivial changes to the text of the New York Convention. If there is a policy reason for each change, it is not readily discernable from the appraisal of the text of the Proclamation itself.

Conclusion

Ethiopia has in recent years made some strides in modernizing its transnational economic laws. In the area of trade, it has recommenced its WTO accession negotiations, and enthusiastically joined the grand AfCFTA project. In investment, although it slowed down its BITs ratification program since 2010, it enacted a new Investment Law that took the law in this area one step forward. In the area of transnational commence, it ratified the New York Convention and enacted a comprehensive implementing legislation. This article has offered a brief critical appraisal of these new developments.

What appears to be the most common defining characteristic of developments in each area is the not so infrequent departures from fairly established norms and texts without readily and reasonably appreciable reasons. This is manifested in each area of law appraised hereinabove: the significant lag in meeting the WTO accession requirements, the silent cessation of BITs ratification activity, and the non-trivial modifications of the legal texts of certain important provisions of the New York Convention in the taxonomy of the new Arbitration Proclamation.

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[138] *Id.* art. 53(2)(c).

[139] *Id.* art. 53(2)(f). ("Where the arbitral award contravenes public policy, moral and security.").

Perhaps more than any area of law, the modernization of transnational economic laws requires synchronous development inasmuch as the whole objective is the harmonious coexistence of transnational laws of various states. These laws bring forth order and offer predictability that transnational economic activities appreciate. Needless local ostensibly idiosyncratic variations of established norms and legal texts have the potential of undermining the whole modernization and harmonization enterprise and must be avoided whenever they do not promote legitimate, rational, ascertainable, and defensible economic, social or other types of local objectives.

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ፍቺ ከፍርድ ቤት ውጭ፡- የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት እና የፌዴሬሽን ምክር ቤት ውሳኔዎች አጭር ዳሰሳ

ተክለኃይማኖት ዳኜ በላይ[*]

መግቢያ

ለዚህ ጽሁፍ መነሻ የሆነው ጸሀፊው በሥራ ምክንያት በሚያያቸው መዝገቦች ስር ሲገጥሙት የነበሩ ክርክሮች እንዲሁም በተለያዩ አጋጣሚዎች ከስራ ባልደረቦቹ ጋር ጋብቻ ከፍርድ ቤት ውሳኔ ውጭ በሁኔታዎች ስለሚፈርስበት አግባብ ያደረጋቸው ውይይቶች ሲሆኑ በዋነኛነት ግን የቅርብ ምክንያቱ የፌዴሬሽን ምክር ቤት በጉዳዩ ላይ የሰጠው ውሳኔ ነው። በፌደራሉ የቤተሰብ ሕግ አንቀጽ 75 ስር እንደተመለከተው ጋብቻ የሚፈርስባቸው ብቸኛ ሶስት ምክንያቶች ሞት ወይም የመጥፋት ውሳኔ፤ ጋብቻ ለመፈጸም መሟላት ካለባቸው ሁኔታዎች አንዱ በመጣሱ ምክንያት ጋብቻው እንዲፈርስ ሲወሰን እንዲሁም ፍቺ መሆናቸው የተመለከተ ሲሆን በአንቀጽ 117 ስር እንደተመለከተው ደግሞ ጋብቻን በፍቺ ለማፍረስ ስልጣን የተሰጠው ለፍርድ ቤቶች ብቻ ነው።

የፌደራሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመ.ቁ. 14290 መጋቢት 25 ቀን 1999 ዓ.ም(ያልታተመ)[1]፤ በቅጽ 5 በመ.ቁ. 31891 ሚያዚያ 14 ቀን 2000ዓ.ም.[2] እንዲሁም

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[*] ኤል.ኤል. ቢ እና ኤል. ኤል. ኤም፤ በፌደራል መጀመሪያ ደረጃ ፍርድ ቤት ዳኛ፤ እንዲሁም በአዲስ አበባ ዩኒቨርሲቲ የሕግ እና አስተዳደር ኮሌጅ የትርፍ ሰዓት መምህር። ለዚህ ጽሁፍ ከፍተኛ አስተዋጽኦ ላደረጉት ኑረዲን ከድር (ፌደራል ጠቅላይ ፍርድ ቤት ዳኛ)፤ ዶክተር ብሩክ ኃይሌ (በአዲስ አበባ ዩኒቨርሲቲ የሕግ መምህር)፤ አቶ ፊሊጶስ አይናለም (የሕግ ባለሙያና ጠበቃ)፤ ምስራቅ ብርሀኔ (ጠበቃና የሕግ አማካሪ) እንዲሁም ስማቸው ላልታወቀው አርታኢ ጸሀፊው ከፍተኛ ምስጋናውን ያቀርባል። አርቄ ከተመለከትኩ በእናንተ ትከሻ ላይ በመቆም ነው። ከዚህ ባለፈ ጸሀፊው በዚህ አጭር ጽሁፍ ለማሳየት ጥረት ያደረገው በጉዳዩ ላይ ያሉትን መሠረታዊ ሃሳቦች ብቻ በመሆኑ ጽሁፉ እንደመነሻ ሃሳብ ተወስዶ ሰፊ ጥናት እና ምርምር እንዲደረግበት ይጠይቃል።

[1] አመልካች ወ/ሮ አበበች የሸዋሉል ተጠሪዎች እነ ወ/ሮ እታገኘሁ አድማሱ፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 14290 (ያልታተመ)።

[2] አመልካቾች እነ አቶ አንለይ እንየው (7 ሰዎች) እና ተጠሪ ወ/ሮ መሬም ጡሃ፤ <u>የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ውሳኔዎች</u>፤ ቅጽ 5፤ የሰ.መ.ቁ. 31819፤ ሚያዚያ 14 ቀን 2000 ዓ.ም።

በቅጽ 19 በመ.ቁ. 102662 የካቲት 15 ቀን 2008 ዓ.ም.[3] በሰጣቸው ውሳኔዎች ጋብቻ በፍርድ ቤት ውሳኔ ያልፈረሰ ቢሆንም የተጋቢዎቹ ለረጅም ጊዜ ተለያይቶ መኖር (በዚህም ጊዜ ሌላ ትዳር መፈጸም) ጋብቻውን በሁኔታ ፈራሽ እንደሚያደርገው ወስኗል። በዚህ የፍርድ ቤቱ አቋም ሕጋዊነት እና ምክንያታዊነት ላይ በብዛት የሚነሱ ክርክሮች ቢኖሩም ጉዳዩ ዋነኛ መነጋገሪያ የሆነው ግን የፌደሬሽን ምክር ቤት በአመልካች ወ/ሮ ቀለሚ ተፈራ እና በተጠሪ አቶ ፍሰሃ ደምሴ መካከል በነበረው ክርክር ላይ በሰጠው ውሳኔ ነው።

በእነዚህ የሰበር ችሎቱ ውሳኔዎች መነሻነት ያቀረቡት የፍቺ አቤቱታ ጋብቻው በሁኔታዎች ፈራሽ በመሆኑ የሚሰጥ የፍቺ ውሳኔ የለም በሚል የተወሰነባቸው እና በመጨረሻም ለፌደራሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ያቀረቡት አቤቱታ አያስቀርብም በሚል ውድቅ የተደረገባቸው ወ/ሮ ቀለሚ ተፈራ ውሳኔው ከሕገ-መንግሥቱ ጋር የሚቃረን ነው በሚል ትርጉም እንዲሰጣቸው ቅሬታቸውን ለፌደሬሽን ምክር ቤት አቅርበዋል። ምክር ቤቱም የሕገ-መንግሥት ጉዳዮች አጣሪ ጉባዔ በጉዳዩ ላይ የውሳኔ ሃሳብ እንዲያቀርብለት ካደረገ በኋላ ምክር ቤቱ መስከረም 27 ቀን 2012 ዓ.ም. በሰጠው ውሳኔ የሰበር ችሎቱን ውሳኔ ሽሮታል[4] ምንም እንኳን ውሳኔው በግለሰቧ አቤቱታ አቅራቢነት ታይቶ ጉዳዩ ለሰበር ችሎት አያስቀርብም በሚል የተሰጠውን ውሳኔ በቀጥታ የሚመለከት ቢሆንም ምክር ቤቱ ውድቅ ያደረገው የውሳኔው ዋና ጉዳይ የሆነውን ጋብቻ በሁኔታዎች ስለሚፈርስበት አግባብ በመሆኑ ሶስቱም የሰበር ችሎት ውሳኔዎች የተሻሩ ሲሆን ይህ የምክር ቤቱ ውሳኔ በአዋጅ ቁጥር 251/93 አንቀጽ 11 እና 56 መሠረት በሀገሪቱ ያሉትን ማናቸውንም አካላት ፍርድ ቤቶችንም ጨምሮ የሚያስገድድ ነው።

በዚህ ጽሁፍ የሰበር ችሎቱ ውሳኔ መነሻ ምክንያት እንዲሁም የሕግና የአመክንዬ መሠረት በአንድ በኩል እንዲሁም የምክር ቤቱ ውሳኔ ምክንያታዊነት እና ሕጋዊነት በሌላ በኩል በዝርዝር ለማየት ጥረት ተደርጓል። በመጨረሻም የሰበር ውሳኔዎቹ እና የምክር ቤቱ ውሳኔ አስገዳጅነት ያልተቀየረ በመሆኑ ተግባራዊ መፍትሄ ሊሆኑ የሚችሉ አማራጮች ተዳስሰዋል። የጽሁፍ አጭር ሃሳብ የሰበር ችሎቱ የሰጣቸው ውሳኔዎች ከፌደራሉ የቤተሰብ ሕግ ውጭ በመሆናቸው እንዲሁም የፌዴሬሽን ምክር ቤቱ የሰጠውም ውሳኔ በሌለው ስልጣን የተሰጠ በመሆኑ ሁለቱም የየራሳቸው ጉድለት አለባቸው የሚል ነው። በመጨረሻም በዚህ ጽሁፍ

[3] አመልካች ወ/ሮ አልማዝ ለሼ ተጠሪ አቶ በቀለ በላቸው፤ <u>የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ውሳኔዎች</u>፤ ቅጽ 19፤ የሰ.መ.ቁ. 102662፤ የካቲት 15 ቀን 2008ዓ.ም።

[4] አመልካች ወ/ሮ ቀለሚ ተፈራ እና ተጠሪ አቶ ፍሰሀ ደምሴ፣ መ.ቁ 50/10፣ መስከረም 27 ቀን 2012 ዓ.ም. (የፌደሬሽን ምክር ቤት፣ 5ኛ ዘመን 5ኛ ዓመት)።

ሕጉን በማሻሻል ሊሰጥ የሚችለው መፍትሄ እንዲሁም ሕጉን ከማሻሻል በመለስ ያሉ ተግባራዊ መፍትሄዎች ለመጠቆም ጥረት ተደርጓል።[5]

1. ጋብቻ በሁኔታዎች ስለ መፍረስ የሰበር ችሎቱ ውሳኔ መነሻ ምክንያት

በፌደራሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ጋብቻ ከፍርድ ውሳኔ ውጭ በሁኔታዎች ሊፈርስ እንደሚችል በቅድሚያ ተነስቶ የነበረው በመ.ቁ. 14290 መጋቢት 25 ቀን 1999 ዓ.ም. በተሰጠ ውሳኔ ነው።[6] በመዝገቡ አመልካች የሚች አቶ በየነ መረጩ ሚስት መሆናቸውን ገልጸው ሲከራከሩ ተጠሪዎች በበኩላቸው አመልካች ሚስት አለመሆናቸውን እና ሚስት ናቸው ቢባል እንኳን ከሚች ጋር ለረጅም ጊዜ ተለያይተው የቆዩ እና ሌላ ባል አግብተው ልጅ የወለዱ በመሆናቸው ግንኙነታቸው ተቋርጧል በማለት እንደተከራከሩ መዝገቡ ያስረዳል። የግራቀኙ ክርክር ይህ ሲሆን በመዝገቡ የነበረው አካራካሪ ጉዳይ አመልካቿ የሚች ሚስት ናቸው ወይስ አይደሉም እንዲሁም ናቸው ቢባል ግንኙነታቸው ከሚች ህይወት ማለፍ በፊት ተቋርጦ ነበር ወይስ አልነበረም የሚል ነው።

ለዚህ አከራካሪ ጉዳይ መልስ ለመስጠት ሁለት ነጥቦችን ማጣራት ተገቢ ሲሆን እነሱም የፍሬ ነገር እና የሕግ ጉዳዮች ናቸው። የፍሬ ነገር ጉዳዩ በሚች እና አመልካች መካከል የነበረው የጋብቻ ግንኙነት ሚች ከማረፋቸው በፊት ተቋርጦ ነበር ወይስ አልነበረም የሚል ሲሆን የሕግ ጉዳዩ ደግሞ ግንኙነታቸው ተቋርጧል ቢባል ሕጉ ጋብቻን ለማፍረስ ምክንያት አድርጎ በአንቀጽ 75 ስር ካስቀመጣቸው ሶስት ምክንያቶች ውስጥ በየትኛው አግባብ ጋብቻው እንዲፈርስ ሊወሰን ይገባል የሚል ይሆናል። የፍሬ ነገሩ ጉዳይ አላስፈላጊ ነው ወይም ቅድሚያ የሕጉ መነሻ ሳይታወቅ ፍሬ ነገሩን ማጣራት ተገቢ ነው አይደለም የሚለው ክርክር እንደተጠበ ሆኖ በጉዳዩ ላይ ምሉዕ ውሳኔ ለመስጠት እና ለበታች ፍርድ ቤቶች በአስገዳጅነት ስልጣኑ ብቻ ሳይሆን በምክንያታዊነቱም አስገዳጅ ውሳኔ ከመስጠት አንጻር ሁለቱም ጉዳዮች መነሳት እና መመለስ ያለባቸው ናቸው።

በመ.ቁ. 14290 ስር የሰበር ችሎቱ በዝርዝር የተመለከተው የፍሬ ጉዳዩን ብቻ ነው በሚያስብል ደረጃ ሐተታው ግንኙነታቸው ሚች ከማረፋቸው በፊት ተቋርጦ ነበር አልነበረም

[5] እዚህ ላይ የፌደሬሽን ምክር ቤት ሥልጣን እና ተግባርን በተመለከተ እንዲሁም የፍርድ ቤት ውሳኔዎችን ይግባኝ በሚመለከት መልኩ የመመልከቱ ሁኔታን በተመለከተ ራሱን የቻለ ርዕስ ተሰጥቶት ሰፊ ክርክር ቢደረግበት የተሻለ እንደሆነ ጸሀፊው ያምናል።

[6] አመልካች ወ/ሮ አበበች የሸዋሉል ተጠሪዎች እነ ወ/ሮ እታገኘሁ አድማሱ፣ ከላይ በቁጥር 1 የተጠቀሰ።

የሚለውን በማጣራት ላይ ትኩረቱን ያደረገ ነው። የሰበር ችሎቱ በውሳኔ በአብዛኛው የተነተነው ግንኙነቱ መቼ ተቋረጠ እና ይህ ጉዳይ በምን ማስረጃ ተረጋገጠ የሚለው የፍሬ ነገር ክርክር ላይ ትችት በማድረግ ነው። እዚህ ላይ በዋነኛነት የሰበር ሰሚ ችሎቱ በሕገ-መንግሥቱ አንቀጽ 80-3-ሀ[7]፣ በአዋጅ ቁጥር 25/88 አንቀጽ 10[8] እንዲሁም በአዋጅ ቁጥር 454/97[9] ስር መሠረታዊ የሕግ ስህተቶችን ለመመልከት ስልጣን የተሰጠው ሲሆን ችሎቱ የፍሬ ጉዳይ ክርክሮችን አከራክሮ ለመወሰን ስልጣን በሕጉም አልተሰጠውም። ከሕጉም ባለፈ ምንም እንኳን የዚህ ጽሁፍ ዓላማ ባይሆንም በዳበረው የሕግ ፍልስፍና እና የዳበረ የሕግ ስርአት ባላቸው ሃገራትም የሰበር ችሎቶች በፍሬ ጉዳዮች መነሻነት የሚቀርብላቸውን ቅሬታ ለመመልከት ሥልጣን የላቸውም። ከዚህ በመነሳት ችሎቱ ግንኙነቱ መቼ እና እንዴት ተቋረጠ ለሚለው ጉዳይ የሰጠው ሐተታ ከስልጣኑ ውጭ እንደሆነ ግልጽ ነው።

በሌላ በኩል የሰበር ችሎቱ በመ.ቁ 102662 (በቅጽ 19 የታተመ) በሰጠው ውሳኔ በመዝገቡ አመልካች የነበሩት ግለሰብ ግንኙነቱ አልተቋረጠም በሚል ያቀረቡትን የፍሬ ጉዳይ ክርክር ለመመልከት ስልጣን የለኝም በሚል ውድቅ አድርጎታል።[10] በመ.ቁ. 14290 ስር ስለ ፍሬ ጉዳዩ ትኩረት ያደረገው ችሎት በዚህኛው መዝገብ አቋሙን ቀይሮ ስልጣን የለኝም ማለቱ የችሎቱ አቋም አገላለጽ እርስ በእርሱ የሚጣረስ እንደሆነ ያሳያል። ምክንያቱም የሰበር ሰሚ ችሎት የፍሬ ነገር ክርክሮችን ለመመልከት ከጅምሩም ቢሆን ሥልጣን የሌለው በመሆኑና ከዚህ ባለፈ ፍሬ ነገሩን ለመመርመር በምን አግባብ እንደተፈለገ ባለመገለጹ ነው።

ከፍሬ ነገሩ ሐተታ በላይ አከራካሪው ጉዳይ ሕጉ ጋብቻን ለማፍረስ ምክንያት አድርጎ በአንቀጽ 75 ስር ካስቀመጣቸው ሶስት መንገዶች ውስጥ በየትኛው አግባብ ጋብቻው ሊፈርስ ይገባል የሚለው ነው። ነገር ግን በሚገርም ሁኔታ ችሎቱ በዚህ ላይ የሰጣቸው ትንተናዎች በጣም ጥቂት ከመሆናቸውም በላይ ጥያቄ እንጂ የሕግ ትችት አይታይባቸውም። በውሳኔው በዚህ ላይ ለተነሳው ጉዳይ ችሎቱ "*ግንኙነቱ <u>በሕጋዊ መንገድ</u> መቋረጡ እስካልተረጋገጠ ድረስ ግንኙነቱ ተቋርጧል ማለት አይቻልም የሚል ጥያቄ መነሳቱ አይቀርም*" ... "*በእውነታ ደረጃ ተለያዩ እንጂ <u>በሕጋዊ መንገድ</u> ስላልተለያዩ ግንኙነቱ ሕጋዊ ውጤት ሊያስከትል*

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[7] የኢ.ፌ.ዲ.ሪ. ሕገ-መንግሥት፣ አዋጅ ቁጥር 1/1987፣ ፌደራል ነጋሪት ጋዜጣ፣ 1ኛ ዓመት ቁጥር 1፣ አንቀጽ 80-3-ሀ።

[8] የፌደራል ፍርድ ቤቶች አዋጅ፣ አዋጅ ቁጥር 25/88፣ ፌደራል ነጋሪት ጋዜጣ፣ 2ኛ ዓመት ቁጥር 13፣ አንቀጽ 10።

[9] የፌደራል ፍርድ ቤቶችን አዋጅ እንደገና ለማሻሻል የወጣ አዋጅ፤ አዋጅ ቁጥር 454/97 አንቀጽ 2(1)።

[10] አመልካች ወ/ሮ አልማዝ ለሼ ተጠሪ አቶ በቀለ በላቸው፤ ከላይ በቁጥር 2 የተጠቀሰ።

ይችላል ለማለትም አስቸጋሪ ይሆናል" እንዲሁም*'' 1ኛ መልስ ሰጭ ከሚች አቶ በየነ መረጭ ጋር ተለያይተው በነበረበት ጊዜ ሌላ ትዳር መስርተው የመኖራቸው ፅውነታ ከአቶ በየነ መረጭ ጋር የነበራቸው ግንኙነት <u>በሕጋዊ መንገድ</u> ተቋርጦ ነበር ለሚለው የጎላ ግምት በቂ መነሻ ሆኖ አግኝተነዋል''* የሚሉ እና መሰል አገላለጾችን ሲጠቀም ይታያል። (ሰረዝ የተጨመረ)

በመሠረቱ ጋብቻ በሕጋዊ መንገድ ተቋርጧል ሊባል የሚችለው በሕግ አግባብ ለተቋቋመ ፍርድ ቤት ጋብቻ ይፍረስልኝ የሚል አቤቱታ ቀርቦ በአንቀጽ 75 ስር ከተመለከቱት ምክንያቶች ውስጥ ጋብቻው እንዲፈርስ ውሳኔ ሲያገኝ ወይም ከተጋቢዎቹ አንዱ ሕይወቱ በማለፉ ወይም መጥፋቱ በፍርድ ቤት ሲታወጅ ብቻ ነው። ጋብቻው የሚፈርሰው በሕጋዊ መንገድ ነው ማለት በሕጉ በግልጽ በተመለከተው መንገድ ወይም አግባብ ብቻ ነው ማለት ስለመሆኑ ለችሎቱ ማስረዳት ለቀባሪው ማርዳት ይሆናል። ችሎቱ በአንድ በኩል በእውነታ መለያየት በሕግ መለያየትን እንደማያስከትል በግልጽ ያመለከተ ሲሆን በእውነታው ዓለም የሚከናወኑ ተግባራት ሕጋዊ ለመባል ሕጉ ባስቀመጠው መንገድ እና ቅደም ተከተል መፈጸም እንደሚኖርባቸው መግለፁ ትክክል ነው። ነገር ግን ችሎቱ በሕገ-መንግሥቱ አንቀጽ 80-3-ሀ፣ በአዋጅ ቁጥር 25/88 አንቀጽ 10 እንዲሁም በአዋጅ ቁጥር 454/97 ሥር ከተሰጠው ስልጣን ውጭ ማስረጃን በመመዘን በደረሰበት ድምዳሜ በሚች እና አመልካቿ መካከል የነበረው የጋብቻ ግንኙነት ሚች ከማረፋቸው በፊት በነበሩት 13 ዓመታት ጀምሮ እንደተቋረጠ አረጋግጧል። በዚህም ፍሬ ነገር በመነሳት በሕጉ ስር ለ13 ዓመታትም ሆነ ከዚህ በላይ ግንኙነት ማቋረጥ ፍርድ ቤት ሳይቀርቡ ጋብቻን በሁኔታዎች ለማፍረስ እንደሚያበቃ ለመወሰን መነሻ የሆነው ሕግ ወይም የሕግ ፍልስፍና ሳያነሳ ግንኙነቱ በህጋዊ መንገድ ተቋርጧል ለማለት "*1ኛ መልስ ሰጭ ከሚች አቶ በየነ መረጭ ጋር ተለያይተው በነበረበት ጊዜ ሌላ ትዳር መስርተው የመኖራቸው ፅውነታ ከአቶ በየነ መረጩ ጋር የነበራቸው ግንኙነት <u>በሕጋዊ መንገድ</u> ተቋርጦ ነበር ለሚለው የጎላ ግምት በቂ መነሻ ሆኖ አግኝተነዋል*"ሲል አትቷል። (ሰረዝ የተጨመረ)

ከዚህ በላይ አስገራሚው ነገር ችሎቱ ግንኙነት በሕጋዊ መንገድ የሚቋረጥበት ሁኔታ የሕግ ወይም የፍሬ ነገር ግምትም እንደሆነ ለመጥቀስ ጥረት ማድረጉ ነው። ጋብቻ ከሶስቱ መንገዶች ውጭ የሚፈረስ ስለመሆኑ በየትኛውም የሕጉ ክፍል በራሱ ወይም የሕግ ወይም የፍሬ ነገር ግምት ነው ተብሎ ያልተመለከተ ሲሆን ከዚህ በፊት ችሎቱ በጉዳዩ ላይ የሰጣቸው ውሳኔዎች አለመኖራቸው እየታወቀ ይህን ያህል ክብደት ለያዘ ጉዳይ አንድም ዐረፍተ-ነገር ትንተና

ሳይሰጡ ማለፍ ትክክል አይደለም። ቀጥለውም በተወሰኑት ሁለት መዝገቦች ስር ችሎቱይህንን ውሳኔ ጠቅሶ ከማለፍ ውጭ በጉዳዩ ላይ ዘርዘር ያለ ትንታኔ አልተሰጠበትም።

2. የሰበር ችሎቱ ውሳኔዎች አመክንዮ

የሰበር ችሎቱ ውሳኔዎችን ምክንያት ከማየታችን በፊት የውሳኔው ጭብጥ ላይ የተወሰነ ማብራሪያ መስጠቱ ተገቢ ነው። ጸሀፊው ያነጋገራቸው አንዳንድ የሕግ ባለሙያዎች የሰበር ችሎቱ ውሳኔ የሚያጠነጥነው ፍቺ መቼ ተፈጽሟል በሚለው የማስረጃ ጉዳይ ላይ እንደሆነ እና ፍርድ ቤት ሳይቀርቡ ፍቺ ይፈጸማል የሚል አለመሆኑን ሃሳባቸውን ገልጸዋል።[11] ነገር ግን በሁለት ምክንያቶች ጉዳዩ የማስረጃ ጉዳይ አለመሆኑን መገንዘብ ይቻላል። አንደኛው ሕጉ በየትኛውም ቦታ ተለያይቶ መኖር ፍቺ እንደተፈጸመ ያስቆጥራል ባለማለቱ ወይም ተለያይቶ መኖር ጋብቻ ከሚፈርስባቸው መንገዶች ውስጥ ባለማስቀመጡ ጉዳዩ የሕግ ድጋፍ የሌለው በመሆኑ ነው። ሁለተኛው ምክንያት ደግሞ ለፍቺ የፍርድ ቤት ውሳኔ አስፈላጊ እና አስገዳጅ በመሆኑ ተጋቢዎቹ ፍርድ ቤት አለመምጣታቸው ከተረጋገጠ መቼ ተለያይተዋል የሚለው ክርክር ፋይዳ ቢስ በመሆኑ ነው።[12] ከዚህም ባለፈ ጸሀፊው ያነጋገራቸው የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ዳኛ የሰበር ችሎቱ የሰጣቸው እነዚህ ውሳኔዎች ትርጉም ወይም ሃሳብ ከማስረጃ ወይም ፍቺ ከተፈጸመበት ጊዜ አንጻር የተያያዘ ሳይሆን ለረጅም ጊዜ ተለያይቶ በመኖር ስለሚፈጸም ፍቺ መሆኑን ገልጸዋል።[13]

ከፍ ሲል እንደተመለከተው የፍቺ ውሳኔ ለመስጠት ሥልጣን የተሰጠው ለፍርድ ቤቶች ብቻ ነው።[14] እዚህ ላይ በግልጽ ሊታይ የሚገባው የተሻሻለው የቤተሰብ ሕግ ቀድሞ ከነበረው የፍትሐ ብሔር ሕግ እንዲሁም ባህላዊ ደንቦች አንጻር በጉዳዩ ላይ ለየት ያለ አቋም መያዙ

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[11] ከፌደራል መጀመሪያ ደረጃ ፍርድ ቤት ፕሬዝዳንት ክቡር አቶ ፉአድ ኪያር እንዲሁም ስማቸው እንዲጠቀስ ያልፈለጉ የሕግ ባለሙያ ከጸሀፊው ጋር በነበራቸው አጭር ውይይት የሰበር ሰሚ ችሎቱ ውሳኔ ጭብጥ ጋብቻው መቼ ተቋርጧል የሚል እንደሆነ ገልጸዋል። በእርግጥ በውሳኔው ሥር በአብዛኛው የተተነተነው ግንኙነቱ መቼ ተቋረጠ እና ይህ ጉዳይ በምን ማስረጃ ተረጋገጠ የሚለው ነው። ነገር ግን በጸሀፊው እምነት ተጋቢዎቹ ፍርድ ቤት ሳይቀርቡ መፋታት እንደማይችሉ በሕግ ተመልክቶ እያለ እና ተጋቢዎቹ ፍርድ ቤት አለመቅረባቸው እየታወቀ መቼ ግንኙነታቸው ተቋረጠ ብሎ ማጣራት የሕግ መሠረት የለውም።

[12] Mehari Redae, *Dissolution of Marriage by Disuse: A Legal Myth*, 22(2) *J. ETH. L.* 43 (2008).

[13] ከፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ዳኛ ክቡር አቶ ኑረዲን ከድር ጋር የተደረገ ውይይት። ይህንን አረዳድ ጸሀፊው እንዲሁም አቶ ፊሊጶስ አይናለምም ይጋሩታል።

[14] የተሻሻለው የፌደራል ቤተሰብ ህግ፣ አዋጅ ቁጥር 213/92፣ አንቀጽ 117።

እምብዛም ለባህል ሥርዓቶች ቅድሚያ የሰጠ እንዳልሆነ አከራካሪ አይደለም። እንዲያውም አንዳንድ ጻህፊያን በፍቅር፣ መተሳሰብ፣ መቻቻል እንዲሁም በታላላቆች ጥረት ሊፈቱ የሚችሉ አብዛኛዎቹ ጋብቻ ነክ ክርክሮች ወደ ፍርድ ቤቶች እንዲመጡ በማድረጉ የተሻሻለው የቤተሰብ ሕግ ተጋቢዎቹን ለበለጠ ጠብ የሚጋብዝ፣ ለሶስተኛ ወገኖች ጣልቃ ገብነት የሚዳርግ፣ የተጋቢዎቹን ምስጢር የሚያወጣ እንዲሁም ለወደፊቱ መስማማትን የማይታሰብ የሚያደርግ እንደሆነ በአጽንኦት ይከራከራሉ።[15] ነገር ግን መታወቅ ያለበት ጉዳይ እነዚህ ሐሳቦች የሚነሱት የቤተሰብ ሕጉ በወቅቱ ከነበረው ነባራዊ ሁኔታ አንጻር ሲታይ የባህል እና የልማድ ሁኔታዎችን ከግምት አለማስገባቱ ያለውን ችግር እና ውጤቱን ከመተቸት አንጻር ሲሆን አንዴ ሕጉ ሥራ ላይ ከዋለ ፍርድ ቤቶች ይህንን ሕግ መተርጎም እና ሥራ ላይ ማዋል ኃላፊነታቸው በመሆኑ ክርክሮቹ የንድፈሃሳብ ብቻ ይሆናሉ ማለት ነው።

በተያዘው ጉዳይ የሰበር ችሎቱ ጋብቻ ከተፈጸመ በኋላ ለረጅም ጊዜ ተለያይቶ መኖር እና በዚህ ጊዜ ውስጥ ሌላ ጋብቻ መስርቶ መኖር ፍርድ ቤት መቅረብ ሳያስፈልግ ጋብቻውን ለማፍረስ በቂ እንደሆነ ለመጀመሪያ ጊዜ ውሳኔ የሰጠው በመ.ቁ. 14290 ነው።[16] ከዚህ በኋላ የተወሰኑት መዝገቦች በአብዛኛው በሃተታቸው "በተመሳሳይ ጉዳይ ላይ ችሎቱ ውሳኔ የሰጠበት በመሆኑ" የሚል አገላለጽን በመጠቀም የሚወሰኑ በመሆናቸው ለአስተማሪነትም ሆነ ለትችት የሚበቁ አይደሉም። በመሆኑም በጸሀፊው እምነት አብዛኛው የጉዳይ ትንተና ማተኮር ያለበት በመ.ቁ. 14290 ላይ ነው።

በዚህ መዝገብ የሰበር ችሎቱ በሕጋዊ መንገድ መፋታት እና በእውነታ መፋታት የሚሉ ሁለት ነጥቦችን በማንሳት የመዝገቡ ፍሬ ነገር የትኛውን እንደሚያረጋግጥ ለማሳየት ሞክሯል። በመሠረቱ በእውነታ መፋታት (de facto divorce) የሚለው ጉዳይ ለሀገራችን የሕግ ሥርዓት ይበልጡንም ለፍርድ ቤቶች አዲስ ጽንሰ ሃሳብ በመሆኑ ችሎቱ በተወሰነ ደረጃ ማብራሪያ መሰጠት ሲገባው ይህንን ሳያደርግ መቅረቱ በጸሀፊው እምነት ውሳኔውን ለመረዳት አዳጋች ያደርገዋል። በመዝገቡ የተሳተፉ ተከራካሪዎች እንዲሁም በጠበቃ የሚወከሉት ተሟጋቾች እንደተጠበቁ ሆነው አብዛኛው የቤተሰብ ችሎት ተከራካሪዎች ስለሕግ እና የሕግ

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[15] ፊሊጶስ አይናለም፣ *ሳይፋቱ (ዲፋክቶ) ፍቺ*፣ 2(1) MIZAN LAW REVIEW (2008).

[16] አመልካች ወ/ሮ አበበች የሸዋሉል ተጠሪዎች እና ወ/ሮ እታገኘሁ አድማሱ፣ ከላይ በቁጥር 1 የተጠቀሰ። እርግጥ ነው ከዚህ በፊት የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመ.ቁ. 20938 ተመሳሳይ ጋብቻ በፍርድ ቤት በፍቺ ባይፈርስም ተጋቢዎቹ ለረጅም ጊዜ ተለያይተው በመኖራቸው እና በዚህም ጊዜ ውስጥ ሌላ ትዳር መመስረታቸው ፍቺ እንደተደረገ ይቆጠራል በሚል ውሳኔ ሰጥቷል። ነገር ግን ከዚህ በኋላ ችሎቱ ይህንን ውሳኔ መነሻ አድርጎ ፍርድ ሲሰጥ አልተስተዋለም ወይም ፍርዱ ሲጠቀስ አይታይም።

ጽንሰሃሳቦች ያላቸው እውቀት እጅጉን ዝቅተኛ በሆነበት ሁኔታ እንዲህ መደረጉ የችግሩን አሳሳቢነት የበለጠ ያጎላዋል። ችሎቱ የሁለቱን ልዩነት እና የሕግ መነሻ በግልጽ ሳያስቀምጥ ለነዚህ ሁለት ዓይነት ፍቺዎች መሠረት የሚሆኑትን ጉዳዮች ያስቀምጣል።

በእውነታ መፋታት (de facto divorce) በሕግ ፊት ከመፋታት (de jure divorce) በተለየ ምን እንደሆነ አቶ ፊሊጶስ አይናለም ሲተረጉሙ በተግባር ወይም በእውነታ የተፋቱ ነገር ግን በሕግ እይታ ያልተፋቱ እንደሆነ ይገልጻሉ።[17] ይህም ሕግ ጋብቻ በፍቺ እንዲቋረጥ ያስቀመጠው መስፈርት እና አሰራር ሳይከበር በተጋቢዎቹ ፍላጎት ብቻ ተለያይተው የሚኖሩበት ሁኔታ ነው።

የሰበር ችሎቱ ተጋቢዎቹ ከአቅም በላይ የሆነ ምክንያት ካልከለከላቸው በስተቀር ለረጅም ዓመት ተለያይተው ከኖሩ፣ በዚህም ጊዜ ሌላ ትዳር መስርተው መኖር ከጀመሩ እና ምንም ዓይነት ግንኙነት ካልነበራቸው ፍርድ ቤት ቀርበው ፍቺ ማስወሰን ሳይጠበቅባቸው ጋብቻው ቀሪ ይሆናል በሚል ምክንያቱን አስቀምጧል። በዚህ ላይ የመጀመሪያው እና ዋናው ችግር የትኛው የሕግ ወይም የአመክንዮ መሠረት ፍርድ ቤት ሳይቀርቡ ጋብቻን ማፍረስ እንደሚደግፍ አለመገለጹ ነው። የሰበር ችሎት እንደማንኛውም ፍርድ ቤት ውሳኔውን መሠረት ማድረግ ያለበት በሕግ፣ በማስረጃ እና በምክንያት ብቻ ነው። ውሳኔ በምን የሕግ አግባብ እንደተወሰነ መግለጽ እንዳለበት በፍትሐ ብሔር ሥነ-ሥርዓት ሕግ[18] የተመለከተ ሲሆን ይህ አስገዳጅ ድንጋጌ ተፈጻሚ መሆን ያለበት በአንድ ተከራካሪ ላይ ውጤት ፈጥሮ ከሚያልፈው ውሳኔ (declarative judgements) ጀምሮ በሀገሪቱ ሁሉም ፍርድ ቤቶች አስገዳጅነት እስካለው የሰበር ችሎት ውሳኔ ይጨምራል። በሁሉም ፍርድ ቤት ላይ አስገዳጅነት ያለው ውሳኔ ደግሞ አስገዳጅነቱን ከሕግ ብቻ ሳይሆን ከምክንያታዊነትም ማግኘት ግድ የሚለው ሲሆን ምክንያት የሌላቸው ውሳኔዎች የተከራካሪን መብት የሚያጣብቡ እንዲሁም የሰበርን አስፈላጊነት ጥያቄ ውስጥ የሚከቱ ይሆናሉ። በሌላም በኩል ምክንያት አለመጥቀስ የሥር ፍርድ ቤቶች የሰበር ሰሚ ችሎት ውሳኔ ችላ በማለት ውሳኔ እንዲሰጡ እና ይህም ተመሳሳይ ጉዳዮች ወደ ሰበር ችሎቱ በገፍ እንዲመጡም ምክንያት ይሆናል።[19]

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[17] ፊሊጶስ አይናለም፣ ከላይ በቁጥር 14 የተጠቀሰ።

[18] በፍትሐብሔር ሥነ-ሥርዓት ሕግ አንቀጽ 182(1) ስር በፍርድ ሀተታ ላይ የሚሰፍሩ ጉዳዮች የተመለከተ ሲሆን በዚህም መሠረት በፍርዱ የተያዘው ጭብጥ እንዴት እንደተወሰነ እና የተወሰነበትን ምክንያት መገለጽ አለበት።

[19] አብርሀም ዮሐንስ፣ የሰበር ውሳኔ አስገዳጅነት፣የሰበር ውሳኔዎች ዳሰሳ፣ የድህረ-ገጽ ጹሁፍ በ https://chilot.me/2015/07fundamental-error-of-law-cassation-bench ማግኘት ይቻላል።

ሁለተኛው ችግር የፌደራሉ የቤተሰብ ሕግ በአንቀጽ 75 ሥር በግልጽ ካስቀመጣቸው ሶስቱ የጋብቻ መፍረሻ መንገዶች ውጭ ሌላ መንገድ ማበጀቱ ነው። በዚህ ድንጋጌ ሥር ሶስት ጋብቻ የሚፈርስባቸው መንገዶች የተመለከቱ ሲሆን እነዚህም ሞት ወይም የመጥፋት ውሳኔ፣ ጋብቻ ለመፈጸም መሟላት ካለባቸው ሁኔታዎች አንዱ በመጣሱ ምክንያት ጋብቻው እንዲፈርስ መወሰን እንዲሁም ፍቺ ናቸው። ድንጋጌው ከሶስቱ መንገዶች ውጭ ጋብቻ እንደሚፈርስ በቀጥታም ሆነ በተዘዋዋሪ መንገድ ያስቀመጠው ነገር የለም። ይህ ከሆነ ደግሞ ከእነዚህ መንገዶች ውጭ ሕግ አውጭው ጋብቻ እንዲፈርስ ፍላጎት የለውም ማለት ነው። በጸሀፊው እምነት ሕጉ ግልጽ ሆኖ እያለ ለረጅም ጊዜ ተለያይቶ በመኖር ፍቺ እንዲፈጸም ማድረግ ለፍርድ ቤቶች ከተሰጠው ሕግ የመተርጎም ሥልጣን በመውጣት ሕግ የማውጣት ስልጣንን እንደመያዝ ሊቆጠር ይችላል። ይሄ ደግሞ በሕገ-መንግሥቱ ከተመለከተው የሥልጣን ክፍፍል ድንጋጌ ጋር የሚጣረስ ነው።

የሰበር ችሎቱ በሰ.መ.ቁ. 102662 ማብራሪያ ሲሰጥ የሚከተለውን አገላለጽ ተጠቅሟል።

> ... ጋብቻው ተቋርጧል ወይንስ አልተቋረጠም የሚለውን ለመወሰን በአመልካች እና ተጠሪ መካከል በጋብቻ ውስጥ የሚጠበቁ ግዴታዎች በአግባቡ ሲተገበሩ ያልነበሩ እና እነዚህን ግዴታዎች ለመወጣት በአመልካች በኩል ያጋጠመው ሁኔታ በሕጉ የተጣሉባቸውን ግዴታቸውን ለመወጣት የማያስችል የነበረ መሆኑ ባልተረጋገጠበት ...[20]

የዚህ አገላለፅ ጭብጥ ተጋቢዎቹ በጋብቻ ውስጥ በተሻሻለው የፌደራል ቤተሰብ ሕግ መሰረት ሊወጧቸው የሚጠበቅባቸውን ግዴታዎች ከአቅማቸው በላይ በሆነ ምክንያት ካልሆነ በስተቀር መወጣት ካልቻሉ ጋብቻው ፈራሽ ይሆናል እንደማለት ነው። በመሠረቱ በቤተሰብ ሕግ ተጋቢዎቹ በጋብቻ ውስጥ እንዲወጡ የሚጠበቅባቸው ግዴታዎች ብዛት ያላቸው ሲሆኑ ሕጉ የጋብቻ ውጤቶች በሚል ያስቀመጣቸውን ግዴታዎች መነሻ በማድረግ በግላዊ ግንኙነታቸው እና የንብረት ግንኙነትን የሚመለከቱ ግዴታዎች ናቸው።[21] በእነዚህ ሁለት ዓይነት ግዴታዎች መሠረትም በጋብቻ ውስጥ ግላዊ ግንኙነትን መሠረት ያደረጉ ግዴታዎች እንዲሁም ንብረትን በተመለከተ የሚጠበቁ ግዴታዎች በሚል ከፍሎ ለማየት ያስችላሉ። የሰበር ችሎቱ ተጋቢዎቹ የሚጠበቅባቸውን ግዴታ ባለመወጣት ሲል የትኛውን ግዴታን አለመወጣት ጋብቻውን ለማፍረስ በቂ እንደሚሆን በግልጽ አላስቀመጠም። ለምሳሌ በተሻሻለው የፌደራል ቤተሰብ

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[20] አመልካች ወ/ሮ አልማዝ ለሼ እና ተጠሪ አቶ በቀለ በላቸው፤ ከላይ በቁጥር 2 የተጠቀሰ።

[21] ጋብቻ በተጋቢዎች ግላዊ ግንኙነት ላይ ስለሚኖረው ውጤት የተሻሻለውን የፌደራል ቤተሰብ ሕግ ምዕራፍ ሶስት ክፍል ሁለት ሥር የተመለከተ ሲሆን በንብረት ረገድ የሚኖረው ውጤት ደግሞ በምዕራፍ ሶስት ክፍል ሶስት ሥር ተመልክቷል።

ሕግ በአንቀጽ 49 ስር ተጋቢዎቹ የመከባበር፣ መተጋገዝና መደጋገፍ ግዴታ፣ በአንቀጽ 50 ስር ቤተሰቡን የመምራት፣ በአንቀጽ 53 ስር አብሮ የመኖር፣ በአንቀጽ 54 ስር የመኖሪያ ስፍራቸውን የመወሰን እንዲሁም በአንቀጽ 56 ስር እንደተመለከተው የመተማመን ግዴታ አለባቸው። የጋብቻ በተጋቢዎቹ ግላዊ ግንኙነት ላይ የሚኖረው ውጤት ተጋቢዎቹ እነዚህ ግዴታዎችን እንዲወጡ ከሆነ የትኛውን ግዴታ ሳይወጡ ሲቀሩ ነው ጋብቻውን ለማፍረስ በቂ ምክንያት የሚሆነው? ለረጅም ዓመታት ሳይተማመኑ ትዳራቸውን የሚመሩ ተጋቢዎች ጋብቻቸው በሁኔታዎች ፈርሷል? ተጋቢዎቹ ሳይተጋገዙ በሚስት ብርታት ብቻ ትዳሩ ቢቀጥል ጋብቻው እንደፈረሰ ይቆጠራል? የሚሉ እና መሰል ጥያቄዎች ከውሳኔው አንድምታ አንጻር አከራካሪ ጉዳዮች ናቸው።

በእርግጥ የሶስቱ የሰበር ችሎቱ ውሳኔዎች የተጋቢዎቹ ለረጅም ጊዜ ተለያይቶ መኖር እና በዚህም ጊዜ ሌላ ጋብቻ መስርቶ መኖር በሁኔታ ጋብቻውን የሚያፈርስ እንደሆነ ያመላክታሉ። ይህም ማለት ተጋቢዎቹ አብረው እንዲኖሩ የሚገደዱበትን የአንቀጽ 53 ንዑስ አንቀጽ 1 ግዴታ ወደ ጎን በመተው በስምምነትም ሆነ ያለስምምነት ለረጅም ጊዜ ተለያይተው ሲኖሩ እና በዚህም ጊዜ ውስጥ ሌላ ጋብቻ መስርትው የሚገኙ ከሆነ የጋብቻ ግንኙነታቸውን ለመቋጨት በቂ ነው ማለት ነው። በመሠረቱ ለረጅም ጊዜ ተለያይቶ የመኖሩ ሁኔታ ሊፈጠር የሚችለው ከሁለት መንገዶች በአንዱ ነው። አንደኛው በስምምነት ሲሆን ሁለተኛው ደግሞ ያለስምምነት ነው። በስምምነት ተለያይቶ መኖርን በተመለከተ ተጋቢዎቹ በፍላጎታቸው ለተወሰነ ጊዜም ሆነ ላልተወሰነ ጊዜ ተለያይተው ለመኖር እንዲችሉ ሕጉ የፈቀደላቸው ሲሆን በመካከሉ ስምምነቱ እንዲቋረጥ ለመጠየቅም እንደሚቻል ተመልክቷል።[22] ይህንን ግዴታ በተመለከተ ክርክር የተነሳ እንደሆነ ክርክሩ እልባት ሊያገኝ የሚችለው በጋብቻ ውስጥ ስላሉ አለመግባባቶች አፈታት በተመለከተው የሕጉ ክፍል ሥር በመሆኑ ብዙ አከራካሪ አይሆንም።[23] ነገር ግን ለተወሰነ ጊዜ ተለያይቶ ለመኖር ወይም ላልተወሰነ ጊዜ ተለያይቶ ለመኖር የተስማሙ ተጋቢዎች በዚያው ሳይገናኙ ቢቀሩ ውጤቱ ምን ሊሆን ይችላል የሚለው ግልጽ ባይሆንም ከሁለቱ አንዱ ግን ይህንን በፈለገ ወቅት ለማቋረጥ እንደሚቻል በአንቀጽ 55(2) ስር መመልከቱ በማንኛውም ወቅት ሊሰራበት የሚችል መብት በመሆኑ አቤቱታ ለፍርድ ቤት በቀረበ ወቅት ተለያይቶ የመኖር ስምምነቱን ለማቋረጥ ይቻላል።

[22] የተሻሻለው የፌደራል የቤተሰብ ሕግ አንቀጽ 55።

[23] ዝኒ ከማሁ፣ አንቀጽ 118።

አከራካሪ የሚሆነው እና በሕግ በግልጽ ውጤቱ ምን ሊሆን እንደሚችል ያልተመለከተው ተጋቢዎቹ ያለስምምነት ለረጅም ጊዜ ተለያይተው የሚኖሩበት እንዲሁም በስምምነት ተለያይተው ስምምነታቸውን ሁለቱም ሳያቋርጡ በዚያው የሚለያዩበት ሁኔታ ነው። ይህም ተጋቢዎቹ በጋብቻ ውስጥ ሲኖሩ ከቆዩ በኋላ ፍርድ ቤት ሳይቀርቡ በራሳቸው ፍላጎት ተለያይተው መኖርን የሚመለከት ጉዳይ ነው። በመሠረቱ በቀደመው የቤተሰብ ሕግ ስር ተጋቢዎቹ አልፈልግሽም አልፈልግህም በሚል መለያየት እንደማይችሉ በግልጽ ተመልክቶ ይገኛል።[24] የዚህም ድንጋጌ አንድምታ ተጋቢዎቹ ፍርድ ቤት እንደአግባብነቱም የቤተሰብ ሽምግልና ጉባዔ ሳይቀርቡ ጋብቻውን አልፈልግም በሚል ተለያይተው መኖር እንደማይችሉ መከልከል ነው። በመሆኑም በነባሩ የቤተሰብ ሕግ እንደዚህ ዓይነት ለረጅም ጊዜ ተለያይቶ በመኖር ጋብቻ ይፈርሳል አይፈርስም የሚለው ጉዳይ በሕግ ምላሽ ያገኘ ነው።

የተሻሻለው የፌደራል የቤተሰብ ሕግ ግን ለዚህ ጉዳይ ቀጥተኛ ወይም በተዘዋዋሪ መንገድ ምላሽ አይሰጥም። እዚህ ጋር በፌደራሉ ቤተሰብ ሕግ አንቀጽ 105 ንዑስ ቁጥር 1 ሥር ጋብቻ ሳይፈጽሙ እንደባልና ሚስት አብረው የሚኖሩ ሰዎች ግንኙነታቸውን በፈለጉ ጊዜ እንዲያቋርጡ ፍቃድ ተሰጥቷቸዋል። ይህ ፍቃድ ጋብቻ ለፈጸሙ ሰዎች የተሰጠ መብት አለመሆኑን ሕጉ ስለጋብቻ በሚደነግጋቸው ክፍሎች ሥር አለማስቀመጡ አንዱ ማሳያ ነው። ሕጉ ግንኙነቱ ውስጥ ባሉ ሰዎች ፍቃድ ብቻ ያለተጨማሪ ሥርዓት በፈለጉ ጊዜ ግንኙነታቸው እንዲያቋርጡ ጋብቻ ሳይፈጽሙ እንደባልና ሚስት አብረው ለሚኖሩ ሰዎች ፍቃድ ሰጥቶ ጋብቻ ውስጥ ላሉ ሰዎች መከልከሉ ወይም በዝምታ ማለፉ የቀድሞውን የቤተሰብ ሕግ መንገድ በተዘዋዋሪ እንደተከተለ እንዲሁም በተሻሻለው የፌደራሉ ቤተሰብ ሕግ ሥር ሁኔታው ተቀባይነት እንደሌለው አመላካች ነው።

ይህ ትርጉም በቂ ካልሆነ ወይም አግባብነት የለውም ቢባል ሕጉ ግልጽ ባልሆነበት ሁኔታ ከሚቀርበው ክርክር አንጻር እየተመለከቱ ምላሽ መስጠት የፍርድ ቤቶች ኃላፊነት ነው። ይህም የፍርድ ቤቶች ተግባር በነጭ እና በጥቁር ቀለማት የተጻፈውን ሕግ ህይወት እንደመስጠት ያለ ተግባር መሆኑ ብዙ አከራካሪ አይደለም። በዚህ ጉዳይ ላይ የፌደራሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አስገዳጅ ውሳኔ ከመስጠቱ በፊት በሁኔታ ጋብቻ

[24] የፍትሐ ብሔር ሕግ አንቀጽ 664።

ስለሚፈርስበት ሁኔታ ፍርድ ቤቶች ሲሰጧቸው የነበሩ ውሳኔዎች የተለያዩ አቋሞችን የሚከተሉ ነበሩ። [25]

እንደሚታወቀው የሰበር ችሎቱ በሚሰጣቸው ውሳኔዎች እንዲያሳካ የሚፈለገው ዓላማ በተለያዩ የሀገሪቱ ፍርድ ቤቶች የሚሰጡ ውሳኔዎች ወጥነት እንዲኖራቸው ማድረግ ነው። ነገር ግን በተያዘው ጉዳይ የሰበር ችሎቱ ውሳኔ ከተሰጠም በኋላ የሚፈለገው ወጥ የሆነ የሕግ ትርጉም ብዙም የተገኘ አይመስልም። በአንድ በኩል አንዳንድ ችሎቶች የሰበር ውሳኔዎቹ ጋብቻው በፍቺ እንዲፈርስ አቤቱታ ሲቀርብ ተጋቢዎቹ ለረጅም ጊዜ ተለያይተው መኖራቸው ከተረጋገጠ ጋብቻው በሁኔታዎች ፈርሷል፤ በዚህም ምክንያት የሚሰጥ የፍቺ ውሳኔ የለም በማለት ውሳኔ ይሰጣሉ። በሌላ በኩል እንዲሁ ጋብቻው በሁኔታዎች ፈርሷል አልፈረሰም የሚለውን በማጣራት እና ጋብቻው በሁኔታዎቹ ፈርሷል የሚባልበት ጊዜ ተገልጾ ከዚህ ጊዜ ጀምሮ ጋብቻው በፍቺ ፈርሷል በሚል ውሳኔ የሚሰጡ ችሎቶችም ይገኛሉ። [26] በመሆኑም የሰበር ችሎቱ ውሳኔ ራሱ በአግባቡ እየተፈጸመ አለመሆኑ ራሱን የቻለ ክፍተት እንደሆነ ለመመልከት ይቻላል። ነገር ግን በጸሀፊው እምነት ውሳኔ መስጠት የፍርድ ቤቶች ኃላፊነት በመሆኑ ተጋቢዎቹ ለረጅም ጊዜ መለያየት አለመለያየታቸውን በማጣራት የፍቺውን ቀን በአግባቡ በመለየት ውሳኔ መስጠት እንጂ የሚሰጥ የፍቺ ውሳኔ የለም ማለት ተገቢ አይመስልም።

በመሠረቱ ጋብቻ ለረጅም ጊዜ ተለያይቶ በመኖር እንዲፈርስ ወይም በፍርድ ቤት የፍቺ አቤቱታ በቀረበ ወቅት እንዲፈርስ ተከራካሪዎች የሚከራከሩት በአብዛኛው ወይም ሙሉ በሙሉ ለማለት በሚቻል መልኩ ከፍቺው ውሳኔ በኋላ ለሚነሳው የፍቺ ውጤት ክርክር ይበልጡንም ለንብረት ክርክር እንዲሁም አባትነትን ለማረጋገጥ መሆኑ አከራካሪ ጉዳይ አይደለም። ምክንያቱም ጋብቻው መቼ ፈረሰ የሚለው የጊዜ ጉዳይ ትርጉም ባለው ውጤት ማለትም በመብት ማግኘት አለማግኘት ላይ ካልተመሰረተ በቀር በራሱ ፋይዳ የማይኖረው

[25] በፍትሐብሔር ሕጉ እንዲሁም በተሻሻለው የቤተሰብ ሕግ መሠረት የተሰጡ ውሳኔዎች ዳሰሳም በአንድ በኩል ጋብቻን ለማፍረስ ሥልጣን ከተሰጣቸው የቤተሰብ ሽምግልና እና ፍርድ ቤቶች ውሳኔ ውጭ ተለያይቶ መኖር ጋብቻውን ያፈርሳዋል የሚሉ ውሳኔዎች ሲኖሩ በአንጻሩም ጋብቻው በፍርድ ቤት ካልፈረሰ በስተቀር ውጤት አይኖረውም የሚሉ ውሳኔዎች ይገኛሉ። በጉዳዩ ላይ ዝርዝር ጉዳዮችን እና የፍርድ ቤቶች ውሳኔዎችን ለመመልከት ፊሊጶስ አይናለም ከላይ በቁጥር 2 የተጠቀሰውን ጽሁፍ ይመልከቱ።

[26] ከፌደራል መጀመሪያ ደረጃ ፍርድ ቤት ፍርድ ቤት ዳኛ ወ/ሮ ህይወት ታደሰ ጋር ህዳር 19 ቀን 2012 ዓ. ም. ከተደረገ ውይይት የተወሰደ ሀሳብ።

በመሆኑ ነው። በመሆኑም ለሕጉ ክፍተት ምላሽ ሲሰጥ ጋብቻው መቼ ፈረሰ የሚለው ጭብጥ ከውጤቱም አንጻር መታየት ይኖርበታል።

ከንብረት ክርክር አንጻር ከታየ ፍቺው ሲወሰን ፍቺ ተፈጽሞበታል የተባለበት ጊዜ ለንብረት ክፍፍል አቤቱታ ለማቅረብ እንደመነሻ የሚያገለግል በመሆኑ ወሳኝነት ይኖረዋል። ይህም ማለት ፍቺ ተፈጽሞበታል ከተባለበት ጊዜ አንስቶ በ10 ዓመት ጊዜ ውስጥ የንብረት ክፍፍል አቤቱታ ካልቀረበ ጥያቄው በይርጋ እንደሚታገድ በሰበር ችሎቱ ተወስኗል።[27] በመሆኑም ጋብቻው እንዲፈርስ ክስ ሲቀርብ ተጋቢዎቹ ከ10 ዓመታት በላይ ሳይገናኙ ተለያይተው መኖር ጀምረው ከሆነ ከፍቺው በኋላ ባል ወይም ሚስት የሚያቀርቡት የንብረት ክፍፍል ክስ በይርጋ ቀሪ የሚሆንበት እድል ይኖራል ማለት ነው። ነገር ግን የሰበር ችሎቱ ውሳኔ ሙሉ በሙሉ የንብረት ክፍፍል ክስ የማቅረብ መብትን የሚከለክል በመሆኑ የይርጋ መቃወሚያ በማይነሳባቸው ክርክሮች ሥር ተጋቢው የጋራ ንብረት የመካፈል እድሉን የሚያሳጣ ይሆናል። ይህ አካሄድ በሰበር ችሎቱ ብቻ ሳይሆን ከፍ ሲል እንደተመለከተው ጋብቻው በሁኔታዎች የፈረሰ በመሆኑ የሚሰጥ የፍቺ ውሳኔ የለም በሚል ውሳኔ በሚሰጡ ችሎቶችም የሚከሰት ይሆናል ማለት ነው።

ሁለተኛው ውሳኔው ከውጤት አንጻር መታየት ካለበት ሊታይ የሚገባው አባትነትን የማረጋገጥ ክርክር ነው። እንደሚታወቀው በጋብቻ ውስጥ ለተወለደ ልጅ አባት ነው የሚባለው ባልየው ነው።[28] ይህ በሕግ ግምት አባትነት የሚታወቅበት መንገድ ሲሆን ዳኝነቱን ያቀረበው ተከራካሪ ልጁ የተወለደው በጋብቻ ውስጥ መሆኑን እስካስረዳ ድረስ ባልየው ያለምንም ተጨማሪ መስፈርት የልጁ አባት ነው ተብሎ ፍርድ ይሰጣል። ከፍ ሲል ከተመለከቱት የሰበር ችሎቱ ውሳኔዎች አንጻር እዚህ ላይ ሊነሳ የሚችለው ጉዳይ ጋብቻው በፍርድ ቤት ፈራሽ ሳይደረግ ተጋቢዎቹ ተለያይተው ሲኖሩ ሌላ ትዳር መስርተው የሚገኙ ከሆነ ነው። ይህ ሁኔታ ሲያጋጥም የመጀመሪያው ጋብቻ ባለመፍረሱ የጸና ሲሆን ባል በፊናው ሌላ ትዳር የመሠረተ፣ እንዲሁም ሚስት በፊናዋ ሌላ ትዳር የመሰረተች ከሆነ እስከሶስት የሚደረሱ ጋብቻዎች ሊኖሩ ይችላሉ። እነዚህ ሶስት ጋብቻዎች ጸንተው ባሉበት ጊዜ ልጅ ሲወለድ አባቱ ማን ነው የሚለውን ለመመለስ በሕጉ መሠረት ከአንድ በላይ ጋብቻ ያለ በመሆኑ ውሳኔውን አስቸጋሪ ያደርገዋል።

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[27] አመልካች ወ/ሮ አልማዝ ለሼ እና ተጠሪ አቶ በቀለ በላቸው፤ ከላይ በቁጥር 2 የተጠቀሰ።

[28] የተሻሻለው የፌደራል የቤተሰብ ሕግ አንቀጽ 126።

ከዚህ መረዳት እንደሚቻለው የፌደራሉ ጠቅላይ ፍርድ ቤት በመዝገቦቹ ሥር የሰጣቸው ውሳኔዎች የሕግ መነሻቸው ያልተጠቀሰ እንዲሁም በፌደራሉ የቤተሰብ ሕግ አንቀጽ 75 ሥር ከተመለከተው የጋብቻ ማፍረሻ መንገዶች የወጣ በመሆኑ አግባብነት ያለው አይደለም። በመሆኑም ጋብቻ በሁኔታዎች ፈርሷል በሚል የሚሰጡ ውሳኔዎች ከሕጉም ሆነ ከምክንያታዊነት የወጡ በመሆናቸው የሚፈጥሯቸው ችግሮች ፈርጀ ብዙ ናቸው።

3. የፌደሬሽን ምክር ቤት ውሳኔ ሕጋዊነት እና ምክንያታዊነት

በማንኛውም የሕግ ጉዳይ ላይ ክርክር ተደርጎ ውሳኔ ከመሰጠቱ በፊት ውሳኔ ሰጪው አካል ጉዳዩን ተመልክቶ ለመወሰን ሥልጣን አለው ወይስ የለውም የሚለው ጭብጥ መታየት ይኖርበታል። በተያዘው ጉዳይም የፌደሬሽን ምክር ቤት በወ/ሮ ቀለሚ ክስ ላይ የሰጠውን የውሳኔ ይዘት ከመመልከታችን በፊት ምክር ቤቱ ውሳኔውን ለመስጠት የሚያስችለው ሥልጣን አለው ወይስ የለውም የሚለውን መመልከት አስፈላጊ ነው። በመሆኑም ምክር ቤቱ የሰበር ችሎቱን ውሳኔ ውድቅ ማድረጉ ከተሰጠው ስልጣን አንጻር ሲመዘን በጉዳዩ ላይ ውሳኔ ለማስተላለፍ ስልጣን አለው ወይስ የለውም የሚለውን በአጭሩ መመልከት ያስፈልጋል።

በፌደራሉ ሕገ-መንግሥት ሥር እንደተመለከተው ሕገ-መንግሥታዊ ክርክሮችን ተመልክቶ ውሳኔ የመስጠት ሥልጣን የፌዴሬሽን ምክር ቤት ነው።[29] ምንም እንኳን የምክር ቤቱ ስልጣን አከራካሪ ባይሆንም ሕገ-መንግሥታዊ ክርክር ማለት ምን ማለት ነው የሚለው ነጥብ አጨቃጫቂ ሲሆን ይስተላል። በዚህ ጉዳይ ብዛት ያላቸው ሃሳቦች የሚነሱ ቢሆንም በዋነኛነት ግን ሁለት ሃሳቦች ተቀባይነት ያገኙ ይመስላሉ። አንደኛው ለምክር ቤቱ የተሰጠው ሥልጣን በሕገ--መንግሥቱ ሥር የሚነሳ ትርጉም ወይም ከሕገ-መንግሥቱ ውጭ ያሉ ሕጎች፤ ውሳኔዎች እንዲሁም ሌሎች አሰራሮች ከሕገ-መንግሥቱ አንጻር ያላቸውን አካሄድ ወይም ተቃርኖ መርምሮ ውሳኔ ላይ መድረስ ነው የሚል መከራከሪያ ነው።[30] በሌላ በኩል ደግሞ ሁሉም ሕገ-መንግሥት ነክ ክርክሮችን በሙሉ ለመመልከት ሥልጣን ተሰጥቶታል የሚል ክርክርም ይነሳል። ነገር ግን አንደኛ በአንቀጽ 83(1) ሥር የተሰጠው ሥልጣን ሕገ-መንግሥትን የመተርጎም እንጂ የፍሬ ጉዳይ ክርክሮችን የማየት ባለመሆኑ፤ ሁለተኛ በአንቀጽ 84(2) ሥር የሕገመንገሥት ትርጉም ማለት የፌደራል ወይም የክልል ሕግ ከሕገ-መንግሥቱ ጋር ይቃረናሉ

[29] የኢ.ፌ.ዲ.ሪ. ሕገ-መንግሥት፤ አንቀጽ 83(1)።

[30] Takele Seboka, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory*, 19(1) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2011).

ወይስ አይቃረኑም የሚል እንደሆነ ለመግለጽ መሞከሩ፤ ሶስተኛ በአንቀጽ 62(1) ሥር በተመለከተው አግባብ ምክር ቤቱ ስልጣኑ በሕገ-መንግሥት ትርጉም ላይ ብቻ የተወሰነ በመሆኑ እንዲሁም እያንዳንዱን በተዘዋዋሪ መንገድ የሕገ-መንግሥት ጉዳይ የሚመለከት ክርክርን ለመዳኘት ስልጣን አለው ማለት በአንቀጽ 79(1) ሥር የዳኝነት ስልጣን ለፍርድ ቤቶች ብቻ ተሰጥቷል የሚለውን ድንጋጌ የሚጥስ በመሆኑ የመጀመሪያው የክርክር መስመር በአብዛኛው መልኩ ተቀባይነት አግኝቷል።[31]

በጉዳዩ ላይ ሰፊ ጥናትና ምርምር ያደረጉት ዶ/ር አሰፋ ፍሰሃ ሕገ-መንግሥቱ ሲወጣ በዚህ ጉዳይ ላይ የነበረው መንፈስ ፍርድ ቤቶችን ከጉዳዩ ማግለል ሳይሆን የህዝብ ተወካዮች ምክር ቤት የሚያወጣቸውን ሕጎች ሕገ-መንግሥታዊነት እንዳይመረምሩ መገደብ ብቻ እንደሆነ ይገልጻሉ።[32] ይህም ማለት አንድ ሕግ ሕገ-መንግሥታዊ ነው ወይስ አይደለም የሚለው ጭብጥ በፍርድ ቤቶች እንዲታይ የአርቃቂዎቹ ፍላጎት ባይሆንም ከዚህ ውጭ ያሉ ክርክሮችን ግን ከፍርድ ቤቶች መውሰድ ተፈጥሯዊ ከሆነው የፍርድ ቤቶች ሥልጣን ጋር የሚጋጭ በመሆኑ ተቀባይነት ያገኘ አይመስልም። በመሆኑም የፌደሬሽን ምክር ቤት ስልጣን የሕጎች ሕገ-መንግሥታዊነት ላይ እንጂ በሌሎች ጉዳዮች ላይ አለመሆኑን በዘርፉ ያሉ ባለሙያዎች ያስረዳሉ።

ከዚህ ጋር በተያያዘ ጸሃፊው የፌደሬሽን ምክር ቤቶች ከሕገ-መንግሥት ትርጉም ባለፈ የፍርድ ቤቶችን ውሳኔ ለመመርመር ወይም በይግባኝ ለመመልከት ሥልጣን ያላቸው ስለመሆኑ የሚዘረዝር ጽሁፍም ሆነ የሌሎች ሀገራት ልምዶችን ለማግኘት አልቻለም።

የፌደሬሽን ምክር ቤት የሰጣቸው ውሳኔዎች ላይ ዳሰሳ ያደረጉት አቶ ሙስጠፋ ናስር በበኩላቸው አብዛኛው ምክር ቤቱ ውሳኔ የሰጠባቸው ጉዳዮች በፍርድ ቤት ሊታዩ የሚገባቸው መሆኑን ጠቅሰው የሕገ-መንግሥት አጣሪ ጉባዔውም ሆነ ምክር ቤቱ ጥሰት ተፈጽሞባቸዋል በሚል የጠቀሷቸው የሕገ-መንግሥት ድንጋጌዎች ፍርድ ቤቶች ሕገ-መንግሥቱን የሚቃረን ውሳኔ ሰጥተዋል ለማለት ሩቅ መሆናቸውን ገልጸዋል።[33]

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[31] ዝኒ ከማሁ።

[32] Assefa Fiseha, *Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience*, 52 NETHERLANDS INTERNATIONAL LAW REVIEW, (May 2005).

[33] Mustefa Nassir, Methods of Constitutional Interpretation in Constitutional Dispute Settlement in Ethiopia (unpublished thesis, Addis Ababa University, School of Law, 2010).

በሌላ በኩል ምክር ቤቱን ለማጠናከር እና ሥልጣን እና ተግባሩን ለመዘርዘር የወጣው አዋጅ አንቀጽ 3 ሥር የምክር ቤቱን ስልጣን እና ተግባር ሲዘረዝር በንዑስ አንቀጽ 1 ሥር ሕገ-መንግሥቱን እንዲተረጉም ሥልጣን ተሰጥቶታል።[34] ከዚህ ባለፈ ግን በዝርዝሩ ውስጥ በፍርድ ቤቶች ወይም በሌሎች አካላት የሚሰጡ ውሳኔዎችን በይግባኝ ተመልክቶ ለመወሰን ስልጣን አልተሰጠውም።

ከዚህ አጠቃላይ የሥልጣን መሠረት ወደ ተያዘው ጉዳይ ስንመለስ የፌደራሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ጋብቻ በሁኔታዎች ሊፈርስ እንደሚችል ውሳኔ የሰጠው በተሻሻለው የፌደራሉ ቤተሰብ ሕግ አንቀጽ 75 ስር ከተመለከተው ሶስት የጋብቻ መፍረሻ መንገዶች ውጭ በመውጣት እንደሆነ ከፍ ሲል ተመልክቷል። ምክር ቤቱ በውሳኔው የሰበር ችሎቱን ውሳኔ ውድቅ ለማድረግ ያሰፈረው ምክንያት ውሳኔው ከሕገ-መንግሥቱ አንቀጽ 50(5)፤ አንቀጽ 55 እንዲሁም አንቀጽ 79(3) ጋር የሚቃረን ነው በማለት ነው።[35] ነገር ግን ሰፊው የውሳኔው ትንተና እንደሚያሳየው ውሳኔው ውድቅ የተደረገው ከቤተሰብ ሕጉ አንቀጽ 75 ውጭ የፍቺ ምክንያት ችሎቱ ተጠቅሟል እንዲሁም ፍቺ በአንቀጽ 82 የፍርድ ቤት ሥልጣን ሆኖ እያለ የሚሰጥ የፍቺ ውሳኔ የለም መባሉ ስህተት ነው በሚል ነው።[36]

የሰበር ሰሚው ችሎት ውሳኔ ጥሷቸዋል የተባሉትን የሕገ-መንግሥት ድንጋጌዎችን ስንመለከት በቅድሚያ የተጠቀሰው አንቀጽ 50 ንዑስ አንቀጽ 5 ነው። ነገር ግን ይህ ድንጋጌ ከጉዳዩ ጋር ምንም ዓይነት ግንኙነት የሌለው እና የሚያትተውም ስለክልል ምክር ቤቶች የሕግ አውጭነት ሥልጣን በመሆኑ እዚህ ላይ መተቸቱ አላስፈላጊ ነው። ሁለተኛው የተነሳው አንቀጽ 55 ስለ ህዝብ ተወካዮች ምክር ቤት ሕግ አውጪነት ሥልጣን ሲሆን በዚህ ድንጋጌ ሥር ሊተች የተፈለገው ጉዳይ የሰበር ችሎቱ ሕግን በመተርጎም ሰበብ በሕጉ ያልተመለከተ አዲስ ሕግ አውጥቷል የሚል ነው። በመሠረቱ በአንቀጽ 75 ጋብቻ የሚፈርስባቸውን ምክንያቶች ሶስት

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[34] የፌዴሬሽን ምክር ቤትን ለማጠናከር እና ሥልጣን እና ተግባሩን ለመዘርዘር የወጣ አዋጅ፣ አዋጅ ቁጥር 251/1993።

[35] አመልካች ወ/ሮ ቀለሟ ተፈራ እና ተጠሪ አቶ ፍሰሀ ደምሴ፣ ከላይ በቁጥር 3 የተጠቀሰ፤ ገጽ 4።

[36] እዚህ ላይ ፍቺን ለመወሰን ሥልጣን የተሰጠው ፍርድ ቤት ስለመሆኑ ምክር ቤቱ መሰረት ያደረገው የተሻሻለውን የፌደራል ቤተሰብ ሕግ አንቀጽ 82 ስለመሆኑ በግልጽ የሚታይ ቢሆንም ድንጋጌው የሚያወራው በአንቀጽ 76(ለ) መሠረት ፍቺ እንዲወሰን ከተጋቢዎቹ አንዱ ወይም ሁለቱ አቤቱታ በሚያቀርቡበት ወቅት ችሎቱ መከተል ስላለበት ሂደት እንጂ ስለ ፍርድ ቤት ሥልጣን የሚደነግግ አይደለም። ፍርድ ቤት በግልጽ ፍቺን ለመወሰን እና ውጤቱን ለማጽደቅም ሆነ ለመወሰን ሥልጣን የተሰጠው በአንቀጽ 117 ሥር ነው። ከዚህ አንጻር ምክር ቤቱ ከጉዳዩ ጋር ግንኙነት የሌለውን አንቀጽ መጥቀሱ የአጻጻፍ ስህተት ነው በሚል ማለፉ የተሻለ ይመስላል።

ብቻ ሲሆኑ የሰበር ችሎቱ ከነዚህ ውጭ አራተኛ የፍቺ መንገድ ያስቀመጠ ስለመሆኑ አጠያያቂ አይመስልም። ሕግ አውጭው ከነዚህ ምክንቶች ውጭ ጋብቻ ሊፈርስ የሚችልበት አማራጭ ባላስቀመጠበት ወይም ዝርዝሮቹን ክፍት አድርጎ ባልተወበት ሁኔታ አዲስ የፍቺ ምክንያት መጠቀም ሕጉን ከመተርጎም ሥልጣን ከፍ ያለ ነው። በሌላ በኩል ግን ሊነሳ የሚችለው ጉዳይ ሕጉ ሲወጣ ሊታሰቡ ያልቻሉ ጉዳዮች ሲነሱ ፍርድ ቤቶች ከነባራዊው ሁኔታ አንጻር እየተመለከቱ መፍትሄ ማበጀት ይኖርባቸዋል የሚል ክርክር ነው። ነገር ግን ለጊዜው የሰበር ችሎቱ ውሳኔ የሕግ ትርጉም ነው ወይስ በትርጉም ሰበብ የተከናወነ አዲስ ሕግ የማውጣት ተግባር የሚለው ራሱን የቻለ ሰፊ ጥናት የሚያስፈልገው ነው። ነገር ግን በጸሀፊው እምነት የፌደራሉ ቤተሰብ ሕግ አንቀጽ 75 እና 117 ሥር የፍቺ መንገዶች እና ፍቺን ለመወሰን ሥልጣን የተሰጠው አካል ግልጽ በመሆናቸውና ሕጉ ግልጽ በሆነበት ሁኔታ ደግሞ መተርጎም አስፈላጊ ባለመሆኑ የሰበር ሰሚ ችሎቱ ውሳኔ የሕግ ትርጉም ነው ለማለት ያስቸግራል።

በመጨረሻም የሰበር ችሎቱ ውሳኔ ይጥሰዋል የተባለው ድንጋጌ የሕገ-መንግሥቱ አንቀጽ 79(3) ነው። ይህ ድንጋጌ የሚያትተው ስለ ዳኞች ነጻነት እንደሆነ በግልጽ መረዳት ይቻላል። ይህም ማለት ዳኞች ከማንም ወገን ጣልቃ ገብነት በጸዳ መልኩ ሥራቸው ሕግን መሠረት ባደረገ መልኩ ብቻ ይሰራሉ ማለት ነው። ይህ ከንዑስ አንቀጽ 2 የሚለየው በዋነኛነት ንዑስ አንቀጽ 2 ስለ ተቋማዊ ነጻነት የሚደነግግ በመሆኑ እና ንዑስ አንቀጽ 3 ደግሞ ስለ ዳኞች ግላዊ ነጻነት (የውሳኔ ነጻነት) የሚደነግግ በመሆኑ ነው። ምክር ቤቱ ዳኞች "በሕግ ካልሆነ በሌላ ሁኔታ አይመሩም" የሚለውን አገላለጽ የተረዳው ሕግ አውጭው ካሰበው ዳኞች ከሌሎች አካላት ከሚመጣ ተጽዕኖ ውጭ ውሳኔ ይሰጣሉ በሚለው አንድምታ ሳይሆን ከሌላ አንጻር እንደሆነ መገንዘብ ይቻላል።

የምክር ቤቱ ሥልጣን እና የሰጠው ውሳኔ መነሻዎች እነዚህ ከሆኑ ሊነሳ የሚገባው ጥያቄ የሰበር ችሎቱ ውሳኔ እነዚህን የሕግ ድንጋጌዎች ይጥሳል ቢባል እንኳን ምክር ቤቱ በምን ሥልጣኑ ውሳኔውን ለመሻር ቻለ? የሚል ነው። በቅድሚያ ምክር ቤቱ በሕገ-መንግሥቱ ሥልጣን እንዲኖረው የታሰበው በህዝብ ተወካዮች ምክር ቤት የሚወጡ ሕጎች ሕገ-መንግሥታዊነትን ለማጣራት በሚል ሲሆን[37] በተያዘው ጉዳይ ግን ይህ ጭብጥ ባልሆነበት ሁኔታ ውሳኔውን ተመልክቶ ውሳኔ መስጠቱ ከሥልጣኑ ውጭ እንደወጣ የሚያመላክት ነው። በሰበር ችሎቱ ውሳኔዎች ሕገ-መንግሥቱን የሚመለከት ክርክር በቀጥታም ሆነ በተዘዋዋሪ አልተነሳም። የፌዴሬሽን ምክር ቤቱ የጠቀሳቸው ዝርዝሮች የሕገ-መንግሥት ጉዳዮች ያስነሳሉ

[37] Assefa Fiseha ከላይ በቁጥር 31 የተጠቀሰ።

ቢባል እንኳን ፍርድ ቤቶች እንዳይመለከቷቸው ባልተከለከሉበት ጭብጥ ላይ በመሆኑ ምክር ቤቱን የሚመለከት አይሆንም። በተዘዋዋሪ ሕገ-መንግሥቱን የሚመለከት ጉዳይ ነው ቢባል እንኳን በዳበረው የሕገ-መንግሥት ፍልስፍና (constitutional jurisprudence) ፍርድ ቤቶች ሕገ-መንግሥቱን የሚመለከት ጉዳይ ሙሉ በሙሉ ማየት አይችሉም የሚል ሕግ ባለመኖሩ እንዲሁም ከተከለከሉት ጭብጥ ውጭ ሌሎችን ለመመልከት የሚችሉ በመሆናቸው ለምክር ቤቱ ጣልቃ ገብነት በር ሊከፍቱ አይችሉም።[38] የምክር ቤቱን ሥልጣን እና ተግባር ለመዘርዘር የወጣው አዋጅም ቢሆን ምክር ቤቱ የፍርድ ቤቶችን ውሳኔ ተመልክቶ ለመሻርም ሆነ ለማጽደቅ ሥልጣን አይሰጠውም። በመሆኑም የፌዴሬሽን ምክር ቤቱ የሰበር ችሎቱን ውሳኔ መርምሮ ውድቅ ለማድረግ በሕገ-መንግሥቱ፤ በመቋቋሚያ አዋጁ እንዲሁም በዳበረው የሕግ ፍልስፍና ሥልጣን ያልተሰጠው በመሆኑ በጉዳዩ ላይ የሰጠው ውሳኔ ከሥልጣን ውጭ (ultra-vires) ነው ሊባል ይችላል።

4. የፌዴሬሽን ምክር ቤቱ ውሳኔ ምክንያታዊነት

የፌደሬሽን ምክር ቤቱ በጉዳዩ ላይ ውሳኔ ከመስጠቱ በፊት አስተያየት እንዲሰጥበት ለሕገ-መንግሥት ጉዳዮች አጣሪ ጉባዔ እንዲሁም ከሕገ-መንግሥት ትርጉምና የማንነት ጉዳዮች ቋሚ ኮሚቴ የቀረበለትን የውሳኔ ሃሳብ ተመልክቷል። የቋሚ ኮሚቴው የውሳኔ ሃሳብ ምን እንደሆነ በውሳኔው ያልተገለጸ ቢሆንም ምክር ቤቱ ውሳኔውን ሲሰጥ የሕገ-መንግሥት ጉዳዮች አጣሪ ጉባዔውን ያቀረበውን የውሳኔ ሀሳብ ከነምክንያቱ የተጠቀመ በመሆኑ የሁለቱንም ምክንያቶች በአንድነት መመልከት ያስፈልጋል።

በቅድሚያ ውሳኔው ሊሻር የቻለው በቤተሰብ ሕጉ አንቀጽ 75 ስር ጋብቻ ከሚፈርስባቸው ምክንያቶች ውጭ ፍርድ ቤት ሌላ መመዘኛ እየፈለገ ጋብቻን ማፍረሱ ተገቢነት የለውም የሚል ነው።[39] ምንም እንኳን ምክንያቱ የቀረበበት አገላለጽ ትክክለኛ እና ጨዋነትን የተላበሰ ባይሆንም[40] ሊባል የተፈለገው ከሶስቱ የጋብቻ መፍረሻ ምክንያቶች ውጭ ፍርድ ቤቶች

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[38] Yemane Kassa, The Judiciary and Its Interpretive Power in Ethiopia: A Case Study of the Ethiopian Revenues and Customs Authority (LLM Thesis, Addis Ababa University, 2011) available at https://chilot.me/wp-content/uploads/2013/01/the-judiciary-and-its-interpretive-power-in-ethiopia.pdf page 65.

[39] አመልካች ወ/ሮ ቀለሟ ተፈራ እና ተጠሪ አቶ ፍሰሀ ደምሴ፣ ከላይ በቁጥር 3 የተጠቀሰ፣ ገጽ 4።

[40] ምክር ቤቱ "ፍርድ ቤት ሌላ መመዘኛ እየፈለገ ጋብቻን ማፍረሱ ተገቢነት የለውም" ከሚል ይልቅ "በቤተሰብ ህጉ አንቀጽ 75 ስር ጋብቻ ከሚፈርስባቸው ምክንያቶች ውጭ የሰበር ሰሚ ችሎቱ ጋብቻውን ፈራሽ ማድረጉ ህጋዊ አይደለም" ቢል የተሻለ ነበር።

ሊያበጁ አይችሉም የሚል ነው። ከላይ በዝርዝር እንደተመለከተው የሰበር ችሎቱ ከሕጉ ውጭ በመውጣት የሰጠው ውሳኔ በመሆኑ አመክንዮው ትክክለኛ እና ህጋዊም ነው።

ሌላው የቀረበው ምክንያት ውሳኔው ተጋቢዎች በቸልተኝነት ጋብቻቸውን ከፍርድ ቤት እውቅና ውጭ በፍቺ መልክ እንዲያቋርጡ መንገድ የሚከፍት እንዲሁም ህገ-ወጥነትን ያበረታታል የሚል ነው።[41] እዚህ ላይ የቤተሰብ ሕጉ ሲወጣ ጋብቻ በሶስት መንገዶች እንዲፈጸም እድል ተሰጥቶ ለምን በፍርድ ቤት ብቻ እንዲፈርስ ተደረገ የሚል ክርክር ይነሳል። ምን ያህሉ የኢትዮጵያ ጎብረተሰብ ነው በፍትሐ ብሔር ሕግና በተሻሻለው የቤተሰብ ሕግ ድንጋጌዎች መሠረት ብቻ ፍቺ ሲፈጽም የቆየው የሚል ጥያቄም ተነስቶ ነበር።[42] እንዳውም በዚህ ላይ አስተያየታቸውን የሰጡት ዶ ዶ/ር ኤሊያስ ኑር በአንድ ወቅት የሚከተለውን ተናግረዋል።

> *ለጋብቻ አፈጻጸም ሥርዓት ሶስት መንገዶች(በሮች) ተፈቅደውለት እያለ ለፍቺ ስርዓቱስ ለምንድነው አንድና አንድ መንገድ ማለትም በፍርድ ቤት ብቻ እንዲከናወን የሚደረገው?*[43]

የፌደራሉ የቤተሰብ ሕግ ሲወጣ ያለው ክፍተት እንደተጠበቀ ሆኖ የምክር ቤቱ ይኼኛው ምክንያት ጋብቻን በፍቺ ለማፍረስ ሥልጣን ተሰጥቷቸው እያለ ፍቺ አንወስንም የሚሉ ፍርድ ቤቶች ተጋቢዎቹ ግንኙነታቸውን በራሳቸው እንዲያቋርጡ በማድረግ ሕገ-ወጥነትን ያበረታታል የሚል ትችት ቀርቦበታል። ይህ ምክንያት ላይ ላዩን ሲታይ ትክክለኛ ይመስላል። ምክንያቱም ሕግ ከደነገገው መውጣት ሕገ-ወጥነት ስለሚሆን ነው። ነገር ግን ጠለቅ ብሎ ለተመለከተው ፍርድ ቤት እስካላፈረሰው ግንኙነቱ ቀጥሏል በሚል በዚያው የሚቀር ተጋቢ ነው ወይስ ፍርድ ቤት ጋብቻውን ባለማፍረሱ ንብረት የመጠየቅ መብቴ በይርጋ ቀሪ ይሆናል የሚል ተጋቢ ነው የፍቺ ጥያቄውን ወደ ፍርድ ቤት ለመውሰድ ጥረት የሚያደርገው የሚለውን ለተመለከተ ምላሹ በተቃራኒው እንደሆነ ለመረዳት አያዳግትም። በምክር ቤቱ ውሳኔ እንደተመለከተው የፍቺ ጥያቄ የሚቀርበው ንብረት ለመጠየቅ እንደሆነ የሚታወቅ በመሆኑ ፍርድ ቤት ባለመምጣቱ የሰበር ችሎቱ በሰጠው ውሳኔ አግባብ መብቱን የሚያጣ መሆኑን ስለሚረዳ ወደ ፍርድ ቤት መቅረብን ያበረታታል። በመሆኑም ምንም እንኳን የሰበር ችሎቱ ውሳኔ ከሕጉ ውጭ ቢሆንም ተጋቢዎች ንብረት የመካፈል መብታቸውን በይርጋ እንዳያጡ

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[41] አመልካች ወ/ሮ ቀለሚ ተፈራ እና ተጠሪ አቶ ፍሰሀ ደምሴ፣ ከላይ በቁጥር 3 የተጠቀሰ፤ ገጽ 3።

[42] ፊሊጶስ አይናለም፣ ከላይ በቁጥር 14 የተጠቀሰ።

[43] ፊሊጶስ አይናለም፣ ከላይ በቁጥር 14 የተጠቀሰ፤ የግርጌ ማስተወሻ ቁጥር 50።

ጋብቻቸውን በወቅቱ ፍርድ ቤት ቀርበው እንዲያስፈርሱ የሚያደርግ እንጂ ምክር ቤቱ እንዳተተው ሕገ-ወጥነትን የሚያበረታታ አይሆንም።

በእርግጥ የምክር ቤቱ መሠረታዊ የሆነ ጥያቄ ሊነሳበት የሚችለው ተጋቢዎች ለየትኛውም ጊዜ ያህል ተለያይተው ቢኖሩ ፍቺ እንዲወሰን ለፍርድ ቤት አቤቱታቸውን ማቅረብ ይችላሉ? ማለትም ምን ያህል ዓመት ተለያይተው የኖሩ ተጋቢዎች ናቸው የፍቺ አቤቱታ ለማቅረብ የሚችሉት? 10 ዓመት? 20 ዓመት? 40 ዓመት? ወይስ ከተጋቢዎቹ አንዱ ህይወቱ እስካላለፈና በዚህም ጋብቻው በሞት እስካልፈረሰ ድረስ? አብዛኛዎቹ የፍትሐብሔር መብቶች በተወሰነ የጊዜ ገደብ ውስጥ ክስ ቀርቦ ዳኝነት ካልተጠየቀባቸው መብቶቹን መነሻ በማድረግ በፍርድ ቤቶች ክስ ከማቅረብ በይርጋ ይታገዳሉ። ከዚህ አንጻር ምክር ቤቱ የሰጠው ውሳኔ ተጋቢዎች መብታቸውን በወቅቱ እንዳይጠይቁ በማድረግ ዳተኝነትን የሚያበረታታ መሆኑ ግልጽ ነው። ምክር ቤቱ የሰበር ችሎቱን ሕገ-ወጥነትን የሚያበረታታ ውሳኔ ሰጥቷል በሚል የሚወቅሰው በዚህ መልኩ ከፍ ያለ ማህበራዊ ቀውስ ሊያስከትል የሚችል ውሳኔ በመስጠት ነው። በዚህ ላይ ደግሞ ይህንን ዓይነት ማህበራዊ ቀውስ ሊያመጣ የሚችል ውሳኔ ለመስጠት ከሥልጣን ውጭ የተሄደበት ርቀት ምክር ቤቱ ቆም ብሎ ሊያስብበት እንደሚገባ አመላካች ነው።

ከዚህ ጋር በተያያዘ የምክር ቤቱ ውሳኔ ነባራዊውን የሀገሪቱን ሁኔታ ያገናዘበ አይመስልም። ለዚህም መነሻ የሚሆነው አብዛኛው የሀገሪቱ ዜጋ የሚኖረው መደበኛ ፍርድ ቤት ለማግኘት እድል በማይኖርበት አካባቢ ነው። ተጋቢዎች ጋብቻቸውን ለማፍረስ ወደ ፍርድ ቤት ለመምጣት እድሉ ካለመኖሩም ባለፈ እድል አላቸው ቢባል እንኳን ፍርድ ቤት በመምጣትም ሆነ ባለመምጣት ሊገኝ ወይም ሊታጣ የሚችለውን ውጤት ካለማወቅ መነሻነት ፍቺን ለማስወሰን ወደ ፍርድ ቤት የማምራት ተነሳሽነት በሚፈለገው ደረጃ እንዳልሆነ አጠያያቂ አይደለም።[44]

በመጨረሻም ምክር ቤቱ የሰበር ችሎቱን ውሳኔ የተቸው ሕገ-መንግሥቱ ያረጋገጠውን የሴቶች እና ህጻናት መብትን አያስከብርም በማለት ነው። የዚህም መነሻ በሕገ-መንግሥቱ አንቀጽ 34 እና 35 ስር የተመለከተው ሴቶች በጋብቻ አፈጻጸም፣ በጋብቻ ዘመንና በፍቺ ወቅት ከወንዶች

[44] አቶ ፊሊጶስ አይናለም የኼን በተመለከተ በጥያቄ መልክ ሲያነሱ በመደበኛ ፍርድ ቤቶች ፍቺና ውጤቱን ለማስወሰን የገጠር ነዋሪ ልማዶችና ግንዛቤስ የቱን ያህል ነው? ፍርድ ቤቶች በቦታና በጊዜ በቀላሉ ተደራሽ ናቸው? በፍርድ ቤት ተሟጋች በመሆንስ ጉዳይ የህብረተሰቡ አመለካከትስ ምን ይመስላል? ከሕጉ ሃሳብስ ጋር ይጄዳል? ሕጉስ እየተፈጸመ ነው? በማለት ይጠይቃሉ።

እኩል መብት አላቸው እንዲሁም በፍቺ ወቅት የልጆችን መብት የሚያስጠብቁ ሕጎች ይወጣሉ በሚል የተደነገገው የሕገ-መንግሥቱ ክፍል ነው። በመሠረቱ በመዝገቡ ለምክር ቤቱ ቅሬታቸውን ያቀረቡት አመልካች ሴት በመሆናቸው ጉዳዩን ከሴቶች መብት አንጻር መመልከቱ ውሳኔውን ሩቅ አዳሪ አያደርገውም። ምክንያቱም መተቸት ካለበት በውሳኔው መብታቸውን ሊያጡ ስለሚገባቸው ተጋቢዎች በሙሉ እንጂ ስለሴቶች ብቻ ባለመሆኑ ነው። በመዝገቡ ቅሬታ ያቀረቡት ተጠሪ ቢሆኑ ምክር ቤቱ ይህንን አመክንዮ ላይጠቀመው ነው? ወይስ ወንዶችም በፍቺ ወቅት ከሴቶች እኩል መብት አላቸው በሚለው ምክንያት ሊተካ ይችል ነበር? የሚለው ጥያቄ ከጾታ ልዩነት አንጻር ብቻ ታይቶ ሊታለፍ የሚገባው ጉዳይ አይመስልም። ከዚህ ይልቅ ምክር ቤቱ በጠቅላላ አገላለጽ የሰበር ችሎቱ ውሳኔ ተጋቢዎቹ ንብረት በማፍራት ረገድ ያላቸውን የእኩልነት መብት እንዲጣስ እድል ይፈጥራል በሚል ተችቶ ቢያልፍ የተሻለ ይመስል ነበር። እንዲሁም ሁሉንም ጉዳዮች ከሕገ-መንግሥቱ ጋር ለማገናኘት የተሄደበት መንገድ ረዘም ያለ ነው። እንደሚታወቀው ሕገ-መንግሥት የሕጎች ሁሉ የበላይ በመሆኑ መሠረታዊ ሰብዓአና ዲሞክራሲያዊ መብቶችን የያዘ በመሆኑ እንዲሁም ዝርዝሩ በበታችአዋጆች፣ ደንቦች እንዲሁም ሌሎች ሕጎች የሚደነገግ በመሆኑ በዝርዝር ሕጎች ላይ የሚነሱ ክርክሮች ሕገ-መንግሥታዊ ጽንሰ-ሀሳብ ወይም መነሻ ይኖራቸዋል። በዚህ አካሄድ በጸሀፊው እምነት የትኛውንም ክርክር እና ጉዳይ ሕገ-መንግሥታዊ ማድረግ ከባድ ባለመሆኑ ሕገ-መንግሥታዊ ክርክሮች መለየት እና በነዛም ላይ ትኩረት ሰጥቶ መወሰን ተገቢ እና ሕጋዊም ነው።

በአጠቃላይ የፌዴሬሽን ምክር ቤቱ በውሳኔው ካነሳቸው አመክንዮዎች ሰበር ችሎቱ ከሕጉ ግልጽ ንባብ ውጭ መውጣቱን በተመለከተ ካነሳው ውጭ ሌሎቹ ውሳኔውን ለመሻር የሚያበቁ በቂ ምክንያቶች አይደሉም። ነገር ግን ምክር ቤቱ ውሳኔውን ለመስጠት ሥልጣን የሌለው ቢሆንም ይህ ታልፎ በፍሬ ጉዳዩ ላይ ከታየ ከተሻሻለው የፌደራል ቤተሰብ ሕግ አንቀጽ 75 ውጭ አዲስ የፍቺ መንገድ መጠቀም በሚል የቀረበው ምክንያት ብቻውን ውሳኔውን ለመሻር በቂ እና ምክንያታዊ እንደሆነ ጸሀፊው ያምናል።

ማጠቃለያ እና የመፍትሄ ሃሳቦች

በዚህ አጭር ጽሁፍ ለመመልከት እንደተሞከረው የፌደራሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ጋብቻ በፍቺ እንዲፈርስ በፍርድ ቤት የተሰጠ ውሳኔ ባይኖርም ተጋቢዎቹ ለረጅም ጊዜ ተለያይተው በመኖራቸው እና በዚህም ወቅት ሌላ ትዳር መመስረታቸው ጋብቻውን

በሁኔታዎች ለማፍረስ የሚያበቃ ምክንያት እንደሆነ የሰጠው ውሳኔ ጋብቻ እንዲፈርስባቸው ሕግ አውጭው ካስቀመጣቸው ሶስት መንገዶች ውጭ ነው። ምንም እንኳን ችሎቱ ውሳኔው ላይ ሊደረስ የቻለው ተጋቢዎቹ በእውነታው ለረጅም ጊዜ መለያየታቸው ግንኙነታቸው እንደተቋረጠ ያስረዳል በሚል የሕግ ሳይሆን የእውነታ መሠረት ላይ በመመርኮዝ ቢሆንም ይህ ውሳኔ በግልጽ ከሕግ ውጭ መሆኑን መረዳት ብዙ አዳጋች አይሆንም።

በሌላ በኩል የፌደሬሽን ምክር ቤቱ ፍርድ ቤቶች አንድን ሕግ በአግባቡ ተርጉመዋል ወይስ አልተረጎሙም ወይም ሕግን በአግባቡ ሥራ ላይ አውለዋል ወይስ አላዋሉም በሚል ለመዳኘት በሕገ-መንግሥቱም ሆነ በማቋቋሚያ አዋጁ ሥልጣን አልተሰጠውም። በመሆኑም በተያዘው ጉዳይ ጋብቻ ስለሚፈርስበት አግባብ የሰበር ችሎቱን ውሳኔ ተመልክቶ ውሳኔ የሰጠው ከሥልጣኑ ውጭ በመውጣት ነው። ይህ አካሄድ የሕግ መሠረት የሌለው፣ የፍርድ ቤቶችን ሥልጣን የሚጋፋ እና የዳኝነት ሥልጣን ለፍርድ ቤቶች ብቻ ተሰጥቷል የሚለውን የሕገ-መንግሥት ድንጋጌ የሚጥስ በመሆኑ ሊተችና ሊነቀፍ ይገባዋል።[45] መሬት ላይ ካለው ነባራዊ ሁኔታ አንጻርም ከታየ እጅግ ብዛት ያላቸው የሰበር ሰሚው ችሎት ውሳኔዎች ለምክር ቤቱ ለመቅረብ ወረፋ በመጠባበቅ ላይ የሚገኙ በመሆናቸው ምክር ቤቱ ራሱን የቻለ የይግባኝ አካል ወደ መሆን ደረጃ የደረሰ በመሆኑ የምክር ቤቱ አካሄድ ለመደበኛ ፍርድ ቤቶች ህልውና እና ነጻነት ራሱን የቻለ ፈተና የሚጋርጥ ነው። ቀድሞውንም በተለያዩ ውስጣዊ እና ውጫዊ ምክንያቶች አቅማቸውን እና የሕዝብ አመኔታቸውን ላጡት ፍርድ ቤቶች ምክር ቤቱ እየተከተለ ያለው መንገድ ጉዳቱ ከፍ ያለ ነው። በጸሀፊው እምነት በጉዳዩ ላይ የሕግ ባለሙያዎች፣ ዳኞች እንዲሁም የምክር ቤቱ ተወካዮች ባሉበት ሰፊ ክርክር እና ውይይት ተደርጎበት ምክር ቤቱ እየሄደበት ያለው መንገድ ፈር ካልተበጀለት በቀር ለፍርድ ቤቶች ሥልጣን ይልቁንም ህልውና አደገኛ መሆኑ ግልጽ ነው።

መፍትሄውን በተመለከተ በሁለት መንገድ፣ ማለትም ሕግ በማውጣት እና ሕግ ከማውጣት በመለስ ያሉ መፍትሄዎች በሚል መመልከት ይቻላል። የመጀመሪያውን በተመለከተ ጋብቻን በሁኔታዎች ማፍረስ ስለሚቻልበት መንገድ የሕግ ማሻሻያ በማድረግ መመለስ ይቻላል። ይህም ማለት ከሶስቱ የጋብቻ ማፍረሻ ምክንያቶች በተጨማሪ ጋብቻ በሁኔታ ስለሚፈርስበት አግባብ በግልጽ አማራጭ በማስቀመጥ ምላሽ ሊያገኝ ይችላል። ማሻሻያውም መቼ እና እንዴት ጋብቻ በሁኔታ እንደሚፈርስ እንዲሁም ስለ ማስረጃ አቀራረብ የሚመለከት ከሆነ አከራካሪውን ጉዳይ በመመለስ ረገድ ትልቅ አስተዋጽኦ ይኖረዋል። በጸሀፊው እምነት ጋብቻን

[45] የኢ.ፌ.ዲ.ሪ. ሕገ-መንግስት አንቀጽ 79(1)።

ለማፍረስ ለፍርድ ቤት ሥልጣን መሰጠቱ ተገቢ ሲሆን ከዚህ ውጭ ግን ተጋቢዎች በራሳቸው ፍላጎት ጋብቻቸውን ጥለው በሚሄዱበት ወቅት ሊፈጠር የሚችለውን ችግር መፍትሄ ለመስጠት ተጋቢዎቹ በእውነታው የተለያዩ እንደሆነ ንብረትንም ሆነ ሌሎች የፍቺ ውጤቶች በምን ያህል ጊዜ መጠየቅ እንዳለባቸው ግልጽ የይርጋ ድንጋጌ ማስቀመጥ ይቻላል። ለዚህም ይርጋ መነሻ ጊዜ ተደርጎ ሊወሰድ የሚገባው ጋብቻው በፍቺ እንዲፈርስ የተወሰነበት ጊዜ ሳይሆን ተጋቢዎቹ ተለያይተው መኖር የጀመሩበት ጊዜ መሆን ይኖርበታል። ምክንያቱም የይርጋ መነሻ የሚሆነው መብቱን መጠየቅ ከሚቻልበት ጊዜ ጀምሮ መሆን ያለበት በመሆኑ ነው።[46]

በጉዳዩ ላይ የሕግ ማሻሻያ ከማውጣት በመለስ ያሉ መፍትሄዎችን በተመለከተ ቀዳሚው እና ዋነኛው ጉዳይ ስለ ሁኔታው ግንዛቤ በማስጨበጥ ችግሩ እንዳይፈጠር መከላከል ሊሆን ይገባዋል። ምክንያቱም ስለ ውሳኔዎቹ ከመነጋገር በላይ ከፍ ያለ ውጤት ሊያመጣ የሚችለው በሕጉ አግባብ ተጋቢዎች ፍቺያቸውን በፍርድ ቤት እንዲፈጽሙ ትምህርት መስጠት በመሆኑ ነው።[47]

ፍርድ ቤቶች በጉዳዩ ላይ ሊከተሉ የሚገባውን አካሄድ በተመለከተ ምንም እንኳን የፌዴሬሽን ምክር ቤቱ ውሳኔ ከሥልጣኑ ውጭ የተሰጠ ቢሆንም በአዋጅ ቁጥር 251/93 አንቀጽ 56 መሠረት የመጨረሻ እና አስገዳጅ በመሆኑ ተፈጻሚ ሊደረግ ይገባል። ይህም ማለት ፍርድ ቤቶች ተጋቢዎች ለረጅም ጊዜ ተለያይተው እና ሌላ ጋብቻ መስርተውም ቢቀርቡ የፍቺ ጥያቄውን ተቀብሎ ፍቺ መወሰን ይኖርባቸዋል። ፍቺ ተፈጽሟል የሚባልበትም ጊዜ ውሳኔው ከተሰጠበት ጊዜ ጀምሮ መሆን ይኖርበታል።

ለዚህ መፍትሔ ሊሆን የሚችለው የፍቺ አቤቱታ በቀረበ ጊዜ ግራቀኙን በማከራከር እንዲሁም በቤተሰብ ሕጉ ሥር በተመለከተው አግባብ ግራቀኙ ለማቀራረብ ጥረት በማድረግ ውጤት ላይ ካልተደረሰ ውሳኔው ከተሰጠበት ጊዜ ጀምሮ ጋብቻው በፍቺ ፍርሷል በሚል ውሳኔ መስጠት ነው። በዚህ አግባብ በአንድ በኩል ፍርድ ቤት ብቻ ጋብቻን ለማፍረስ ስልጣን አለው የሚለውን የአንቀጽ 117 ድንጋጌ ማስጠበቅ ይቻላል። አንዲሁም ጋብቻ የሚፈርስባቸው ብቸኛ ምክንያቶች ናቸው ተብለው በአንቀጽ 75 ስር ከተመለከቱት ሶስት መንገዶች መውጣት ሳያስፈልግ መወሰን ይቻላል። ከውሳኔው በኋላ የንብረት ክርክር የተነሳ

[46] የፍትሐብሔር ሕግ አንቀጽ 1846።

[47] ይህንን ሃሳብ በጉዳዩ ላይ በዝርዝር የጻፉት አቶ ፊሊጶስ አይናለምም በቀዳሚነት በመፍትሄነት ያነሱታል።

እንደሆነ ንብረቱ ተለያይተው በኖሩበት ወቅት የተፈራ መሆኑ ከተረጋገጠ በመርህ ደረጃ ንብረቱን ያፈራው ተጋቢ የግል ንብረት ነው ተብሎ መወሰን ያለበት ሲሆን[48] ለንብረቱ መፈራት ተጋቢዎቹ በአንድም ሆነ በሌላ መንገድ አስተዋጽኦ ነበራቸው የሚል ክርክር የተነሳ ከሆነም ተጋቢዎቹ ለንብረቱ መፈራት በጋራ አስተዋጽኦ አድርገዋል ወይስ በአንደኛው ተጋቢ ጥረት ብቻ ንብረቱ ተፈርቷል የሚለውን በማጣራት የጋራ አስተዋጽኦ ከተገኘ ከግል ጥረቱ አንጻር ያለው ብልጫ መሰረታዊ ነው ወይስ አይደለም የሚለውን በመለየት የንብረት ክርክሩን እልባት መስጠት ይቻላል። [49]

እዚህ ላይ አስተዋጽኦ ሲባል ጠበብ ባለ መልኩ ብቻ በመረዳት ልክ በንግድ ማህበራት ሥር እንደሚጠበቀው ድርሻን በዓይነት፣ በዕዳ፣ በክህሎት ወይም በገንዘብ በመወጣት ብቻ ሳይወሰን ሰፋ ባለ እና አብዛኛውን የሀገራቱ ሴት ባለትዳሮችን ከግምት ባስገባ መልኩ ንብረቱ በተፈራ ወቅት አብሮ በመኖር እና ትዳሩን በመምራት የትዳሩን እና የንብረቱን ህልውና በማስቀጠልም መልኩ ሊወሰድ ይገባል። በዚህ ዓይነት መንገድ በአንድ በኩል በቤተሰብ ሕጉ አንቀጽ 75 ሥር የተመለከቱትን ዝግ የጋብቻ መፍረሻ መንገዶች መከተል እንዲሁም የፍቺ ውጤት የሆነውን የንብረት ክፍፍልም በአግባቡ ማስተናገድ ይቻላል። በሌላ በኩል አባትነትን ከማረጋገጥ ጋር ተያይዘው ለሚነሱ ክርክሮች የየክርክሩ ልዩ ሁኔታ ከማስረጃው አንጻር እየታየ ምላሽ ማግኘት የሚገባው መሆኑ እንደተጠበቀ ሆኖ በመርህ ደረጃ ግን በፌደራሉ ቤተሰብ ሕግ አንቀጽ 148 መሠረት ውሳኔ መስጠት ይቻላል። [50]

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[48] አመልካች ወ/ሮ ሰኒያ ሴሻ ተጠሪ እነ ወ/ሮ በላይነሽ ማቴቦ፤ <u>የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ውሳኔዎች</u>፤ ቅጽ 11 መ.ቁ. 43988 መስከረም 23 ቀን 2003ዓ.ም.።

[49] አመልካች ወ/ሮ ዙሪያሽ ተገኝ እና ተጠሪ ወ/ሮ የሺ ውድዬ፤ <u>የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ውሳኔዎች</u>፤ ቅጽ 17 መ.ቁ. 94952 መስከረም 30 ቀን 2007 ዓ.ም።

[50] የፌደራሉ ቤተሰብ ሕግ አንቀጽ 147 በሕጉ አግባብ በተመለከተው መሰረት ልጁ ከአንድ በላይ አባቶች የሚኖሩት ከሆነ አባት የሚባሉት ሰዎች በመካከላቸው ስምምነት በማድረግ ለጉዳዩ እልባት መስጠት ይችላሉ። ይህ ስምምነት ከሌለ ግን ሕጉ በአንቀጽ 148 መሰረት ጋብቻ ሳይፈጸም እንደባልና ሚስት ከሚኖር ሰው ይልቅ በጋብቻ ውስጥ ለሚኖር ሰው እንዲሁም ልጁ በሚጸነስበት ወቅት ካለው ባል ወይም አብሮ ኗሪ ልጁ ሲወለድ ያለው ባል ወይም አብሮ ኗሪ የልጁ አባት እንዲሆን ቅድሚያ ይሰጣል። በመሆኑም ልጁ ሲወለድ ከልጁ እናት ጋር የሚኖረው ባል የልጁ አባት ይሆናል ማለት ነው።

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♠ Prepared by Yehualashet Tamiru & Kokebe Wolde.

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