Haramaya Law Review

Vol. 7 2018 ISSN-2227-2178 (P) & 2305-3739 (E)

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HARAMAYA LAW REVIEW: POLICIES AND SUBMISSION GUIDELINES (2nd Edn., 2016)

Haramaya University College of Law

HARAMAYA LAW REVIEW

VOL. 7 2018 ISSN-2227-2178 (P) & 2305-3739 (E)

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HARAMAYA LAW REVIEW

VOL. 7 2018 ISSN-2227-2178 (P) & 2305-3739 (E)

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HARAMAYA LAW REVIEW
(HLR)

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HARAMAYA LAW REVIEW *Vol.* 7 (2018) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this Article: Bebizuh Mulugeta Menkir, *Conflict of Laws in Delegation of Criminal Jurisdiction Between Ethiopia and Other Countries: Choice of Applicable Criminal Law,* HARAMAYA LAW REVIEW 7 (2018):1-21

CONFLICT OF LAWS IN DELEGATION OF CRIMINAL JURISDICTION BETWEEN ETHIOPIA AND OTHER COUNTRIES: CHOICE OF APPLICABLE CRIMINAL LAW

Bebizuh Mulugeta Menkir[*]

Abstract

As a sovereign state, Ethiopia can exercise its jurisdiction on criminal cases based on principles recognized under its Criminal Code and International Law. At times, Ethiopia may not be practically able to exercise its jurisdiction over the offender when, for instance, someone after committing the crime absconds to other state. If there is no possibility of extradition of such suspect, Ethiopia may delegate the exercise of its jurisdiction to the country of refuge so that the offender will be tried in the latter's court. In some other cases, when someone absconds and sought refuge in Ethiopia after committing a crime in another country, the latter may delegate the exercise of its jurisdiction to Ethiopia. In both scenarios, the criminal law that the delegated country shall apply to entertain the delegated case is a question that calls for an answer. This question triggers the usually neglected question of choice of applicable law in criminal matters. This Article aims at discussing the choice of applicable criminal law at the time of delegation of criminal jurisdiction between Ethiopia and other countries. By examining the issue in light of the principles of criminal jurisdiction and customizing the principles developed in the choice of law over civil cases, this Article argues that the applicable law by the delegated state (country of refuge) in the case of delegated exercise of jurisdiction is the criminal law of the delegating state.

Keywords: *choice of law, country of refuge, criminal jurisdiction, criminal law, delegation*

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I. INTRODUCTION

Indisputably, States[1] are entitled to maintain their peace and stability. To this end, they enforce criminal law which specifies actions/omissions that a person shall not commit along with the penalty to be imposed on the transgressors. In principle, a state has jurisdiction to prosecute anyone who has violated its criminal law through its law enforcement agencies. State's exercise of jurisdiction is also the inherent and primary manifestation of its sovereignty.

Needless to say, much attention has not been given in Ethiopia to the application of conflict of laws in criminal matters. In other countries, the lack of attention to conflict of laws in criminal matters can be partly attributable to identifying conflict of laws only in relation to civil cases.[2] Similarly, this can be presumed in the Ethiopian context as there is a dearth of court cases and scholarly articles related to the area. Despite this, the exercise of jurisdiction by one state over a certain crime may sometimes involve issues with a foreign contact which, *inter alia*, demand identifying the set of law that shall apply to resolve it. This would, in turn, lead to conflict of laws question to arise.[3]

Under international and national laws, it is known that there are different recognized principles for states to exercise jurisdiction over certain crime/s or person/s suspected of perpetrating the same. However, the mere existence of these principles does not mean that states are always able to exercise their jurisdiction. For instance, the suspected offender may abscond to other countries after committing the crime and seek refuge. Due to this, it would be difficult for a state under whose territory a crime has been committed to exercise its jurisdiction. When this is the case, states would follow other alternatives like delegating the exercise of their jurisdiction to other countries to prosecute the suspect.[4] Likewise, Ethiopia can delegate the exercise of its criminal jurisdiction to the country of refuge when a person has committed crime in Ethiopia cannot be tried for lack of extradition.[5] In such cases, "Ethiopia entrusts the task of punishing the offender in her stead."[6] Similarly, other countries may delegate Ethiopia to exercise criminal jurisdiction.

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[1] In this Article, the word State refers only to those entities which are subjects of International law as defined in Art.1 of the Motevideo Convention on Rights and Duties of the States (1933). Hence, unless explicitly stated, those administrative units within the municipal sphere which are called as "states" are not within the focus of this Article.

[2] Robert A. Leflar, *Conflict of Law: Choice of Law in Criminal Cases*, 25 (1) CASE WESTERN RESERVE LAW REVIEW, 44-65, 44 (1974). See also, Markus D Dubber, *Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective*, 63 (2) THE UNIVERSITY OF TORONTO LAW JOURNAL, 247-277, 263 (2013).

[3] What would bring the question of conflict of laws is not only the civil nature of the case. Though conflict of laws is usually identified only in relation to civil cases, there are still chances for the same question to arise in criminal cases too. When it comes to criminal jurisdictions involving two states, albeit it would fall within the scope of public international law, when the question comes particularly to delegated exercise of criminal jurisdiction, it has also features that can be regulated by conflict of laws principles.

[4] PHILIPPE GRAVEN, AN INTRODUCTION TO ETHIOPIAN PENAL LAW 37 (Haile Sellassie I University and Oxford University Press) (1965).

[5] *The Criminal Code of the Federal Democratic Republic of Ethiopia,* Proclamation No.414/2004, FED. NEG. GAZETA, Art. 12, Addis Ababa, 9th May 2005.

[6] GRAVEN, s*upra* note 4.

Though the Criminal Code of Ethiopia (here in after the Criminal Code) has tried to regulate delegating Ethiopia's exercise of jurisdiction to country of refuge, it does not address the question as to which law that the delegated country shall apply. The question is also valid when Ethiopia is delegated by other countries. In the latter case, however, the question is twofold since the Criminal Code does not explicitly state whether Ethiopia can accept and exercise delegated criminal jurisdiction from other countries. This question has to be addressed before examining the choice of law question in relation to it. To provide an answer to the choice of applicable criminal law when Ethiopia delegates its criminal jurisdiction, Phillip Graven argued that the criminal law of the country of refuge (the delegated state) is the applicable law.[7] On the contrary, as the place of commission of the crime is the delegating state, it can be said that the criminal law of the delegating state is comparatively closer to the case than that of the delegated state. Unless the delegated state has another basis to justify assuming jurisdiction, the room is not totally closed to argue that the criminal law of the delegating state shall apply because, among other things, the crime would principally affect the interest of the delegating state.

Generally, the application of conflict of laws involves identifying the appropriate law to entertain the case.[8] The same holds true in the delegation of criminal jurisdiction as it requires choosing the applicable law from the two competing set of laws: the criminal law of the delegating state and that of the delegated state. This Article aims at examining the choice of applicable criminal law in the above two ways of delegation, i.e., when Ethiopia is the delegating state and when Ethiopia is the delegated state. To do this, the Article approaches the issue by studying it in light of the principles of state's exercise of criminal jurisdiction and experience of other countries. Moreover, some relevant principles of choice of law used in conflict of laws in civil cases are also adopted to provide answer for the choice of law question in delegation of criminal jurisdiction.

The remaining part of the Article is organized in four sections. The second section tries to lay a conceptual framework by briefly discussing the meaning and the principles of criminal jurisdiction. The third section then discusses the principles adopted by Ethiopian criminal law and how it regulates the delegation of criminal jurisdiction to countries of refuge. Section four, on its part, addresses the question of choice of law when Ethiopia delegates its criminal jurisdiction. It also attempts to investigate whether Ethiopia may accept delegation from other countries and the related choice of law issue when Ethiopian is delegated to exercise criminal jurisdiction. Finally, the fifth section provides some concluding remarks.

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[7] *Id*. at 38.

[8] ABLA J MAYSS, PRINCIPLES OF CONFLICT OF LAWS 109 (Cavendish Publishing Limited, 3rd ed. 1999); Hannah L. Buxbaum, *Determining the Territorial Scope of State Law In Interstate and International Conflicts: Comments on the Draft Restatement (Third) And on the Role of Party Autonomy*, 27 DUKE J. COMAT & INT'L L 381-403, 382, (2017).

II. PRINCIPLES FOR STATES EXERCISE OF CRIMINAL JURISDICTION: AN OVERVIEW

Jurisdiction is the states' exercise of their authority (on a legal basis) over persons, incidents or properties.[9] It is one manifestation of the sovereignty of states by applying their legislative, judicial or executive powers over the said persons, incidents or properties.[10] There are certain accepted principles under international law by which states can exercise their jurisdiction on a certain criminal matter.[11] The main principles are the Territoriality Principle, Nationality Principle, Protective Principle and Universality Principle.[12]

Territorial Principle recognizes the authority of a state to prescribe criminalized actions/omissions within its territory.[13] If someone, irrespective of his nationality, commits a crime inside the territory of a state, the state can exercise its jurisdiction over the transgressor.[14] Since it is said that the exercise of jurisdiction includes the exercise of legislative, judicial or executive powers, the criminal laws of the state will apply to the case, the court of the state will try the offender and its authorities will enforce the punishment.[15] Sometimes, a crime might be started within the territory of one state and completed in the territory of another state. To accommodate these instances, Subjective Territoriality Principle and Objective Territoriality Principle are recognized within Territoriality Principle. The former allows the state under whose territory the crime has been started or the unlawful act has been committed to assume jurisdiction, and the later permits the state under whose territory the crime has been completed (the intended result has been achieved) to exercise jurisdiction.[16]

Though Territoriality Principle is the oldest principle, understanding jurisdiction on strictly territorial principle is not acceptable in the contemporary world. As such, other principles for extra-territorial exercise of jurisdiction have been recognized in international and national laws. These principles are Nationality Principle, Protective Principle and Universality Principle.[17] According to Nationality Principle, a state can exercise its jurisdiction over its nationals regardless of the place of commission of the crime. This principle is known as Active Nationality

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[9] Anthony Colangelo, *Legal Studies Research Paper Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and international Law*, 48 (1) COLUMBIA LAW SCHOOL PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP, 121-201, 126 (2007). See also Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 (3) HARVARD LAW REVIEW, 241-262, 241 (1923).

[10] *Id.,* Joseph H. Beale, at 251.

[11] MALCHOM N. SHAW, INTERNATIONAL LAW 652 (Cambridge University Press, 6th ed.) (2008).

[12] *Id*, at 652-668. See also Anthony Colangelo, *supra* note 9, at 127-129.

[13] According to the present conception, territory of a state includes the land, the air space above the land and its territorial sea. Moreover, the board of the ships and the air crafts are also considered as a territory of the state the flag of which they carry.

[14] Alejandro Chehtman, Jurisdiction, *in* OXFORD HANDBOOK OF CRIMINAL LAW, (Markus Dubber and Tatjana Höernle eds., Oxford University Press).

[15] SHAW, *supra* note 11, at 652.

[16] *Id*, at 654, see also PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 110 (Routledge Publisher, 7th ed.) (1997).

[17] Hannah L. Buxbaum, *Determining the Territorial Scope of State Law In Interstate and International Conflicts: Comments on the Draft Restatement (Third) And on the Role of Party Autonomy*, 27 DUKE J. COMAT & INT'L L. 381-403, 386, (2017).

Principle.[18] Moreover, there is also another version of Nationality Principle called Passive Nationality Principle by which states can exercise their jurisdiction over crimes committed abroad against their own nationals.[19]

On the basis of Protective Principle, a state can exercise jurisdiction over crimes, though they are committed abroad, against its security, integrity and vital interests. The kinds of crimes that can be dealt under this principle are dubious and prone to political manipulation.[20] But still, states can claim jurisdiction based on this principle on crimes such as crimes against state's military forces, crimes against its currency and espionage.[21] Universality Principle, on the other hand, recognizes states exercise of jurisdiction over international crimes like War Crimes, Genocide, and Piracy.[22] According to this principle, every state, irrespective of lack of direct link between the crime and the state, is equally recognized to exercise its jurisdiction over the perpetrators of international crimes because these crimes are considered as crimes against the whole international community.[23]

Generally, in the past, the application of criminal law used to be highly influenced by strict territorial sovereignty ground.[24] As the jurisdiction of a state includes, among others, legislative jurisdiction, and because states are sovereign, a criminal law of a sovereign state was believed to be applicable only within its territorial limits.[25] Corollary to this, a sovereign state was not expected to give effect to criminal/penal laws of another state. Nowadays, however, understanding jurisdiction and applicability of criminal law exclusively based on territorial sovereignty cannot always be a base to decide the applicability of criminal laws. As discussed above, the grounds other than territoriality principle have recognized the exercise of jurisdiction extra-territorially which includes applying their criminal laws on extra-territorial conducts. Hence, the conception of jurisdiction on a purely territoriality ground has become obsolete. The perception that confines the application of a criminal law exclusively within a country is "parochialism".[26] Thus, even if territoriality is the principal ground for criminal jurisdiction and application of criminal law,[27] there are extra-territorial aspects too.[28]

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[18] SHAW, *supra* note 11, at 663.
[19] *Id*. at 664, See also Malanczuk, *supra* note 16, at 111.
[20] SHAW, *supra* note 11, at 667.
[21] Malanczuk, *supra* note 16, at 112, see also Chetman, *supra* note 14, at 11.
[22] SHAW, *supra* note 11, at 668.
[23] *Id.*
[24] Buxbaum, *supra* note 17, at 386.
[25] SHAW, *supra* note 11, at 653.
[26] Markus D Dubber, *Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective,* 63(2) THE UNIVERSITY OF TORONTO LAW JOURNAL 247-277, 256, (2013). It is "Parochialism" because, while the crimes committed in one country could affect the interest of another state or individual/s living in the latter, limiting the exercise of jurisdiction only on territoriality ground would inappropriately narrow the possibility of prosecuting the perpetrator/s, by the state whose interest or the interest of its inhabitants is affected by the crime committed outside of its territory.
[27] SHAW, *supra* note 11, at 654.
[28] Buxbaum, *supra* note 17, at 249. See also Dubber, *supra* note 26. Even if criminal jurisdiction has territorial and extra-territorial features, there are differences between common law and civil law legal systems regarding the conception of territorial and extra-territorial criminal jurisdictions. In common law systems, the exercise of criminal jurisdiction is territorial as a matter of principle and extra-territorial jurisdiction is an exception. And sometimes the

III. EXERCISE OF CRIMINAL JURISDICTION UNDER ETHIOPIAN CRIMINAL LAW

A. Principal and Subsidiary Exercise of Jurisdiction

Ethiopia's jurisdiction over criminal cases is regulated under the provisions of the Criminal Code of Ethiopia.[29] The Code has specifically provided its scope of application based on conditions related to place which incorporate grounds recognized by international law and states as principles to exercise criminal jurisdiction. With respect to place, the Criminal Code divides the application of the Code as Principal Application and Subsidiary Application.[30] The former identifies the kind of crimes over which Ethiopia shall exercise its principal jurisdiction even when other countries have already exercised their jurisdiction over the case.[31] From the nature of the crimes incorporated under the Principal Application of the Code, it can be discerned that the legislator thought that these crimes primarily affect Ethiopia's interest.[32]

The Criminal Code shall be applied on anyone, except those who are protected by immunities under international law, who violates its provisions while he/she is within Ethiopian territory.[33] This provision reiterates the Territoriality Principle of criminal jurisdiction. It is stated above that Territoriality Principle is further classified as Subjective Territoriality and Objective Territoriality Principles to allow more than one state in case where a crime is started in a state and completed in another state.[34] However, the part of the Criminal Code that regulates its application with respect to place has not explicitly covered this aspect. Yet, Article 25 of the Code can provide some hint as to which specific principle is recognized in Ethiopian.[35] Accordingly, when certain criminal conduct is started in one place and its desired result is achieved in another place ("non-instantaneous crimes" as they are described by the Criminal Code)[36], Ethiopia can exercise its principal jurisdiction only if the criminal act is committed in Ethiopia. And when the prohibited conduct is committed abroad and the consequence thereof has occurred in Ethiopia, the jurisdiction of Ethiopia is subsidiary to the jurisdiction of the place of

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exercise of extra-territorial jurisdiction is even considered as the exercise of rules of territoriality. The Civil Law countries, on the other hand, consider territoriality as the "primary norm" and they also recognize extra-territoriality as the other ground for the exercise of criminal jurisdiction.(see Dubber, *supra* note 26, at 266-667)

[29] CRIMINAL CODE, *supra* note 5.

[30] *Id*., Chapter II, Section II, Sub-section I (Art. 11-16).

[31] *Id.*, Art. 16.

[32] But here, the fact that Ethiopia claims principal jurisdiction on these types of crimes, *per se*, does not mean that other countries cannot exercise their own jurisdiction based on other grounds. Even if it has the risk of exposing the offender to double jeopardy, other countries can also exercise their jurisdiction on a case where Ethiopia is exercising or has already exercised its jurisdiction. In the same manner, Ethiopia can also, in principle, exercise its jurisdiction whether other countries are exercising their jurisdiction or not.

[33] CRIMINAL CODE, *supra* note 5, Art. 11. And according to the terms of Art. 11(1) and Art 2 of the FDRE Constitution, the territory of Ethiopia constitute the territory of the regional states that form Ethiopia. Though not explicitly mentioned on this provision, according to rules of Public International Law, premises of Ethiopian diplomatic missions abroad, ships and Aircrafts carrying Ethiopian flag are also considered as Ethiopia's territory.

[34] SHAW, *supra* note 11, at 652.

[35] Though Art 25 seems to only regulate domestic conflict of jurisdiction, between two or more national administrative units in Ethiopia, it can also regulate international conflict of criminal jurisdiction between Ethiopia and other sovereign state. See GRAVEN, *supra* note 4, at 65.

[36] CRIMINAL CODE, *supra* note 5, Art 25(2).

commission of the prohibited conduct.[37] This means that Ethiopia can exercise its jurisdiction only when the state under whose territory the criminal act was committed fails to exercise its jurisdiction. Hence, it can be concluded that, in the case of "non-instantaneous crimes", it is only over cases that fall under Subjective Territoriality Principle that Ethiopia can exercise its principal jurisdiction. Those cases that are covered by Objective Territorial Principle would therefore be subjected to its subsidiary jurisdiction.

In addition, the Criminal Code shall principally apply on "who outside of Ethiopia has committed one of the crimes against the State of Ethiopia, its safety or integrity, its institutions, essential interests or currency"[38] This ground is based on Protective Principle. Universality Principle is also recognized under Article 17(1) (a) of the Criminal Code.[39] In addition, Nationality Principle, which comprises Active Nationality and Passive Nationality Principles, is stated under Art 18(1) of the Criminal Code.[40] These Universality and Nationality Principles are grounds for Ethiopia's exercise of subsidiary jurisdiction.[41] Unlike the grounds for the exercise of principal jurisdiction, these subsidiary jurisdictions will be exercised only if the accused was not tried and final judgment had not been given in a foreign country and upon the fulfillment of the other conditions under Art 19 of the Criminal Code.[42]

B. Delegating Criminal Jurisdiction to Other Countries

Though Ethiopia shall exercise its criminal jurisdiction over anyone who has committed a crime in Ethiopia, it may delegate its jurisdiction to a foreign country in which the foreigner has taken refuge and his extradition cannot be obtained.[43] Delegation exclusively falls within the countries' sovereign power that the act of rendering and accepting the same will be conducted based on the free consent of the respective countries.[44] When Ethiopia delegates its jurisdiction to country of

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[37] *Id*, see also GRAVEN, *supra* note 4, at 65. But here, before Ethiopia's exercise its subsidiary jurisdiction mentioned under Art 25 (2),whether the conditions for the subsidiary application of jurisdiction that are mentioned under Art 19 need to be met or not remains to be another question.

[38] CRIMINAL CODE, *supra* note 5, Art 13.

[39] Universality Principle recognizes states exercise of jurisdiction over International Crimes like War Crimes, Genocide, and Piracy (Shaw, *supra* note 11, at 668).

[40] As discussed under section one of this Article, Nationality Principle has two components: Active Nationality and Passive Nationality Principles. The text of Art 18(1) which reads as "This Code shall also apply to any person who has committed a crime **outside Ethiopia against an Ethiopian national**…" (*Emphasis added*) is the recognition of Passive Nationality Principle. And the part of the same provision which says "This code shall also apply…**to any Ethiopian national who has committed outside Ethiopia** a crime of another kind than those specified in the foregoing Articles…"(emphasis added) recognizes Active Nationality Principle. Here, the exercise of Active and Passive Nationality Principles is subjected to the restrictions stated under Arts 18 and 19 the code.

[41] CRIMINAL CODE, *supra* note 5, Chapter II, Section II, Sub-section II.

[42] *Id.* Art.17 and 18. The conditions stipulated under Art 19 can be summarized as follows. Except in the case of exercise of jurisdiction based on universality principle or as per Art 18(2) of the Criminal Code, before Ethiopia starts exercising its criminal jurisdiction, formal complaint has to be lodged in the place of commission of the crime, in case when the crime is punishable up on complainant either in the law of its commission or Ethiopian criminal law. In addition, the suspect must either be in Ethiopian territory or has already been extradited to Ethiopia. Moreover, in every case, the prosecution shall also be endorsed by the Minister of Justice (now the Federal Attorney General) (see Proclamation No 943/2016)).

[43] *Id.*, Art.12.

[44] GRAVEN, *supra* note 4, at 36-37. Here, the process of offering and accepting the delegation has political aspect which can be highly influenced by the level of diplomatic relationship existing between the two countries. Since it is

refuge and the latter accepts it, "the authorities of the latter shall be taken to have substituted themselves in the place of the corresponding Ethiopian authorities."[45]

Despite the above, it should be noted that not all forms of Ethiopia's criminal jurisdiction can be delegated. Since Article 12 of the Criminal Code is placed immediately next to the provision that specifies Ethiopia's criminal jurisdiction on the basis of Territoriality Principle (Art 11) and from the text of Article 12 which reads "Where a foreigner who *has committed a crime in Ethiopia* cannot be tried or punished…." (*emphasis added*), it is possible to say that only crimes that fall under Ethiopian's principal jurisdiction can be delegated.[46] Here, when the crime is a "non- instantaneous type," as defined under Article 25, "the exception that Article 25 creates to Article 11"[47] shall not be forgotten. In "non- instantaneous" crimes, Ethiopia can delegate its jurisdiction only when the criminal conduct has been committed in Ethiopia. However, when only the consequence of the criminal act has been achieved in Ethiopia, Ethiopia cannot delegate its criminal jurisdiction because it does not have principal jurisdiction in these types of crimes. This is what the combined reading of Articles 12 and 25 of the Criminal Code would convey.[48] Moreover, crimes which are under Ethiopian's principal jurisdiction based on Protective Principle (Criminal Code, Art. 13) cannot be delegated for other countries.[49]

Since Article 12 talks only about the case of a foreigner, if delegation can be given when an Ethiopian has committed an offense in Ethiopia and absconds to another country is ambiguous. The *expose de motif* of the Criminal Code has not also said anything as to why Article 12 states only about a foreigner. Despite this, the author argues that the case of an Ethiopian citizen shall be seen in light of the rationale of Article 12 and interpreted as per what Art 2(4) dictates, *i.e.* interpretation according to the spirit and purpose that the Criminal Code wants to achieve.[50]

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not within the purview of this Article, this and other procedural aspects of delegating the exercise of criminal jurisdiction are not discussed.

[45] *Id.,* at 38.

[46] GRAVEN, *supra* note 4, at 37.

[47] *Id*., at 65.

[48] As said above, it is only when Ethiopia claims/exercises its principal jurisdiction based on territoriality jurisdiction that delegation of criminal jurisdiction to another country is possible (GRAVEN, *supra* note 4, at 37). Nevertheless, since a criminal act might be started within one state and its result is achieved in another state, Territoriality Jurisdiction is divided into Subjective Territoriality and Objective Territoriality Principle which provide the right to exercise jurisdiction to the state in which the crime has been started and to the state in which the resulted is achieved respectively (Shaw, *supra* note 11, at 652). Despite this, as per Art 25(2) of the Criminal Code, when only the consequence of the criminal act has been achieved in Ethiopia, Ethiopia's exercise of jurisdiction is not principal. It is rather subsidiary. As a result, these types of crimes cannot be delegated to other countries.

[49] GRAVEN, *supra* note 4, at 37. The prohibition is because crimes subject to Ethiopian's principal jurisdiction on Protective Principle may be committed in the foreign country under its help and support or another foreign county. In this case, if the offender resides or escapes to the foreign country which has provided help for the crime, delegating this country will not be helpful to achieve the purpose of the law as this country may not be partial. This is also true when the offender commits a crime in Ethiopia under the help of a foreign country to whose territory he escapes after the commission of the crime (GRAVEN, *supra* note 4, at 37-38).

[50] CRIMINAL CODE, *supra* note 5, Art 2(4).

Delegation of criminal jurisdiction is one way of avoiding impunity that may otherwise happen as a result of "negative conflict of jurisdiction".[51] In some cases, the offender may commit a crime in Ethiopia and absconds to other country (with no possibility of extradition). In this case, save for the possibility of trial in absentia under Article 160-164 of the Criminal Procedure Code of Ethiopia, Ethiopia may not be practically able to exercise jurisdiction over the offender. So does the country of refuge because of lack of grounds for the exercise of the same. This is a "negative conflict of jurisdiction" that would help the offender to escape criminal liability.[52] Even in cases that can be tried in absentia, the sentence passed may not be practically executable.[53]Thus, though it is not stated on the *expose de motif*, the author of this paper argues that the reason why Art 12 is incorporated under the Criminal Code cannot be different than avoiding impunity that may possibly arise as a result of the mentioned problems.

Accordingly, when the offender absconds to another state, Ethiopia may delegate the country of refuge to conduct the prosecution so that the offender will not escape liability. At this time, it seems essential not to overlook one difference between the Penal Code (1957) and the Criminal Code (2004). The Penal Code mandatorily required Ethiopian authorities to request for delegation.[54] And since the Penal Code prefers delegation over trial in absentia, the latter will be conducted only after the possibility for delegation is exhausted.[55] Unlike the Penal Code, trying the possibility of delegation is not mandatory under the Criminal Code.[56] According to the latter, the choice between trail in absentia and delegation shall thus be done on a case by case basis by taking different factors, which can serve the interest of justice, in to account.

Since it is accepted that there should not be impunity, whether the offender is a foreigner or an Ethiopian, the purpose that delegation would serve is valid when an Ethiopian commits a crime in Ethiopia and escapes to another country with no possibility of extradition. As a result, delegation can be the viable way to bring the offender in front of justice. Irrespective of nationality of the offender, delegation is therefore in line with the object and purpose of Article 12 and the Criminal Code in the whole.

IV. DELEGATION OF CRIMINAL JURISDICTION BETWEEN ETHIOPIA AND OTHER COUNTRIES: WHICH COUNTRY'S CRIMINAL LAW SHOULD APPLY?

As it is already mentioned, the Ethiopian Criminal Code, under Art 12, tries to regulate delegation of Ethiopia's jurisdiction to other countries. However, it does not answer as to which law, the criminal law of Ethiopia or that of the delegated country, would apply to entertain such cases. Moreover, there is no specific provision on whether Ethiopia can exercise criminal jurisdiction by delegation from other countries. In addition to doubts related to the legality of its exercise, the question regarding the applicable criminal law can be raised if Ethiopia accepts

[51] GRAVEN, *supra* note 4, at 36.
[52] *Id*., at 36-37.
[53] *Id.,* at 37.
[54] PENAL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 158, NEGARIT GAZETA, Art. 12, 23rd July 1957, Addis Ababa.
[55] GRAVEN, *supra* note 4, at 37.
[56] See CRIMINAL CODE, *supra* note 5 Art 12(1).

delegation. The following two sub-sections discuss the choice of applicable criminal law when Ethiopia is the delegating country and when it is the delegated country.

A. The Applicable Criminal Law when Ethiopia is Delegating Country

It is said that Ethiopia can delegate its criminal jurisdiction to the country of refuge when an offender in Ethiopia escapes to another country with no possibility of extradition.[57] Delegating Ethiopia's criminal jurisdiction is prescribed both in the old Penal Code[58] and in the current Criminal Code of Ethiopia.[59] However, both the Penal Code and the Criminal Code do not provide clear answer for the choice of applicable criminal law question.[60] In the absence of clear stipulation in the Penal Code, Philip Graven opined that the case will be entertained by the country of refuge using its own law.[61]

In the contemporary world, various "choice influencing considerations" are being applied to identify the appropriate criminal law.[62] In USA, for instance, there is no strict rule to be followed in criminal cases that involve giving effect to the criminal law of other state and some courts tend to decide the issue on case by case basis by considering factors like "state sovereignty and local control over criminal policy and individual rights".[63] In the Ethiopian case, the author contends that there are sufficient grounds or choice influencing factors that should be considered so that the court of the delegated country should apply the criminal law of Ethiopia.

First of all, a country needs to prove whether its jurisdictional claim and exercise rests on solid legal basis before it applies its own laws on territorial and extra territorial conduct.[64] Such

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[57] CRIMINAL CODE, *supra* note 5, Art 12.

[58] PENAL CODE, *supra* note 52.

[59] CRIMINAL CODE, *supra* note 5.

[60] Art 12(3) of the Criminal Code stipulates as to how the suspect shall be treated where he has not undergone his punishment or only undergone part of it in the foreign country. It says that the whole or the unexpired part thereof shall be enforced in Ethiopia if he is apprehended and the enforcement of the penalty is not barred by limitation under the provisions of this Code. In doing so, if there is a difference, in form and nature, between the sentence passed by the foreign court and Ethiopian Criminal law, such punishment as is the closest to that imposed in the foreign country shall be enforced. From this, it may be argued that the law that should apply during delegation is the criminal law of the delegated state because the stipulation of this provision will be irrelevant if what should be applied by the foreign court is the Ethiopian law. However, Art 12(3) still wants to regulate the period of limitation according to the Ethiopian Criminal Code by stating "…the enforcement of the penalty is not barred by limitation **under the provisions of this Code**."(*emphasis added*). And this leads to question as to how can criminal sentence passed in accordance with a foreign criminal law be regulated according to the provisions of Ethiopian criminal law? Once a case has been delegated to a foreign country for the latter to try it according to its own criminal law, all the issues related to it, including the period of limitation shall be regulated according to the same criminal law. Regulating the sentence in one criminal code and the period of limitation in another would amount to regulating the same criminal conduct with two different criminal codes. That is why the author argues that the Criminal Code does not have clear stand on law that should apply.

[61] GRAVEN, *supra* note 4, at 38.

[62] Lefar, *supra* note 2, at 61 & 65.

[63] Jenia Iontcheva, Turner, *Interstate Conflict and Cooperation in Criminal Cases*: *An American Perspective, European Criminal Law*, EUROPEAN CRIMINAL LAW REVIEW1-52, at 3 & 13, *available at* http://ssrn.com/abstract=2473248, (Accessed on 18 August 2018).

[64] Colangelo, *supra* note 9, at 126. It must be noted that applying criminal laws of one state over a given case is one component of its exercise of jurisdiction with respect to the case. See also Beale, *supra* note 9, at 241.

legal bases can be inferred from domestic and international law. It is only when a state has legally justified jurisdiction that it shall apply its criminal law. This is because "judicial jurisdiction and legislative jurisdiction are identical."[65]

In Ethiopia, the law states that "the authorities of the later (delegated country) shall be taken to have substituted themselves in the place of the corresponding Ethiopian authorities."[66] As a result, the delegated state cannot be taken as exercising its own jurisdiction. It shall rather be taken as if it is exercising the jurisdiction of Ethiopia. Hence, unlike what Philip Graven opined,[67] the author argues that the country of refuge takes a responsibility to entertain the case as if the trial is happening in the courts of the delegating state. As Robert A. Leflar stated, "judicial jurisdiction and legislative jurisdiction are identical"[68] that they cannot exist and exercised separately from one another. In delegation of criminal jurisdiction, legislative jurisdiction shall thus be considered accepted or delegated together with the judicial jurisdiction. This makes the criminal law of the delegating state to be applied by the delegated state.

In addition, even in case when two or more states claim jurisdiction over a certain crime, the jurisdiction shall be exercised by the one with material and substantial connection with the case.[69] This can also be called as "interest analysis" which involves taking different factors into account and "identifying a state with the greatest interest in having its law applied."[70] In other words, a state needs to have strong connection with the crime to exercise its jurisdiction over it.[71] Specifically, if a state wants to apply its criminal law to regulate activities outside of its territory, the conduct must first cause injury to "the peace and good order of its territory"[72] or it has to be justified by one of the principles of criminal jurisdiction. The "interest analysis test" basically considers two factors: "the geographical locations of acts" and "the effects of acts"[73] and identifies whose interest was more affected.[74]

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[65] Lefar, *supra* note 2, at 47.

[66] GRAVEN, *supra* note 4, at 38.

[67] *Id*. Graven stated his opinion in the following words. "**In the case of delegation**, Ethiopia which has the principal jurisdiction waives her right to try the offender and vests the exercise of the right in the country of refugee which will there upon have the principal jurisdiction and punish the offender under its own laws as though the offence had been committed in its own territory."(*emphasis added*)

[68] Lefar, *supra* note 2, at 47. Within the context of criminal law, legislative jurisdiction is the power of a sovereign state to legislate the prohibited conducts by its own criminal law.

[69] SHAW, *supra* note 11, at 655.

[70] John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 THE GEORGETOWN LAW JOURNAL, 1217, at 1219 (1985), available at: http://scholarshiatlaw.wm.edu/facpubs/839, (Accessed on 1/9/2018). This principle of "interest analysis" or identifying the state with relatively better/best substantial connection with the case is a principle that is derived from the application of conflict of laws in civil cases. (See Lefar, *supra* note 2, at 49) . And as John Bernard Corr succinctly stated it "...application of certain conflicts principles developed many years ago in civil litigation is the best way-probably the only way-to achieve consistent and just results in this surprisingly sticky area **(choice of law)** of criminal law" (*emphasis added*).

[71] Shlomit Wallerstein, *Delegation of Powers and Authority in International Criminal Law*, LEGAL RESEARCH PAPER SERIES PAPER NO 3/2013, 1-27, 3, (2014).

[72] Edward S Stimson, Conflict of Criminal Laws, *available at,* www.constitution.org/cmt/stimson/con_crim.htm, (Accessed on 15 November, 2017.

[73] Lefar, *supra* note 2, at 49.

[74] Turner, *supra* note 63, at 28-29.

In USA, *Major v. Common Wealth of Kentucky* case, a murder committed in Kentucky was under trial in its court. The contentious issue was the choice of law, between the laws of Kentucky and Massachusetts, which should be applied to pass decision on admissibility of evidence extracted by tapping telephone conversation between a father (living in Kentucky and consented to the interception) and the suspect (living in Massachusetts). The court decided to apply the Kentucky law commenting that "Massachusetts did not have more significant relationship than Kentucky"[75] This judgment can be used to show the application of "the interest analysis test". Because Kentucky had more significant relationship to the case than Massachusetts, Kentucky is considered to have the greatest interest. The experience in UK is also similar in this regard as England's criminal law is applicable "if either the defendant's act or its harmful consequences are located in England unless Parliament declares otherwise."[76]

At this juncture, it is important to make it clear that the choice of law experiences of the American courts is mostly in relation to conflict of criminal law between two American States. It should also be noted that American States have exclusive control over criminal matters committed inside their territory.[77] Moreover, they are considered as "severally sovereign, independent and foreign to each other in regard to their internal affairs."[78] Since the thoughts, in the court cases, about choice of criminal laws are developed within this context, which is also true regarding conflict of criminal laws between two internationally sovereign states, the author argues that they can validly be applied to resolve some choice of criminal laws issues having international features including delegation of criminal jurisdiction.

Bringing the above experience to the case of delegated exercise of jurisdiction, the criminal law of the delegating state shall apply as creating the substantial (material) link between the crime and the law of the forum (country of refuge) will not be plausible in the existence of the law of the country of commission of the crime. Simply stated, the fact that Ethiopia is the place of commission of the crime and whose interest has been affected makes its criminal law to have a comparatively strong material connection than the criminal law of the delegated country.[79]

Applying the criminal law of the delegating state is also justified when we examine the issue from another perspective. In the first place, it is clear that delegation can hardly be a ground for

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[75] ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW: CASES AND MATERIALS 11-12, (5th ed., 2013).

[76] Lefar, *supra* note 2, at 59.

[77] Turner, *supra* note 63, at 3.

[78] Buxbaum, *supra* note 17, at 386.

[79] The "strongly connected" thesis based on the place of commission of the crime may be challenged when the victim and the perpetrator of the crime are not citizens of the place of commission of the crime. For example, let us assume that a citizen of country A, being in the territory of country B, commits a crime of homicide against the citizen of country C. In this case, one may argue that country A and C are more connected to the case than country B. Even in this case too, the author contends that country B is more connected than others because it is the right as well as the responsibility of every state to keep the security of its national and non-nationals on its territory. A state should not be considered as more concerned to its nationals abroad than foreigners living in its territory. Furthermore, whether the victim and perpetrator of the crime are locals or foreigners, the crime first affects the inhabitants of the place of commission of the crime. This provides country B with relatively more substantial connection/interest to the case than countries A and C.

exercise of jurisdiction because it is neither among the recognized principles nor a ground for the exercise of the recognized principles.[80] Secondly, it is understood that the existence of the ground/s (connecting factor/s) is mandatory to justify states exercise of extra-territorial jurisdiction. In other words, we can say that there is a presumption against extra-territorial application of criminal laws.[81] As such, applying the criminal law of the country of refuge would amount to an extra-territorial application of its criminal law if the necessary link between its law and the crime remains loose or missing. In such situation, the application of criminal law of the forum state is not warranted by international law and perhaps under domestic laws. For example, the Fifth Amendment of the US Constitution prohibits the application of US Criminal Code to criminalize foreign conducts that are not subject to universal jurisdiction. According to this amendment, except in the case of a universal crime, there need to be an obvious connection between the criminal act and US before the criminal provisions of the US Criminal Code is applied.[82] As per the interpretation given by the US Supreme Court to Sherman Act, the required connection is the impact that the conduct in question caused to the US.[83]

In case of delegation, the delegation is only reason that creates a nexus between the country of refuge and the criminal case. This makes it appropriate for the court in the country of refuge to apply the criminal law of the place of commission of the crime which is "obviously connected" to the case. Since there is no impact that the crime has caused on country of refuge, to apply its law would be inappropriate and unjustified extra-territorial application of the law.[84] When we examine the application of the criminal law of the delegating country, it would not, however, entail extra-territorial application of criminal law. Firstly, the crime has been committed in its territory. Secondly, the country of refuge is exercising the jurisdiction of the delegating state. Indeed, it can still be justified based on territoriality principle, *i.e.* trying the accused based on criminal law of the place of commission of the crime.

The question of identifying the applicable criminal law can also be examined in the light of the dissenting judges' opinion of the *Lotus* case.[85] In their decision on the case, the dissenting

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[80] The recognized principles and grounds for the exercise of criminal jurisdiction are discussed briefly under section II of this paper.

[81] Buxbaum, *supra* note 17, at 388-389.

[82] Colangelo, *supra* note 9, at 123.

[83] Buxbaum, *supra* note 17, at 394. Even if Sharman Act was the law passed by the US Congress, in 1890, to regulate trade practices, the interpretation given by the Supreme Court can be used to clarify what connection between a crime and a country means in other kinds of crimes too. However, some authors opined that the nexus, between the criminal case and US, to apply the American law for extra-territorial conducts is required only if the accused would receive severe penalty than what would have been imposed under the law of the place of commission of the crime. This standard is relatively lower than requiring the existence of impact on America. (See Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 (4) MICHIGAN LAW REVIEW, 507-557,510 (2016).

[84] This is said based on the assumption that there is no nexus, other than the delegation, between the crime and the country of refuge. If there are other grounds of justifying jurisdiction, the case of delegation and the choice of law may need to be examined differently so that the forum court may apply its own criminal law.

[85] The fact of the *Lotus* case can be summarized as follows. A French boat named *Lotus* was collided with another Turkish vessel named *Boz-Kourt.* As a result, some crew members in the latter died. When the French boat latter arrived at the Turkish port, the Turkish authorities arrested and prosecuted the crew members of the boat for the crime of manslaughter. France opposed this prosecution, and the case was submitted to Permanent Court of International Justice for it to decide on the appropriateness of the Turkish exercise of jurisdiction.

judges stated that the criminal law that should apply is that of the place of commission of the crime.[86] When we put delegation of criminal jurisdiction in context, given that there is no other ground of nexus, the applicable criminal law is the criminal law of the delegating state (place of commission of the crime). The county of refuge has to either extradite the offender to the former or try the accused according to the criminal law of the delegating state.

In criminal law, the application of a law over a certain action or omission is believed to have historical explanation based on territoriality justifications.[87] In the case of choice of law, whether it is criminal or civil case, the chosen law must be helpful to achieve the "socio-legal purposes that choice of law process need to serve".[88] The factors that need to be considered to decide on the choice of law can be studied in this regard. The factors are predictability of results, maintenance of interstate and international order, simplification of judicial task, advancement of the forum's governmental interests and better application of rule of law.[89] Applying the criminal law of the place of commission of the crime in case of delegation is, therefore, more or less justified when it is evaluated based on these factors. Doing so is more helpful to "maintain predictability of results" as it makes it clear that the offender will be subjected to the criminal law of the delegating state irrespective of the forum of trail. On the contrary, given the numbers of countries to which the accused may abscond, predictability can hardly be maintained if the law of country of refuge applies. This is because it makes the issue highly subjective and relative to how the law of the country of refuge reacts to the crime that he is accused for.

"Maintenance of interstate and international order" can also be better safeguarded through the application of criminal law of the delegating state. The offender will still be tried according to the criminal law of the delegating state even if he absconds to another country. This would discourage potential criminals who would otherwise violate the criminal law of a country if they think that there is modest treatment or mitigated penalty in the country of refuge. This is important in maintaining peace/order in the two respective countries and internationally.

Furthermore, there is no visible interest of the forum country that could be affected when it applies the criminal law of the delegating country. Indeed, as delegation is subject to the prior consent of the country of refuge,[90] it can reject delegation if it thinks that it would be against its national interest or if it does not believe in the appropriateness of the prosecution, especially when the conduct is not a crime according to its law. Once the country of refuge accepts the delegation, it is fair to assume that it believes in the appropriateness of the prosecution and there is no visible interest that can be affected by applying the criminal law of the delegating state. In fact, applying Ethiopian criminal law has the potential to serve the interest of the forum state as it can be used as a basis to claim similar treatment (reciprocity) from the delegating country when the latter, some other time, accepts delegation of criminal jurisdiction from the former.

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[86] Stimson, *supra* note 72.
[87] Lefar, *supra* note 2, at 47.
[88] *Id.*, at 55.
[89] *Id*., at 6.
[90] GRAVEN, *supra* note 4, at 37.

Applying Ethiopian criminal law can also contribute in the better application of rule of law. Rule of law encompasses principle of legality which requires for criminal laws to be stated publicly in advance and equally applied on individuals who are under its scope.[91] When one goes against the criminal law of a country, he is believed to be informed, from publicized criminal law of the land, as to what kind of repercussions his action/omission would entail. If he violates the law, it is taken as acceptance from his side for any corresponding punishment unto him.[92] In other words, "…legal effect of an individual's conduct always depends on one's law and not upon the law of any other country into whose territory he may subsequently go."[93] There is nothing that holds this conception of principle of legality and rule of law inapplicable in case of delegation of criminal jurisdiction.

It is commented that in case of delegated exercise of jurisdiction, the criminal law of the place of commission of the crime can be applied by the country of refuge if it is more favorable to the accused than the law of country of refuge so that principle of legality can be upheld.[94] However, applying the criminal law of the delegating state only when it is favorable to the accused does not seem to be in line with the basic feature of the principle of legality. It is true that rule of law and principle of legality are designed to protect the interest of the accused. However, protecting the interest of the accused has to be seen within the context of the interest of the society against whom the crime was committed. In delegation, treating the offender based on the law he has violated would be in his best interest as he is presumed to be informed about the consequences of his action/omission. Secondly, in crimes other than those punishable upon complaint, it is the society which is the victim of the crime. As such, applying the criminal law that its representatives have passed would be in the best interest of the society. Moreover, the act of a person who would commit a crime in one country and abscond to another shall not be promoted by applying a lenient punishment of the country of refuge. This is because applying the criminal law that favors the offender would encourage potential offenders to commit a crime in one country and escape to another country to face lesser punishment. This will fly in the face of rule of law and maintenance of order in the country/place of commission of the crime.

It is also known that principle of equality before the law is the other element of rule of law. Applying the criminal law of the country of refuge may sometimes violate this principle. For instance, let us assume that two or more individuals have principally participated in the commission of a crime in Ethiopia and each absconds to different countries and Ethiopia gives delegation for each of them. If the law of the country of refuge is to be applied, there will be a possibility for each to receive different penalty. This is against the principle of equality because the same provision must be cited against those who have principally participated in the same crime. This outcome can be minimized, if not avoided, if all of the countries of refuge apply the

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[91] BRIAN Z. TAMANAHA, THE HISTORY AND ELEMENTS OF THE RULE OF LAW, at 236, 240.

[92] Simeneh Kiros, *Methods and Manners of Interpretation of Criminal Norms*, 11 (1) MIZAN LAW REVIEW 88, 104&105 (2017).

[93] Stimson , *supra* note 72.

[94] GRAVEN, *supra* note 4, at 38.

criminal law of the delegating state. This is another illustration for why applying the law of the delegating state, is helpful for "better application of rule of law."

Among the listed factors above,[95] the only goal that is relatively difficult to be achieved is "simplification of the judicial task". In fact, this problem can still be minimized through the assistance that can be provided by the delegating country. In the America's experience, one of the reasons why courts of one state are prohibited from applying the criminal laws of other states is because "…. the diplomatic processes of extradition and interstate rendition would give adequate relief against absconding parties."[96] Here, "The true rule is not that foreign penal laws will not be enforced, but that an accused will not be tried for violating a foreign criminal law and the reason for it is that the trial can more conveniently be held in the state where the accused was in at the time of the conduct in question."[97] In the case of delegation, when these two points are put together, the accused "cannot conveniently be tried" in the place of commission of the crime because he absconds to other country. And it is because extradition is not possible that a state would resort to delegation.[98] Consequently, the "possibility of extradition" cannot be presented again as a justification not to apply the foreign criminal law. Since the reasons for the prohibition of giving effect to foreign criminal law are inexistent in case of delegation, it is therefore possible to apply the criminal law of the delegating state so far as it is appropriate to the case.

Indeed, the author argues that absence of extradition and the adoption of delegation should be taken as compromise between the conflicting interests of the state where the crime is committed and that of the suspect. When a person absconds to a foreign country after committing a crime, it would be in the best interest of the state if the suspect is extradited and tried according to its criminal law. The absence of this extradition is believed to work in the interest of the suspect because, *inter alia*, he is saved from being subjected to the court and law enforcement agencies by which he does not want to be treated. If it is a compromise, the country shall not therefore be disadvantaged for the second time by holding its criminal law inapplicable. As the suspect is benefited, at least in principle, from the absence of extradition, he shall come half way and be tried in accordance with the criminal law of the delegating state.

As an adverse argument to what is stated in the aforementioned paragraphs, one may argue that the question of choice of criminal law shall be answered in accordance with the municipal law of the delegated state. Some may also take setting the applicable law could be going beyond the limits and intruding into the sovereignty of other countries.[99] Nonetheless, it should be noted that, even in the existence of municipal law, courts are expected to make judicial interpretation

[95] As already stated, the other factors that should be considered in determining the applicable law are predictability of results, maintenance of interstate and international order, advancement of the forum's governmental interests and application of the better rule of law.(Lefar, *supra* note 2, at 6).

[96] Lefar, *supra* note 2, at 47.

[97] Stimson, *supra* note 72.

[98] Art. 12(1) of the Criminal Code which makes conferring delegation conditional upon the absence of extradition of the offender, from the country of refuge, can be taken as example here.

[99] Buxbaum, *supra* note 17, at 385.

when the application of a certain law would result in unintended outcomes.[100] This provides them the discretion to apply other set of law which they believe is appropriate to the case.

Moreover, if sovereignty is the justification not to execute criminal law of other countries, its influence will be minimal when it comes to delegation. Undoubtedly, delegation is to be given based on the prior consent of the states concerned.[101] Once the country of refuge consents to exercise the delegated jurisdiction, it is fair to assume that the focus shall be more to cooperation (between the two states) to provide justice over the case.[102] In USA, for example, one of the opinions on the choice of law suggests that the forum court shall apply the law of the *situs* (the place where the investigation was conducted) if it finds it appropriate. Such actions of the forum court will be in line with "cooperative federal venture".[103] This sentiment of cooperation to provide justice can also be presumed to exist in the case of delegation of criminal jurisdiction.[104] Justice, among others, requires the application of the best law to the case and this is one of the reasons why court of one state, in civil cases, applies the relevant laws of another state.[105] This is also true in the case of cooperation by delegating/accepting criminal jurisdiction because of the justifications discussed above, *i.e.,* justice will be best served when the applicable law is the law of the delegating state.

Generally, due to the reasons discussed in this section, the delegated country shall try the offender in accordance with the Ethiopian criminal law when Ethiopia delegates its criminal jurisdiction to the countries of refuge.

B. The Applicable Criminal Law when Ethiopia is Delegated Country

Sometimes a suspect after committing a crime inside the territory of other sovereign states might escape and seek refuge in Ethiopia. In this case, the state where the crime has been committed may request for extradition of the suspect and Ethiopia may not accept the request due to different reasons.[106] Following this, the foreign state may request to delegate Ethiopia for the suspect to be tried in Ethiopia. The acceptance by Ethiopia of the delegation would similarly give rise to the question of choice of criminal law that should be applied by Ethiopian courts.

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[100] Lefar*, supra* note 2, at 44 &57.

[101] GRAVEN, *supra* note 4, at 37.

[102] Here, even if the decision to give and accept delegation is also a political decision in addition to being legal, once delegation is accepted, the trying court in the country of refuge, at least in principle, shall focus on ascertaining how to arrive at a just decision with respect to the case.

[103] Turner, *supra* note 63, at 28-29.

[104] As it is said before, if the country of refuge is not interested to be delegated/cooperate, it is still within it is sovereign power to reject the request for delegation.

[105] Ibrahim Idris, *The Applicability of Foreign Civil Laws: A Case Comment on Civil Appeal No 852/73*, 13JOURNAL OF ETHIOPIAN LAW 227, 228 (1986).

[106] As per Art 21(2) of the Criminal Code, Ethiopia shall decline from extraditing the offender if the offender is an Ethiopian national (either at the time of request or at the time of commission of the crime). The request may also be rejected if there is no extradition treaty between Ethiopia and the country requesting the extradition or in case when the case cannot be covered by the terms of the extradition treaty if any. Moreover, according to Art 21(1), the request for extradition shall also be rejected if the crime over which extradition is sought for falls under Ethiopia's exercise of principal jurisdiction according to Art 13 of the Criminal code (Protective Principle).

Before proceeding to the choice of law question, it is important to examine if the Ethiopian law recognizes delegation of criminal jurisdiction to Ethiopia. The delegation of criminal jurisdiction to Ethiopia is not expressly recognized under the Criminal Code and Article 12 of the Code deals only with delegating Ethiopia's criminal jurisdiction to other countries. However, the absence of explicit recognition in the Code to delegation of criminal jurisdiction from other countries cannot enable the accused to object based on lack of jurisdiction because, first of all, "there is no inherent problem with states delegating their power to punish to other states."[107] More importantly, the delegated state should not be taken to be exercising its own jurisdiction, but the jurisdiction "on behalf of the delegating state."[108] The accused cannot object the jurisdiction of the latter since it is the place of commission of the crime and by extension the jurisdiction of the delegated state cannot also be challenged.

Besides, the author contends Ethiopia may accept delegation of criminal jurisdiction from other countries. It is not logical to assume that the legislator of the Criminal Code would prohibit delegation from other countries while it recognizes the possibility for delegating Ethiopia's criminal jurisdiction to other countries. Indeed, if Ethiopia envisages delegating its criminal jurisdiction to other countries in "special cases", it is reasonable to assume that it is also ready to accept the request for delegation of criminal jurisdiction from other countries.[109] Nevertheless, for Ethiopia's acceptance /exercise of delegation from other countries to give sense, the crime should fall neither under the principal nor subsidiary application of the Criminal Code. If the crime is the subject of either the principal or subsidiary application of the Criminal Code, the Code shall be implemented over the crime.[110] This means that Ethiopia can exercise its criminal jurisdiction in its own right. However, Article 18(2) of the Criminal Code, which states about the subsidiary application of the Code on crimes which are committed outside of Ethiopia, is worth considering here. The full text of the provision reads as:

> In the case of all other crimes committed outside Ethiopia by a foreign national, the criminal shall, save as otherwise expressly provided, failing extradition, be prosecuted and tried only if the crime is punishable under Ethiopian law with death or with rigorous imprisonment for not less than ten years.[111]

Article 18(2) brings crimes committed outside Ethiopia by a foreigner under the subsidiary application of the Criminal Code. Accordingly, if extraditing the suspect is not possible and "the crime is punishable under Ethiopian law with death or with rigorous imprisonment for not less

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[107] Wallerstein, *supra* note 71, at 1.

[108] GRAVEN, *supra* note 4.

[109] It is not to mean that Ethiopia should always accept delegation from other countries. As it is stated, delegating and accepting criminal jurisdiction is not purely legal issue. What type of the crimes to delegate? Whom to delegate? When to delegate? etc. have also political dimensions. So, Ethiopia's decision to accept or not to accept the delegation of criminal jurisdiction may depend on the actual circumstances of a given case. In any case, the legal room must be open to accommodate the possibility of accepting delegated criminal jurisdiction from other countries.

[110] CRIMINAL CODE, *supra* note *5,* Art 11-19.

[111] *Id*., Art.18(2). The phrase "all other crimes" refers to crimes committed by a foreigner outside of Ethiopia that cannot be covered under other provisions regulating the principal and subsidiary application of the Code.

than ten years"[112], the case is under the subsidiary application of the Criminal Code so that Ethiopia can exercise its subsidiary criminal jurisdiction over the suspect.[113] And this can be done without getting delegation of criminal jurisdiction from the country under whose territory the crime has been committed or whose interest has been affected by the crime or others.

However, the author would like to comment the legislator of the Criminal Code should not have brought crimes referred in Art 18(2) under Ethiopia's subsidiary jurisdiction. Rather, they should have been prescribed as crimes over which Ethiopia should get delegation to exercise jurisdiction. This is because Art 18(2) talks about a foreigner who has committed a crime outside of Ethiopia and the only connecting factor between the case and Ethiopia is the fact that the suspect has sought refuge in Ethiopia.[114] Ethiopia's exercise of jurisdiction on this kind of cases, by her own right, will not be compatible with the recognized principles of criminal jurisdiction.[115] Unless it is supported by one of the principles for criminal jurisdiction, states exercise of jurisdiction may be taken as inappropriate and hence unacceptable by another state as well as international law.[116] And according to the principles, the presence of the suspect under the territory of one country (after committing crime in the territory of another country) *per se* is not recognized as a ground to assume jurisdiction over him. In the case of crimes stated under Art 18(2), Ethiopia, as a country under whose territory the suspect found himself, may either extradite him to the country of commission of the crime (if it is possible) or needs to get delegation to prosecute the suspect. It would be unjustified extra-territorial exercise of criminal jurisdiction if Ethiopia starts prosecuting the suspect without being delegated. Moreover, prosecution without delegation has also a potential to expose the offender to double jeopardy as the country of commission of the crime may not necessarily be bound by the sentence passed in Ethiopia.[117] Thus, so far as there is no other connecting factor and no interest is affected, this danger of double jeopardy could have been avoided had the legislator of the Criminal Code made

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[112] *Id.*

[113] It brings under the subsidiary criminal jurisdiction of Ethiopia because jurisdiction encompasses legislative, judicial and executive jurisdictions. (Beale, *supra* note 12, at 241, see also Shaw, *supra* note 13, at 652) In addition, "legislative jurisdiction and judicial jurisdiction are identical" (Lefar, *supra* note 2, at 47).

[114] The fact that a foreigner sought refuge in Ethiopia after committing a crime abroad is taken as the only connecting factor (between the crime/s and Ethiopia) because if there is any other connecting factor, there will be a possibility for the case to fall under other provisions of the Criminal Code which regulate its applicability with respect to place and this would make the presence of Art 18(2) irrelevant. This is what can be concluded from the part of Art. 18(2) which says "….In the case of all other crimes committed outside Ethiopia…" and from Art. 18(1) which says "…save as otherwise expressly provided…"

[115] Since the crime has been committed outside Ethiopia, it is out of territoriality principle. There is also no principal interest of Ethiopia that is affected, by the crime committed abroad, and this makes the case out of the Protective Principle. And the suspect is not Ethiopian or has not victimized Ethiopian to bring him under the Nationality Principle. Furthermore, the crimes are not of the nature that can make them subjected to the Universality Principle. As said, if the crime falls under one of these principles, the relevance of Art. 18(2) will be questionable.

[116] SHAW, *supra* note 11, at 652; Malanczuk, *supra* note 16, at 111.

[117] According to Art.16 of the Criminal Code, if a crime falls under Ethiopia's principal jurisdiction, the sentence passed by a foreign court over a crime may not bind Ethiopia and the suspect may be prosecuted again for the same crime in Ethiopia. And the country in whose territory the crimes mentioned under Art 18(2) of the Criminal Code have been committed may also have the same kind of provision in its criminal law.

delegation from other countries a requirement before Ethiopia exercises jurisdiction over crimes under Art 18(2).

In all other cases, as stated earlier, Ethiopia may accept delegation of criminal jurisdiction from other countries. This will in turn pose questions pertaining to choice of appropriate criminal law to be applied by Ethiopian Courts. All the discussions regarding the choice of applicable criminal law when Ethiopia is a delegating state are, *mutatis mutandis,* valid. This makes the criminal law of the respective delegating country the applicable law by the Ethiopian courts. The application of the criminal law by Ethiopian courts of the delegating state in their exercise of delegated jurisdiction can also be vindicated when it is seen from another perspective. As it is said, no mention has been made in the Criminal Code regarding delegation from other countries. With this, it can be argued that it is only on the mentioned grounds for its principal and subsidiary application that the Criminal Code shall apply. In addition, it is presumed that the legislator has exhaustively listed down grounds that allow application of the Criminal Code. In all other grounds which are not mentioned including delegation, the Criminal Code shall not apply. Otherwise, it could be taken as being in defiance with the principle of legality which, among others, regulates the application of the Criminal Code with respect to place.[118] This, together with the presumption against extra-territorial application of criminal laws,[119] will lead to conclude that the applicable law should be the criminal law of the delegating state when Ethiopia accepts delegation from other countries.

V. CONCLUSION

When a foreigner after committing the crime in Ethiopia absconds to another country with no possibility of his/her extradition, Ethiopia may delegate the exercise of its criminal jurisdiction to the country of refuge according to Article 12 of the Criminal Code. In the same vein, another country may also delegate Ethiopia. Such acts of delegation of criminal jurisdiction triggers the question of choice of law which entails identification of the criminal law that the delegated country shall apply. This Article concludes that the applicable criminal law in case of delegation shall be the criminal law of the delegating state for the following main reasons.

The old conception that characterizes jurisdiction on strictly territorial sovereignty has come to be obsolete. Thus, when a court is faced with choice of law question in criminal matters, it has to choose the appropriate law by considering different factors. The interest which has been most affected by the crime (interest analysis test) is among the factors to determine the county having substantial connection with the crime. Though the principle of interest analysis is developed in the application of conflict of laws in civil cases, various courts have used it to resolve the choice of law question in criminal matters. In the case of delegated exercise of criminal jurisdiction, unless there is evidence to the contrary, the delegating state (where the crime is committed) is

[118] Simeneh, *supra* note 92, at 108.
[119] Buxbaum, *supra* note 17, at 388-389.

presumed to have strong connection with the crime and that the crime affects its interest. This makes its criminal law the appropriate law to be applied by the court in the delegated country.

Moreover, the law to be chosen by courts must be able to satisfy the purpose of the choice of law process. Since one of the main objectives of choice of law is rendering justice, the law that has historical and territorial connection with the place of commission of the crime is relatively helpful than other criminal laws. Save for some exceptional situations, this is because a crime should be taken to be organically connected to its place of commission. As a result, it is when the law of the place of commission of the crime is applied that the justifications and historical explanations that give impetus for the drafting of the criminal law can at the same time be applied and best serve justice. This can also go together with the sentiment of cooperation that is believed to exist between the two countries.

In addition, applying criminal law of the delegating state is also helpful to maintain predictability of results in criminal proceedings, to preserve interstate and international order, and application of relatively better rule of law. Furthermore, it is identified that states exercise of criminal jurisdiction shall be supported by at least one of the grounds for territorial or extra-territorial criminal jurisdiction. Since delegation is not among the recognized principles for criminal jurisdiction, applying the criminal law of the delegated country would amount to inappropriate exercise of extra-territorial jurisdiction of the country of refuge. On the other hand, since the delegated state is exercising the jurisdiction of the delegating state and since judicial and legislative jurisdiction are inseparable, the application of the criminal law of the delegating state can still be justified by territorial jurisdiction.

Due to the above reasons, when there is delegation of criminal jurisdiction between Ethiopia and other countries, the court in the delegated state (forum state/country of refuge) shall therefore apply the criminal law of the delegating state to entertain that specific case.

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HARAMAYA LAW REVIEW *Vol.* 7 (2018) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this Article: Teguadda Alebachew Sete, *Intra Party Democracy in Ethiopia: Towards a Regulatory Regime*, HARAMAYA LAW REVIEW 7 (2018): 22-47.

INTRA PARTY DEMOCRACY IN ETHIOPIA: TOWARDS A REGULATORY REGIME

Teguadda Alebachew Sete[*]

Abstract

In Ethiopia, political parties are argued to have problems in their internal functioning: non-adherence to party internal rules, dominance of party leaders, disengaging party members in party decision making and governance, little institutionalization of party functions and weak party organization. These internal problems are also believed to have resulted in weak political parties that do not provide viable political choices to the electorate. This Article investigates whether intra-party democracy (IPD) is adequately regulated in Ethiopia and seeks to establish the need for a sufficient regulatory regime to promote IPD. For this purpose, the author examines the pertinent provisions from the FDRE Constitution, relevant subsidiary laws and bylaws of three purposively selected political parties. Besides, relevant research works are used to address the matter. Accordingly, the finding suggests that intra party democracy is not adequately regulated in Ethiopia. As it is evident in the FDRE Constitution and party laws, party regulation in Ethiopia is more inclined to the external behavior of parties than their internal operation. The Constitution and party laws contain few provisions regulating limited aspect of internal behavior of parties. In addition, despite the claims under the bylaws of parties to adhere to democratic principles, there is democratic deficit in their internal functioning leading them to an endless cycle of disintegration, merger and re-constitution. This Article therefore calls for a full-fledged regulation of IPD to promote democracy within parties. It is important that the government enacts a detailed law intended at enforcing internal democracy in political parties.

Keywords: *cultures of democracy, intra party democracy, political parties, party regulation, multi- party system*

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I. INTRODUCTION

Political parties were considered as private organizations and, hence, party regulation was thought to be beyond the mandate of states.[1] Later on, people's discontent on emerging behavior and poor performance of political parties, introduction of state financial support, and a desire to protect democratic order resulted in an increased interest to regulate internal behavior of parties.[2] To this end, states (mainly in Europe) have provided regulatory rules demanding parties to be internally democratic.[3] There is now an expectation and need both from the state and the parties themselves to be democratic in their internal functioning: in deliberation, decision making, candidate nomination, leadership selection, empowering underrepresented groups (women, language and ethnic minorities) and use of finance.[4] Parties' internal democracy has multiple advantages. It promotes stable and vigorous political parties which can offer a well-articulated program to the electorate, and promotes culture of democracy among the wider society beyond the parties themselves.[5] Moreover, while parties' own regulation of IPD is essential, external regulation is the most effective mechanism to implement IPD.[6]

This Article investigates whether intra-party democracy is adequately regulated in Ethiopia and seeks to establish the need for a full-fledged regulatory regime against the internal functioning of parties to promote IPD. A content analysis of the FDRE Constitution and other laws is made to study whether IPD is provided as desired behavior for parties and whether parties in Ethiopia are adequately regulated for this. The bylaws of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), Ethiopian Democratic Party (EDP) and Blue Party are also studied to see the place and commitment political parties have given to the principles of internal democracy. The parties are selected purposively as they represent generation of parties in Ethiopia. Besides, while EPRDF is the ruling party, EDP and Blue Party can be considered to

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[1] Ingrid van Biezen & Daniela Romee Piccio, Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations *in* THE CHALLENGES OF PARTY DEMOCRACY 27-48, 27 (William P. Cross and Richard S. Katz *eds*., Oxford University Press, 2013) (*herein after*, Ingrid van Biezen & Daniela Romee Piccio). See also Gary Johns, *Desirability of Regulating Political Parties, and Agenda*: 8(4) A JOURNAL OF POLICY AND ANALYSIS AND REFORM. 291, 291 (2001).

[2] *Id.,* Ingrid van Biezen and Daniela Romee Piccio.

[3] *Id*., at 28.

[4]Susan Scarrow, Implementing Intra-Party Democracy in Political Parties and Democracy in Theoretical Perspectives 20 (2005), *available at* https://www.ndi.org/sites/default/files/1951_polpart_scarrow_110105_5.pdf, (Accessed on 7August, 2018). See also Salih, M.A. Mohamed, 'The Challenges of Internal Party Democracy *in* AFRICA: IN UNDP HANDBOOK ON WORKING ON POLITICAL PARTIES, 54-55, (Gretchen Luchsinger Sidhu eds., UNDP, New York, 2006). Also see Chris C. Ojukwu and Tope Olaifa, *Challenges of Internal Democracy in Nigeria's Political Parties: The Bane of Intra-Party Conflicts in the People's Democratic Party of Nigeria*, 11(3)GLOBAL JOURNAL OF HUMAN SOCIAL SCIENCE 25, 28 2011). And See Jeroen Mimpen, Intra-Party Democracy and Its Discontents, Democratization in a Volatile Political Landscape, 2005, *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.581.8569&rep=rep1&type=pdf(Accessed on 15 March, 2017).

[5] Josh Maiyo, Political Parties and Intra-Party Democracy in East Africa – from Representative to Participatory Democracy 23(2008), *available at* http://www.ascleiden.nl/Pdf/thesis-maiyo.pdf, (Accessed on 6 August 2018).

[6] Marcin Walecki, Regulating Politics: The Role of Internal and External Oversight in at Europe, *available at* www.legislationline.org/.../Walecki_IFES%20paper_Regulating_Politics_in_Europe, (Accessed on 17 May, 2018).

have a considerable public presence. A study of the practice of internal democracy in the political parties is also made to assess if regulation of IPD is necessary in Ethiopia.

The remaining part of this Article is structured in seven sections. Section II discusses about parties and their roles in/for democracy. Section III addresses the theoretical discourses relating to the meaning, elements and importance of IPD. Section IV discusses the progressive development of regulation of political parties in general and their internal functioning. In particular, it emphasizes discussing regulation as mechanism to promote IPD. It further explains on how and what aspect of internal activities of parties may be regulated. It also discusses the specific legal instruments used to implement IPD. Section V investigates the regulation of IPD in Ethiopia by studying the contents of the FDRE Constitution, other relevant subsidiary laws, and the bylaws of three selected political parties. Section VI presents the practice of internal democracy in political parties in Ethiopia through analysis of different researches. Finally, section VII provides some concluding remarks. In this Article, terms such as "Intra-Party Democracy", "Intra Party Democracy", "Internal Party Democracy", and "IPD" are used interchangeably throughout the text.

II. POLITICAL PARTIES AND THEIR ROLES IN DEMOCRACY

The American founding fathers had considered political parties as 'ominous' capable of undermining, perverting or usurping the popular will of the majority.[7] In addition, the party splits which often commanded the US Congress to a political deadlock including on key policy issues has yet kept the anti-party reaction alive in America.[8] Similarly, trust and confidence in political parties also remain low in Latin America.[9] Contrary to this, liberal theorists have explained parties as quintessential to representative democracies[10] where the latter is impossible without the participation of the political parties.[11] Political parties make democracy workable by acting as bridges between the electorate and government.[12] They act as bridges through articulating and aggregating public interests, formulating public policy, recruiting political leaders, mobilizing

[7] NORRIS PIPPA, BUILDING POLITICAL PARTIES: REFORMING LEGAL REGULATIONS AND INTERNAL RULES 3 (Stockholm: IDEA, 2005), (*herein after,* NORRIS PIPPA*)*. James Madison, for instance, described political parties as dangerous vice that tainted public administration. See Kate O'Regan*,* (Justice of the Constitutional Court (1994 – 2009)), Political Parties: the Missing Link in our Constitution, Corruption Watch, (2015), *available at* http://www.corruptionwatch.org.za/political-parties-the-missing-link-in-our-constitution, (Accessed on 18 May, 2018).

[8] *Id.,* NORRIS PIPPA.

[9] See generally Linz Juan J., Parties in Contemporary Democracies: Problems and Paradoxes *in* POLITICAL PARTIES: OLD CONCEPTS AND NEW CHALLENGES 291, 291-317(Richard Gunther, Jos´e Ram et al, *eds.,* Oxford University Press, 2002). See Noam Lupu, Brand Dilution and the Breakdown of Political Parties in Latin America, 1(2012), *available at* http://americo.usal.es/iberoame/sites/default/files/lupu_BrandDilution_confInsti.pdf. (Accessed on 18 May 2018).

[10] NORRIS PIPPA, *supra* note 7.

[11] SCHATTSCHNEIDER, E. E., PARTY GOVERNMENT 1 (Holt Rinehart and Winston, New York :) (1942).

[12] JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 3 (University of Chicago Press, Chicago) (1995).

citizens to participate in election, and forming the parliament and government.[13] Thus, in democracy, parties must exist to have a government in place.[14]

Because political parties are the major vehicles for the expression of an essential feature of democratic process, a political system is barely deemed democratic without the central assignment of political parties in its process.[15] A consensus also exists among political scientists that parties and competitive party systems are central to democracy and are essential agents of democratization.[16] The indispensability of parties in democracy is also evident from the fact that there is no democracy in the modern world that is able to function without political parties.[17] Number of parties contesting elections worldwide has increased since 1974 signifying their indispensability in the contemporary political process.[18] Moreover, political parties are forums for the exercise of individuals' fundamental rights to association and expression.[19] While competing for power, parties would also check the incumbent and contribute for improved political governance in a given country.[20] This is particularly significant in democracies where there is weak and ineffective system of checks and balance.[21] Last but not least, political parties can play significant role in the continuity and peaceful transfer of power.

III. INTRA PARTY DEMOCRACY

A. Meaning and Elements of IPD

Intra party democracy is democracy within the party and the extent to which a party pledges and commits itself to the basic and universal principles of democracy.[22] It is a comprehensive concept unfolding very broad-range of approaches and procedures for engaging party members in intra-party deliberations and decision making process.[23] As such, IPD lacks a one size fits all approach. Internal party democracy is about the degree to which a party is democratically organized and functions.[24] Unlike the "big democracy" or the "democracy at state level", IPD

[13] NORRIS PIPPA, *supra* note 7.

[14] Currently, there is no other viable means to coordinate elections and formation of political power other than parties. See generally Steven Levitsky & Maxwell A. Cameron, *Democracy without Parties? Political Parties and Regime Change in Fujimori's Peru*, 45(3) LATIN AMERICAN POLITICS AND SOCIETY 1, 1-33 (2003).

[15] TYODEN SONNI GWANLE, PARTY RELATIONSHIP AND DEMOCRACY IN NIGERIA (1992).

[16] Peter Burnell, Promoting Parties and Party Systems in New Democracies: Is There Anything the 'International Community' Can Do? *in* CHALLENGES TO DEMOCRACY 188, 188., (K. Dowding et al. (eds.), Political Studies Association, 2001).

[17] Jan Teorell, *A Deliberative Defense of Intra-Party Democracy*, 5(3) PARTY POLITICS 363, 363 (1999).

[18] Per Nordlund, External Regulation and Internal Functioning of Political Parties: An Introductory Overview, 1(2006), *available at* www.idea.int, (Accessed on 19 May 2018)

[19] Steven Levitsky and Maxwell A. Cameron, *supra* note 14, at 7.

[20] JOHN H. ALDRICH, *supra* note 12, at 3.

[21] Steven Levitsky and Maxwell A. Cameron, *supra* note 14, at 4.

[22] Chris C. Ojukwu, Tope Olaifa, *supra* note 4 at 27.

[23] Scarrow Susan, *supra* note 4, at 3.

[24] Goran Cular, Organizational Development of Parties and Internal Party Democracy in Croatia, (unpublished, Paper presented at the ECPR Joint Session of Workshops, Lisbon, 2009), at 6-7.

should be taken as a neutral term and be valued only if it contributes to the quality of the former".[25] IPD is thus not a standalone concept having separate purpose.

Scholars have combined a number of elements of IPD. These include members' equal participation in decision making (including in selection of leaders and candidates, policy making, and assuming leadership role in the party), representation of underrepresented groups, institutionalization of internal party activities, and appropriate use of party fund.[26] These elements are briefly elaborated below.

1. Equal Participation of Members

A party that allows equal participation of members in the decision making process is considered internally democratic.[27] Members must be able to equally influence the decision making process in the party including in the formulation of party program, and selection of candidates and party leaders. In addition, members must have equal rights to assume leadership in the party. Their equal participation ensures a deliberative decision making which is critical to develop an informed party program, and select appealing party leaders and candidates.[28] The empowerment and recognition of equality of members in the political party would also reduce dominance of party figures or elites in the party. Besides, it could minimize the possibility that candidates are selected on the basis of clientelism and unequal representation of all interest groups.

In a party where members are empowered in decision making, the General Assembly assumes powers on crucial matters in the party politics.[29] Contrarily, in a party where decision making is centralized, the executive committee usually assumes huge role in the party's decision making.[30] Open and equal participation of members in all aspect of party's internal functioning is therefore a viable means of creating cohesive and robust parties.[31] Internal cohesion of parties, in turn, is crucial for parties to win the hearts of the electorate.[32]

2. Participation and Representation of Disadvantaged Groups

An attempt to accommodate party members such as women, persons with disabilities and language and ethnic minorities in the party's decision making and leadership role is noted as one element of IPD.[33] While there is no agreement on the best way to ensure participation of these groups in the political parties, provision of affirmative measures such as quota is widely adopted across countries.[34] A number of countries have legislations requiring parties to apply a quota

[25] *Id*.
[26] Scarrow Susan, *supra* note 4.
[27] Jeroen Mimpen, *supra* note 4, at 2. Also see Chris C. Ojukwu, Tope Olaifa, s*upra note* 4 at p.28.
[28] Jeroen Mimpen, *supra* note 4, at pp. 1-2.
[29] Scarrow, supra note 4.
[30] *Id*.
[31] Chris C. Ojukwu, Tope Olaifa, *supra* note 4, at 28.
[32] *Id*.
[33] Salih, M.A. Mohamed, *supra* note 4 at 54. See Jeroen Mimpen, *supra* note 4, at 4.
[34] Jeroen Mimpen, *supra* note 4 at 7.

scheme for these groups of party members.[35] The creation of a specific "women's section" or "gender division" of a party is occasionally used as an instrument to encourage gender equality.[36] This contributes to ensure women's participation by allowing them an opportunity to discuss issues of common concern and serve as a forum for expertise-building activities.[37]

3. Institutionalization of Internal Activities

Institutionalization of internal party activities is the other element of IPD.[38] This refers to the extent to which internal party activities are performed in an established systems or procedure.[39] It is also about the availability and potency of party organizational structure to effectively and efficiently respond to all party matters. A decentralized party structure and the existence of a party organ for conflict resolution are also indicators of party institutionalization.[40] However, a decentralized internal party structure does not necessarily entail party institutionalization.[41] The National Democratic Institute (NDI- a nonprofit, nonpartisan organization working to support and strengthen democratic institutions worldwide), in its minimum standard for democratic party functioning, stressed that the existence of a conflict resolution body in a party is important for free deliberation and debate on ideas within the party.[42] This is because, in any democratic party, it is both inevitable and desirable that dedicated and ambitious politicians will have clashing perspectives about which policies and approaches are in the best interests of the nation, and of the party.[43] Institutionalized parties are generally considered predicable, and capable of establishing a stable government at state level.[44]

4. Appropriate Use of Party Fund

As already said, there is an increasing trend that governments allocate money for political parties. It is also common that parties could solicit money from other sources permitted by the law. As a result, how parties must use this money has become a concern for governments. Use of party fund is believed to have many distorting effects including corruption, buying of votes and

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[35] *Id.* also see Methods of Implementing Internal Democracy in Political Parties, the Electoral Knowledge Network (ACE), at p.1, *available at* http://aceproject.org/electoral-advice/archive/questions/replies/110615365, accessed on April 4, 2018.

[36] The OSCE and the Venice Commission, Guidelines on Political Party Regulation, (2011), *available at* https://www.osce.org/odihr/77812?download=true, (Accessed on 22 May, 2018)

[37] *Id*.

[38] Scarrow, *supra* note 4, at 6-7

[39] *Id*., at 6.

[40] *Id*., at 15-16.

[41] There can be cases internally decentralized parties are weakly institutionalized. Scarrow, *supra* note 4, at 16.

[42] *Id*. See also the National Democratic Institute, Minimum Standards for the Democratic Functioning of Political Parties, 8(2008), *available at* www.ndi.org. (Accessed on 22 May, 2018)

[43] *Id*.

[44] Okechukwu Ikeanyibe, *Internal Party Democracy, Party Candidature, and Democratic Consolidation in Nigeria's Fourth Republic,* 42(5) POLITICS & POLICY 769, 775-777(2014). See generally Political Parties in Afghanistan: A Review of the State of Political Parties after the 2009 and 2010 Elections, Washington, DC: National Democratic Institute (NDI), 2011, *available at* https://www.ndi.org/sites/default/files/Afghanistan-political-parties-july-2011.pdf, (Accessed on 6 August, 2018).

clientelism.[45] Internal transparency and accountability on the use of party fund ensures that party funds are used to advance party goal.[46] It limits the possibility that party leaders acquire illegitimate funds to boost their personal standing in the party or to be inappropriately elected for the party position.[47] As such, lack of accountability and transparency in party finance can be a challenge to democratic functioning of parties internally.[48] As political parties are generally regarded as source of corruption, transparency and accountability on the use of party fund can prevent corruption in political parties.[49] The 2003 United Nation Convention against Corruption and the 2003 African Union Convention on the Prevention and Combating of Corruption have also stressed the importance of enhancing transparency into the funding of political parties to fight corruption.[50] Party fund has thus become a subject of state regulation to control the potential distorting effects of use of the funds by the parties.

B. The Case for Intra Party Democracy

It has been said that the primary function of political parties is to link the citizenry with the government.[51] To meet this responsibility, they must adhere to institutional guarantees such as IPD.[52] Political parties have to provide opportunities for effective participation of their members and leaders in their decision making processes. Unlike any other form of associations, the claim for democracy in political parties is stronger as parties are prospective institutions which may form government at state level. Contrary to the case in the older democracies where parties were deemed to assume private role, the participation of political parties in the political process is in the interest of the formation of the political will of the people.[53] In this respect, The German Party Law, for instance, defines political parties as associations which are freely established to perform public function.[54] As such, their internal functioning is strictly regulated in Germany both under the Basic Law and other party laws.

The relationship between parties and democracy should reflect the parties' adherence not only to democratic goals and actions, but also to internal democratic structures and practice.[55] Scholars such as Mersel argued that parties' failure to subscribe to legitimate political goal customarily causes the dissolution of the same, and a democratic deficit in their internal activities must cause parties to a similar consequence.[56] Mersel argued that there is interdependence

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[45] GRINER S. & DANIEL ZOVATTO (*eds*.), FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS IN THE AMERICAS 19 (OAS and International IDEA, San José) (2005).

[46] National Democratic Institute, *supra* note 42, at 9-10.

[47] *Id*.

[48] Salih, M.A. Mohamed, *supra* note 4.

[49] Kate O'Regan*, supra* note *7*.

[50] The United Nation Convention Against Corruption, 2003, Art. 7(3), and the African Union Convention on the Prevention and Combating of Corruption, 2003, Art. 10(B).

[51]Giovanni Sartori, *Party Types, Organisation and Functions*, 18(1) WEST EUROPEAN POLITICS 5, 11 (2005).

[52]Jan Teorell, *A Deliberative Defense of Intra-Party Democracy*, 5(3) PARTY POLITICS 363, 364 (1999).

[53]The Basic Law of Germany, 1949, Article.21 (1).

[54]Political Parties Act of Germany, 1967: Section I and II.

[55]Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, *4(1)* INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 84, 87-88 &97, *available at* https://doi.org/10.1093/icon/moi053 (Accessed on 6 August, 2018)

[56] *Id*.

between political parties and democracy. He further stated that it is likely that a political party which is not democratic internally can be externally undemocratic as the internal agenda and predispositions would influence the party's external attitudes and activities.[57] This emphasizes that a political party which does not commit itself to democratic values internally cannot logically hope to form democracy at state level. In other words, a party cannot normally respect oppositions in the wider political realm if it is intolerant of internal differences. The German Constitutional Court, in its ruling on the constitutionality of the *neo-Nazi Sozialistische Reichspartei*, also stated that there is logical relationship between the concept of free democratic order and the democratic principles of party organization.[58]

A party which follows democratic procedures internally possesses a chance of winning election.[59] This is because the party could, assisted by the democratic procedures, present an appealing candidate who can win the hearts of the electorates. It could also relate to the fact that the electorate develops trust and confidence on such a party given that it is habituated to democracy. Contrarily, a political party which does not follow democratic producers such as, for instance, which restraints deliberation or repress dissenting views obviously lack a solid base to compete for and occupy state power. Such parties are rather assessed to suffer from a risk of disintegration.[60] Party's presentation in front of the electorate as fractured, on the other hand, would noticeably put the party in a position of losing the electoral competition. The risk of disintegration resulting from the undemocratic internal functioning of political party would in particular become dangerous if such party gets chance to hold state power. For this reason, internal party democracy is regarded as commendable to form cohesive and stable government at state level.[61] Again, IPD allows for representation of the views of the electorate, creates a place for different views to mushroom, and can attract more party members.[62]

Moreover, in any constitutional democracy where democracy, accountability and transparency are proclaimed as fundamentals of the system, political parties cannot become exceptions to disregard democratic values in their internal functioning. These fundamentals can reasonably give the state legitimate power to impose external regulation on party democracy where there is no constitutional prescription to this effect. Last but not least is the importance of party democracy to nurture cultures of democracy both within the political parties and in their relationship with the outside world, and at societal level.[63] Forbidding deliberation and dissenting opinions, factionalism, discrimination among members, breaches and non- compliance to party rules and regulation and other similar undemocratic activities in a political party apparently reinforce a pattern of weak culture of democracy at state and societal level.

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[57] *Id.,* at 97.

[58] Schneider Carl, *Political Parties and the German Basic Law of 1949*, 10(3) THE WESTERN POLITICAL QUARTERLY 527, 536 (1957).

[59] Scarrow, *supra* note 4, at 21.

[60] Okechukwu Ikeanyib, *supra* note 44, at 774.

[61] *Id.* See Chris C. Ojukwu, Tope Olaifa, *supra* note 4.

[62] Jeroen Mimpen *supra* note 4, at 3.

[63] Josh Maiyo, *supra note* 5, Scarrow, *supra* note 4, at 3, Okechukwu Ikeanyibe, *supra* note 44.

In continents such as Africa, where it is perceived that there is hardly a culture of democracy, IPD is indicated to have a particular significance in promoting the culture from inside the political parties to the societal level.[64] In such polities where levels of civic awareness are low, IPD provides opportunities to expand civic education and awareness through participation while at the same time devolving power and decision making processes to broader sections of the society.[65] Moreover, in Africa, where political parties are perceived more as means of assuming power than vehicles for democracy, IPD is likely to improve the overall effectiveness of the party against its competitors.[66] As stated before, it should, however, be noted that IPD should always be designed and valued in terms of its relevance to the democracy at state level. The benefits of IPD also depend on the specific democratic procedures adopted, implementation method, and interaction within the political context.[67]

IV. REGULATING INTRA-PARTY DEMOCRACY

Political parties have long been regarded as private entities entitled to compete freely in the electoral marketplace and determine their own internal structure and process.[68] As a result, regulating how parties must behave and function internally was considered a contravention to parties' internal affair.[69] So far, in countries such as the US, United Kingdom and Australia, regulation is largely considered against the liberal understanding of parties as non- state agencies.[70] In these three countries, there is, however, slow progress in introducing regulatory frameworks on political parties. In the US, party regulation has increasingly become the norm though its constitution makes no mention of political parties.[71] The US Supreme Court has also ruled that freedom of association is not absolute and states can regulate certain aspects of political parties, including their internal government structure and nominating process, if they can demonstrate an interest in the regulation that corresponds to the severity of the regulation imposed.[72] In UK, too, after persistence in considering parties as free institutions, the Tony Blair's Government effort to modernize the British Constitution has seen an effort to bring parties under some type of control.[73] In Australia, while regulation of external activities of

[64]Josh Maiyo, *Id.*
[65]*Id*.
[66]*Id*.
[67]Jeroen Mimpen, *supra* note 4, at 2, See Yigal Mersel, *supra* note 55, at 108.
[68]Ingrid van Biezen & Daniela Romee Piccio, *supra* note 1.
[69]*Id*.
[70] ALAN WARE, CITIZENS, PARTIES AND THE STATE 92 (Princeton University Press, 1987). Anika Gauja, Enforcing Democracy? Towards a Regulatory Regime for Implementation of Intra-Party Democracy, *available at* https://www.researchgate.net/publication/241042635_Enforcing_democracy_Towards_a_regulatory_regime_for_the_implementation_of_intra-party_democracy. (Accessed on 18 May, 2018).
[71] Sarah John, Resisting Legal Recognition and Regulation: Australian Parties as Rational Actors, *in* PARTY RULES?: DILEMMAS OF POLITICAL PARTY REGULATION IN AUSTRALIA 37, 40-42 (Anika Gauja and Marian Sawer eds.), ANU Press, 2016).
[72]See *NAACP v. Alabama ex rel*. Patterson, 357 U.S. 449 (1958)), *available at* https://supreme.justia.com/cases/federal/us/357/449, (Accessed on 6 August, 2018).
[73]Scott Bennett, Australia's Political Parties: More Regulation? 10(2002), *available at* http://www.aph.gov.au/binaries/library/pubs/rp/2001-02/02rp21.pdf, (Accessed on 8August 2018).

parties has long been a reality,[74] only the state of Queensland has officially adopted IPD regulations.[75] Indeed, a substantial number of case laws regulating internal life of political parties have developed over time throughout Australia.[76] A discussion on the need for greater transparency and accountability of political parties through party laws has also long been underway in Australia.[77]

Party regulation was necessitated by the fear of come-back of past despotic regimes and communism, peoples' discontent on the behavior of parties, and the introduction of state finance of political parties.[78] Party regulation has progressively dominated the understanding regarding parties and their role in the political process. The demand and suggestion for party regulation from politicians, partisan, policymakers and non-governmental organizations has increased over time.[79] Despite the absence of a global normative standard in the form of a binding legal instrument for party regulation[80], countries have progressively engaged in party regulation both in their internal and external activities. A large majority of European countries[81]and countries in Africa and Latin American[82] have now regulated IPD. External regulation of political parties is gradually seen in many countries as fundamental safeguard against the monopolization of political power, a means to empower the public to have control over the government, and a manifestation of democratization and institution-building.[83] Political competition under unregulated conditions is regarded as equivalent with 'inviting two people to participate in the race in sport, with one participant turning up with a bicycle, and the other with a sports car.[84]

More than before, organizations like the European Commission for Democracy through Law (Vince Commission) and the National Democratic Institute also advocate for party regulation. The Vince Commission has emphasized on the need for IPD regulation.[85] These organizations have also provided normative, though soft, standards for party regulation.[86] For the

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[74] Anika Gauja, Keeping the Party under Control: The Legal Regulation of Australia's Political Parties, Review of Public Affairs, 2005, *available at* http://www.australianreview.net/digest/2005/07/gauja.html, (Accessed on 17 May, 2018).

[75]Anika Gauja, *supra* note 70, at 2.

[76]Anika Gauja Dilemmas of Party Regulation: Hands-on Courts versus Hands-off Legislators? *in* PARTY RULES?: DILEMMAS of POLITICAL PARTY REGULATION IN AUSTRALIA 173, 183-184(Anika Gauja and Marian Sawer eds.), (ANU Press, Australia, 2016).

[77] See *supra* note 73.

[78] Ingrid van Biezen and Daniela Romee Piccio, *supra* note 4 at p.27.

[79] *Id.,* at 28.

[80]Despite international conventions and other instruments establish a set of basic principles that recognize the qualified right of parties to exist and to contest elections, significant normative disagreements exist surrounding the desirability of parties as electoral actors, qualifications upon freedoms of association, the extent to which parties should be supported by the state, the nature of party competition, and the extent to which equality interferes with the freedoms of political expression and association(and vice versa). There is hence wide divergence on the content and degree of regulation. See Anika Gauja, *The Legal Regulation of Political Parties: Is There a Global Normative Standard*, 15(1) ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY, 1 (2016).

[81]Ingrid van Biezen and Daniela Romee Piccio, *supra* note 4, at 30-31.

[82]ACE, *supra* note 35, at 3.

[83] Anika Gauja, *supra note* 68.

[84] KEITH D. EWING, MONEY, POLITICS AND LAW 15 (Oxford University Press, 1992).

[85]Ingrid van Biezen and Daniela Romee Piccio, *supra* note *4, at 28.*

[86]See generally the OSCE and the Venice Commission, Guidelines, *supra* note 36. See also NDI, *supra* note 42.

relevant mainstream international laws, however, though they have provisions addressing elections and the right to vote, this is not generally the case as regards political parties. Both UDHR and ICCPR have not specifically addressed political parties.[87] However, latter in 1996, the Human Rights Committee, in its comment under Article 25 of the ICCPR, had came up with the comment that freedom to join or form association is fundamental to the right to participate in periodic elections (guaranteed by the covenant) hinting that political parties as one necessary association.[88] Under paragraph 26 of its comment, the Committee specifically stipulated that political parties and membership in parties play a significant role in the conduct of public affairs and the election process and, hence, states must ensure that political parties (in their internal management) respect the applicable provisions of Article 25 to enable citizens exercise their rights there under.[89]

Customarily, party's internal rules claim to regulate internal democracy though parties lose the motivation to practically implement party democracy. Thus, external legislative regulation which forces them to commit to practicing internal democracy is important. While a regulation is necessary, it is equally important that a potent enforcement system is put in place to critically follow up the implementation of the requirements of the law. Problems related to the implementation of regulatory provisions are, for instance, reported in many African countries due to weak enforcing institutions.[90]

A. How and What will be Regulated?

Experience of countries dictates that regulation of party democracy could be made in different ways. As it is discussed below, the regulation can be made either for both content and form or for one of the two. In terms of regulating content, laws may stipulate certain rights which parties must guarantee to party members. In terms of form, laws may regulate parties to follow certain procedure or adopt a certain internal organizational structure. Moreover, regulation could involve both positive and negative forms of regulation. The positive regulation is by way of incentivizing parties which uphold some behaviors required by the state.[91] This kind of regulatory scheme is usually applied to encourage parties to ensure equal participation of unrepresented groups. On the other hand, the negative regulation is by way of demanding parties to act according to a certain prescribed procedure or behavior, and failure to comply would result in certain legal responsibility.[92]

Regulation of intra party democracy in the European countries, for instance, takes different forms. In some states, party democracy is regulated by way of generally requiring political parties to be abided by the principle of democracy while leaving the details to be addressed by

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[87] Marian Sawer and Anika Gauja, Party rules: Promises and pitfalls, *in* PARTY RULES?: DILEMMAS OF POLITICAL PARTY REGULATION IN AUSTRALIA 1, 2(Anika Gauja and Marian Sawer eds.), ANU Press, 2016).

[88] The Human Rights Committee (HRC) 'General Comment on Art.25, adopted at the Fifty-seventh Session of the Human Rights Committee, 1996, paragraph 12, *available at* http://www.refworld.org/docid/453883fc22.html. (Accessed on 20 September, 2018).

[89] *Id,* paragraph 26.

[90] ACE, *supra* note 35, at 3.

[91] *Id*., at 1.

[92] *Id*.

the parties' statues.[93] In others, it is regulated through stipulating specific democratic principles and procedures which parties must uphold in dealing with internal matters.[94] The democratic principles or procedures stipulated refers to the specific rights for party members, specific procedures for party decision making, procedure for the selection of party leaders and candidates, types of organizational structure that parties must adopt, and manner and purpose for which party fund must be spent and disclosure. In a more stringent regulation, in countries such as Finland and Czech Republic, party democracy is provided as precondition for party formation.[95] A party which wishes to register as political party must show that it will apply democratic principles in its internal functioning. In Czech Republic, political parties with undemocratically elected leader and undemocratic statutes are unqualified both for the establishment and operation as a political party.[96]

B. Regulation of Intra Party Democracy by A Constitution and Party Laws

1. Constitutional Regulation of IPD

Constitutions are hardly cited as sources of party regulation laws in the literature. This could, as mentioned in this Article, relate to the long standing understanding of political parties as free institutions. This is, in fact, still true for the constitutions of older democracies such as the US constitution. As discussed earlier, the US constitution is devoid of a provision mentioning the word political parties let alone to regulate parties. The same goes true for the constitutions of older democracies in Europe such as Denmark, Belgium, Ireland and the Netherlands.[97] Following the constitutionalization of political parties and party democracy in Germany in 1949, 28 European countries have now constitutions addressing political parties.[98] In Africa, the Nigerian and Kenyan constitutions can be cited as an example for constitutional recognition of parties and party democracy.[99] The Nigerian constitution, beyond acknowledging the place of parties in the political process, has provided specific regulatory statements on internal party democracy. It, for instance, requires political parties to undertake a periodic and democratic election of its leadership.[100] The Constitution of Kenya, which is referred to as the 4th wave of African Constitutions,[101] has in particular addressed political parties in separate section and with greater depth. Part three of this constitution provides a list of requirements for political party formation and requires them to practice democracy and abide by principles of good governance

[93] Ingrid van Biezen and Daniela Romee Piccio, *supra* note 4, at 38-39.
[94] *Id.*
[95] *Id.*
[96] *Id*
[97] *Id.*, at 31.
[98] *Id.,* at 30.
[99] ACE, *supra* note 35, at 3.
[100] *Id*.
[101] Gedion T. Hessebon, *The Fourth Constitution-Making Wave of Africa: Constitutions 4.0*?, 28 TEMP. INT'L & COMP. L.J. 185 (2014).

internally.[102] It also empowers the parliament to make laws which further regulates political parties in both their internal and external behavior.[103]

2. Regulation by Party Laws

Apart from the constitutional regulation, which usually set the principles, states may also provide other subsidiary laws that further regulate internal behavior and practice of parties.[104] These laws may generally refer to the statuary laws that regulate party registration laws, electoral laws, campaign finance laws, and party code of conduct laws.

V. REGULATION OF INTRA PARTY DEMOCRACY IN ETHIOPIA

A. Constitutional Regulation of IPD

Like the constitutions in the older democracies, the FDRE Constitution lacks a provision defining political parties.[105] Except mentioning the name "Political Parties" or "Political Organizations" here and there, the Constitution does not prescribe their special roles, privileges and responsibilities in the political process. In fact, a close reading of the provisions of the FDRE Constitution such as Articles 9, 31, and 38(2) & (3) unfolds that the Constitution rather regards political parties as ordinary associations than as unique associations which assumes a public role.

Under Article 31, the FDRE Constitution prohibits formation of associations and political organization in violation of the relevant law and for the purpose of subverting the constitutional order. Article 9 of the Constitution also requires every form of associations including political parties to ensure observance of the Constitution and to obey it. These regulatory provisions are interested in how parties must operate within the framework of the constitutional system, and hence are directed at the external behavior of parties. However, as Article 9 generally requires associations including political parties to obey the Constitution, one may argue that this would equally oblige parties to obey and respect in their internal operations the constitutional provisions such as the equality and non-discrimination clauses under Article 25 and rights of women under Article 35. It has to, however, be noted that private application of constitutional provisions is generally arguable in Ethiopia. Whether citizens can directly claim constitutionally protected rights in a private setting (outside state machineries) is not yet clear. This ambiguity requires a promulgation of subsidiary laws that enforces the rights in the Constitution.

Under the FDRE Constitution, the only explicit provisions regulating IPD are sub-articles 2 and 3 of Article 38. Article 38(2) guarantees everyone a right to join in any associations including political parties as long he/she meets the membership requirement of the respective associations or political party. While this is a general reference to all associations, the power to determine the membership requirement is still left to the respective association or party. More directly to the issue of IPD, Article 38(3) requires election to a leadership position in all forms of associations to be made in a free and democratic manner. Accordingly, irrespective of the

[102] See Part III of the Constitution of Kenya, 2010.
[103] *Id*.
[104] Ingrid van Biezen and Daniela Romee Piccio, *supra* note 4, at 38-39.
[105] Political parties are, in one way or another, mentioned in the Constitution under Art.9(2), Art 31, Art 38(2)&(3), Art.51(15), Art.56, Art.60(2)&(5) and Art.73(2).

freedom of association which is guaranteed under Article 31of the Constitution, political parties cannot act arbitrarily to elect a person for a leadership position internally.

In nutshell, there are thus no clear and adequate rules in the Constitution regulating how political parties should function internally, whether their internal systems should be democratic, how they should manage their relationship with their members, nor does the Constitution require auditing or disclosure of their finances. It can be argued, however, that in the absence of an explicit constitutional prescription of IPD and clear mandate to the government to regulate IPD, Article 38 of the Constitution should give the government a legitimate reason to enact a law to regulate party democracy. Besides, Article 51(15) of the Constitution has empowered the federal parliament to make laws governing political parties any time as it thinks necessary to enforce the political rights of citizens. Accordingly, if the government believes that lack of IPD and arbitrariness in the political parties' internal functioning is negatively affecting political rights of the citizen protected in the constitution, it can enact a comprehensive law regulating IPD. The state regulation of internal activities of charities and societies may be cited as a perfect precedent towards regulating parties. The parliament has enacted this specific law regulating every aspect of internal functioning of association and charities irrespective of the freedom of association guaranteed under Article 31 of the FDRE Constitution and in the absence of specific constitutional delegation to regulate internal affairs of association.[106] The precedent is significant for the case at hand given that the Constitution has described political parties as associations.

B. Regulation of IPD under the Party Laws

Party laws refer to the subsidiary laws that regulate parties as to how they must act and behave both internally and externally. These refer to both laws with permissive and obligatory provisions against parties' behavior and practice. In this category, the relevant laws in Ethiopia include the Party Registration Proclamation, the Electoral Law Proclamation, and the Proclamation to Provide for the Electoral Code of Conduct.[107]

1. Political Party Registration Law

The Party Registration Proclamation No. 573/2008 contained seven chapters addressing the different set of issues ranging from how parties must be formed, operate, and dissolve, to the rights of members (Articles 4-41). It also addresses legitimate sources of party fund and how it should be consumed (Articles 42-56). In addition, it stipulates the respective legal responsibilities of parties for failing to respect the condition provided in this law and other laws of the country (Articles 49, 52(2 &3), 53, 56(4), 57). Most of the provisions in this proclamation, however, regulate parties' external behavior: what goals that parties must and must

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[106] *The Proclamation to Provide for The Registration and Regulation of Charities and Societies*, No. 621/2009, FED. NEGARIT GAZETA, 15th year No. 25th, Addis Ababa, 13th February, 2009.

[107] *The Revised Political Parties Registration* Proclamation No. 573/2008, FED. NEGARIT GAZETA, 14th Year, No. 62, Addis Ababa, 24th September, 2008, *The Proclamation to Amend the Electoral Law of Ethiopia* No. 532/2007, FED. NEGARIT GAZETA, 13th Year No. 54, Addis Ababa, 25th June, 2007, and *The Proclamation To Provide for the Electoral Code of Conduct for Political Parties No.* 662/2009, FED. NEGARIT GAZETA, 15th Year No. 8 Addis Ababa, 28th August, 2009.

not champion, and legal rules that they must adhere in promoting their goal. Only few provisions are available guiding limited aspect of internal behavior and operation of parties such as Articles 8(2(f)), 15(1(I)) & (2), 28, 31(2) and 42-56.

In fact, Article 16 of the Proclamation specifically provides for independence of political parties in their internal affair. Article 15(3) provides that the bylaws of every political party shall be drawn pursuant to the principle provided under Article 16 i.e., independence of political parties in their own internal affairs. Accordingly, political parties are free to determine the procedures of adopting and amending their political program and holding meetings, internal organizational structure, and to determine on establishing branch offices. As a result, specific procedure on how parties must operate internally is not explicitly provided by the Proclamation. A general requirement for parties to be guided by democracy internally is not also stated.

Indeed, the Proclamation contains few provisions regulating limited aspect of internal democracy. These provisions address rights and obligations of members in political parties, and source and use of party fund. Regarding members' right, the Proclamation has provided a right to participate in party meetings, to vote and be elected (Article 28). The manner of participation of members in meeting and the procedure of decision making is yet subject to the bylaws of parties (Article 28). While determining procedures for participation of members in the parties' decision making, parties cannot, however, abridge rights or revoke responsibilities of members as citizens of the country (Article15 (2)). Besides, party statues are required to include details as to the equality of votes between members (Article 15(1(I)). As part of the requirement for registration, the Proclamation also puts a prerequisite for political parties to present documents showing that the leaders of the party are elected by the general assembly (Article 8(f)). This requirement has a tone of impliedly requiring that positions for party leadership to be made in election and among party members (the General Assembly) than a veiled selection by the informal party lines.

The Proclamation also provides a right for members to relinquish their membership any time (Article (31(3)). While political parties can expel members from party membership in accordance with the bylaws of the party, the law has guaranteed members a right to challenge the decision before the Federal High Court (Article 30(2)).

A more detailed regulation, however, is provided in the Proclamation concerning political parties' use of state allocated fund and other funds from legitimate sources indicated in the Proclamation. Articles 42-56 of the Proclamation talks about the legitimate/illegitimate source fund for political, on access to government fund, proper use of party fund, a requirement to keep books and accounts, finical report to the Election Board of Ethiopia, and the respective penalties and liabilities of political parties for failure to respect the rules on the use of fund.

In addition to the abovementioned, the Proclamation has empowered the National Election Board of Ethiopia to oversight the operation and decide on the registration and dissolution of political parties (Articles 7, 8, 9(1-17), 37, 38, and 39). The decision of the Board on cancellation of registration and dissolution is subject to revision by the Federal High Court upon application by the party (Article 39(3)). The Federal High Court has also the power to dissolve a political party on the grounds of criminal charges or party's act in violation of the Constitution and the Registration Proclamation (Article 40).

In a nutshell, the party registration law, though it guarantees political parties independence, has provided regulatory provisions guiding only some aspect of their internal life. However, it is difficult to assert that the Proclamation has regulated IPD. For one thing, The Proclamation regulates only limited aspect of parties' internal life as part of IPD. It lacks full-fledged provisions regulating all features of IPD. For the other, the Proclamation does not proclaim IPD as guiding principle for parties' internal functioning.

2. The Electoral Law (Amended) Proclamation No.532/2007 and Proclamation to Provide for Electoral Code of Conduct No. 662/2009.

These proclamations are less relevant to the issue of regulation of internal functioning of parties. The Electoral Law (Amended) Proclamation No.532/2007 rather addresses parties' relationship with the Board and the electorate. In addition, the Proclamation to Provide for the Electoral Code of Conduct No. 662/2009 addresses the kind of behavior that parties must show externally during election campaign such as respecting the constitutional order in general, other parties and their candidates, the electorate, the media, election administrators, other government bodies and etc.

C. IPD Regulation under the Bylaws of Political Parties

IPD can be regulated internally under the bylaws/statutes of political parties. The bylaws of three selected political parties are assessed to see if parties have addressed IPD. The purpose of this is only to see if parties have at all incorporated the concept of IPD or have provided rights, specific democratic procedures and organs relevant to IPD. It is not to make comparison among the parties as regards the inclusion of IPD, but to support the argument on the need for a regulatory regime in the internal functioning of parties in Ethiopia.

The selected parties are the Ethiopian People's Revolutionary Democratic Front (EPRDF), The Ethiopian Democratic Party (EDP), and Blue Party. The bylaws are assessed based on the basic features of IPD which are already discussed above.

1. Adoption of IPD as Guiding Principle

The bylaws of the three parties have declared democracy as guiding principle of their internal functioning. The bylaw of the EPRDF has in particular addressed IPD with great importance. Under its bylaw, IPD is described as guiding principle for party activities and as precondition for party membership and for the survival of the coalition. The bylaw has emphasized that the realization of the party's political ideology i.e. Revolutionary Democracy, is very much dependent on internal democracy.[108] EPRDF would accept a political party as a member if such a party has leaders that are elected based on a democratic participation of its members, and that it is committed for members' freedom to freely express their opinion. [109] It is also provided that party democracy is indispensable for the survival of the party as coalition.[110] Moreover, the

[108] Bylaw of EPRDF September 2006, Preamble & Section II- Organizational Principle Number Seven (7) *available at* http://www.eprdf.org.et/documents/10184/324318/STATUTE+english.pdf/1f87f164-8fde-4831-8341-0c0fbcec1444, (hereinafter, Bylaw of EPRDF)(Accessed on 20 May, 2018).

[109] *Id.,* Section II of the Organizational Principle Number Seven (7).

[110] *Id.,* Section II, the Organizational Principle Number Nine (9).

statute has pledged that the party will perform its activities on the basis of the principle of transparency and accountability.[111]

Under the bylaw of the Blue Party, it is stated that ensuring a democratic relationship among party organs and members is one of the purpose of the bylaw.[112] More specifically, it is provided that the internal functioning of the party will depend on the basis where rules and regulations are respected; rights' of members to freely express their view is esteemed; and where there is no domination of party personalities.[113] There are also statements acknowledging democracy as guiding principle under the bylaw of EDP. The bylaw, in its preamble, provides EDP is party that struggles for democracy allowing all segment of the society to be a member irrespective of differences on sex, race, language and social status.[114] The preamble also provides that the bylaw is necessitated to ensure a democratic relationship and functioning within the party.

2. Institutionalization of Internal Party Activities

The Statutes of the three political parties have provided a list of organs and champion for more decentralization through establishing branches at regional and district level- denoting a commitment for decentralized decision making. The parties generally have bodies: The General Assembly/Congress (the highest party organ), the Party Council (a council of representatives selected from members of the General Assembly, and is the next highest party organ), the Executive Council, the Party Chairman/President, Party Watch-dog/ Conflict Management Body, and other lower level organs.[115] The bylaws of EDP and Blue Party have espoused to establish branches at regional level.[116]As regards EPRDF, it already has regional representation as it is a coalition of four regional parties.

Most important is that all the parties have established a watch-dog or conflict management body. This body (herein after the Commission) is named as Audit and Investigative Commission in the Blue Party; Audit and Inspection Commission in EDP, and Inspection Commission in the EPRDF.[117] As discussed earlier, having a watch-dog or court-like body to inspect activities of the party and to manage and resolve party conflicts is one manifestation of party institutionalization and is crucial to ensure democracy within a party. Though it is significant that all the political parties under investigation have established this form of body, most crucial is the power endowed to it and its relative independence as an arbitrator of conflict or as watch-dog body.

In the Blue Party, the Commission is elected by and accountable to the General Assembly.[118] The powers of the Commission include interpreting the party statute, controlling

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[111] *Id.,* Article 7(3).

[112] Bylaw of Blue Party, Preamble *available at* http://semayawiparty.org/themes/garland/images/_baylaws.pdf, (hereafter Bylaw of Blue Party) (Accessed on 22 May 2018).

[113] *Id*., Article 4(1-6).

[114] Bylaw of Ethiopian Democratic Party January 2000, Preamble *available at* http://edponline.org/wp-content/uploads/2012/11/FinalDenb2001.pdf, (hereinafter Bylaw of Ethiopian Democratic Part) (Accessed on 22 May 2018).

[115] Bylaw of EPRDF, Art. 17, Bylaw of Ethiopian Democratic Party, Art. 7, Bylaw of Blue Party, Art 8.

[116] Bylaw of Blue Party, Art. 14-18, Bylaw of EDP, Art. 13-17.

[117] Bylaw of the Blue Party, Art. 11, Bylaw of EDP, Art. 10.

[118] Bylaw of the Blue Party, Art. 11.

the proper use of party fund, making final decision on disciplinary matters among members or leaders, creating forums to resolve conflicts among the Executive and Party Council (if any), gathering the General Assembly for a meeting when it believes party rules and regulation has not been properly respected by Party Council or the Executive Council.[119] In EPRDF, the Commission is formed by equal representatives of each member parties to the EPRDF and is accountable to General Assembly.[120] The Commission has powers such as to investigate the violation of rights of individual members in the party and to provide recommendation on the possible measures, control the proper use of party fund and resources, take disciplinary measure on members, and call the General Assembly for a meeting after securing support from 1/3rd of the party Council.[121] The Commission is required to work collaboratively with the Executive and Party Council. While the accountability of the Commission is to the General Assembly, decision made by the former is equivalent to decision of the Executive Council.[122] The Statute states that on matters that the Commission has differing opinion/decision than the Executive Council, the matter must be referred to the Party Council.[123] The decision of the Council on such matters will be final and binding until the next General Assembly.[124] Moreover, unlike the case in the Blue Party, the Commission is not given a power to interpret the party statute which is a very important power for such bodies to have.

In EDP, members of the Commission are elected by the General Assembly and are accountable to the same.[125] The Commission has powers such as to follow up and control the use of the party fund and resources, in collaboration with other concerned bodies, to make sure that mistake as regards policy and regulation of the party are rectified, and when it becomes difficult to rectify, to call the General Assembly to pass a final decision.[126] However, the Commission lacks a specific mandate to interpret the bylaw of the party and resolve conflicts in the party. Matters related with disciplinary issues are rather set to be entertained by the Party Council.[127]

In nutshell, looking at the bylaws of the parties, it can generally be said that the parties possess the structure to regard them as institutionalized. However, more important is whether these structures practically exist and function. This is because institutionalization is not only about design but, most importantly, it is also about implementation. The next section discusses the practice that whether the parties have the structure in place and that it functions as designed under the bylaws.

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[119] *Id.,* Art. 11(1-12).
[120] Bylaw of the EPRDF, Art. 23(1).
[121] *Id.,* Art. 23(2(A, B, C, & H)).
[122] Bylaw of the EPRDF, Art. 23(2(D).
[123] *Id.*
[124] *Id.*
[125] Bylaw of EDP, Art. 10.
[126] *Id.,* Article 10(10.1, 10.2,& 10.3).
[127] *Id.,* Article 9(9.4.11) & 9(9.4.12).

3. Equal Rights of Members and their Role in the Party's Decision-Making Process

The Statues of Blue Party and EDP have guaranteed a right to their respective party members to elect (on the basis of one person one vote), to be elected, to express ones' views in meetings, and to request for information and explanation on matters of the party.[128] In EPRDF, rights are rather provided to the member parties than individuals as it is a coalition.[129] To this end, member parties have rights such as equal rights to assume a leadership role in the party, to provide candidates for party leadership positions which will be filled by election, to hold and express opinions in accordance with rules and procedures of the party, to pass decisions on matters of the EPRDF and to equally use resources of the EPRDF.[130] With the exception to the statute of EPRDF where withdrawal of member parties is allowed with condition (up on fulfillment of certain withdrawal procedures),[131] members are allowed to withdraw any time without any prior condition in both the bylaws of EDP and Blue Party.[132]

One of the issues concerning the role of party members in decision making relates to the power of General Assembly. It is said that party members are significantly empowered in decision making when the General Assembly assumes a great deal of power. To this end, in the Blue Party, the General Assembly assumes huge power including powers to elect the Party President, members of the Party Council, and members of the Audit and Investigative Commission.[133] It also has the power to decide the party's emblem, anthem, policy and program.[134] In EDP too, the General Assembly assumes largely similar power, except the power to elect the Party President who is to be elected by the Party Council.[135] In EPRDF, the General Assembly has powers like to approve, amend or repeal the party's statute, set national policies, decide numbers of members of the Party Council and Executive Council, and hear and decide reports presented by the Party Council and the Commission.[136] Unlike the other two parties, the General Assembly in EPRDF lacks the role of electing the Party Leader, members of the Party Council and members of the Commission. Members to the Party Council and the Commission are assigned by each coalition parties from their respective Central Committee.[137] Powers like electing the Party Chairman and Vice Chairman, interpreting the party statute, approving the party's budget, and suspending member parties are reserved to the Party Council.[138]

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[128] *Id.,* Art. 5, 5.2(5.2.1, 5.2.2, 5.2.3). Bylaw of Blue Party, Art. 6, 6.1(1, 2, 5, 7).
[129] Bylaw of the EPRDF, Art. 8 through Article 15.
[130] *Id.,* Art. 11(1, 2, 3, 6, &7).
[131] A member party to the EPRDF which wants to withdraw from membership must first get approval from its own General Assembly, and must arrange a forum for other member parties to discuss on the matter. See The Bylaw of EPRDF, Art. 13(2(A, B, & C).
[132] Bylaw of the Blue Party, Art. 6, 6.1(8), and The Bylaw of EDP, Art. 5, 5.2(5. 2.6).
[133] *Id.,* Bylaw of the Blue Party, Art. 9, 9.2(1-5).
[134] *Id.*.
[135] Bylaw of EDP, Art. 8, 8.3(8.3.1 -- 8.3.11).
[136] Bylaw of EPRDF, Art. 3(A - G).
[137] *Id.,* Art. 19(1) &23(1).
[138] *Id*., Art. 19(2(A –K)).

4. Provision of Democratic Procedures for Decision Making

The parties under discussion have also tried to provide some degree of democratic principles/procedures guiding limited aspect of their internal actions. Examples of these are the provisions of term office and the secret ballot.

In the Blue Party, a 3 years term office is set for members of the General Assembly, the Commission and for the Executive Committee members including the party president.[139] The party president can serve for another term of 3 years only, yet the party leader can compete for the position after recession of one term period.[140] In EDP, 2 years term office for members of the General Assembly and the Commission is provided.[141] However, despite the bylaw, it is dispatched on the news that the party, in its fourth general assembly, had decided to limit the term of the party's president to a maximum of two years.[142] In EPRDF, members of the Congress/General Assembly stay as permanent members until the next Congress,[143] which is set to meet every two years and six months (the term can be extended up to six months up on the decision of the Party Council).[144] However, regarding members of the Party Council and the Executive Council, member parties possess exclusive powers to sack or replace their respective delegates anytime.[145] In terms of providing term office for the Chairman of the Party, despite discussion and interest towards that, nothing is said in the bylaw of the party.[146] Apart from term office, EDP and Blue Party have provided secret ballot as procedure for the selection of members for the Party organs.[147]

5. Inclusion of Disadvantaged Groups

In addressing disadvantaged groups of party members, much is not said in the bylaws of the three parties. Yet, some statements and bodies are provided addressing women as one segment of disadvantaged groups. EPRDF and Blue Party have established a women committee or body to reflect on women issues and to influence the parties' internal activities to be responsive on gender issues.[148] In EDP, there is no such specific organ to advocate on matters of the women in the party than a provision stating that special effort will be made to see women are represented in the Party Council.[149] More relevant to the case at hand, EPRDF has introduced a voluntary party

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[139] Bylaw of the Blue Party, Art. 9(8), 11(12), 13(13).
[140] *Id.,* Art. 13(13).
[141] *Id.,* Art. 8, 8.3(8.3.11) &10(10.6).
[142] Bruck Shewareged, Ethiopian Democratic Party (EDP) limits term of office, (2009), *available at* http://nazret.com/blog/index.php/2009/02/09/ethiopian_democratic_party_edp_limits_te, (Accessed on 21 May 21, 2018). The Author could not find a term office provided for the president in the bylaw of the party issued on January 24, 2001 Ethiopian Calendar which is still posted in party website.
[143] Bylaw of EPRDF, Art. 18(1(C)). The expression in English version of the by law is stated in certainty that the members will be replaced by the next Congress meeting.
[144] *Id.,* Art. 18(1(A)).
[145] *Id.,* Art. 19(1(C), & 20(1(B)).
[146] See generally the bylaw of the EPRDF.
[147] Bylaw of the Blue Party, Art. 25(5) and Bylaw of EDP, Art. 19(19.1(19.1.4).
[148] Bylaw of the EPRDF, Art. 27 and Bylaw of Blue Party. Art. 35.
[149] Bylaw of the EPRDF, Art. 9(9.2.1).

quota system for women candidature though this is not clearly provided in its bylaw.[150] This is a peculiar experience which other parties need to replicate.

6. Appropriate Use of Fund

Along with the specific provisions requiring parties to appropriately use party fund and make a disclosure, the bylaws under investigation have also provided mechanisms that ensure transparency of the same. As discussed, all of the three parties have, for instance, empowered their respective Commission to inspect and audit the proper use of party fund and resource. They also have made general reference to the provisions of the law to be guided by the same.

In general, while it is one thing that parties claim to adhere to party democracy in their bylaws and have provided some level of democratic procedures, there is yet a problem in relation to adequately addressing all elements of IPD. Besides, resulting from the absence of law that regulate IPD, there is a difference in the degree each of the above parties has adopted democratic principles and procedures guiding IPD in their respective bylaws.

VI. INTERNAL DEMOCRACY IN THE POLITICAL PARTIES IN ETHIOPIA: DO PARTIES PRACTICE DEMOCRACY INTERNALLY?

Despite their proliferation,[151] political parties in Ethiopia are critiqued for their failure to play multi- party function in the political process. Both the incumbent and opposition political parties are believed to have failed to play a multi- party function in the democratic process. This especially has become more evident in the current 100% a single party and its affiliate federal parliament. While different legal, political and cultural issues could have caused this paradox (i.e. political parties without multiparty system), nonexistence of internal democracy in political parties could certainly be one of the reasons. As shown below, studies on party practice in Ethiopia have generally reported a democratic deficit in the internal functioning of the parties. This finding works equally for parties in the opposition and the incumbent.

Despite parties' claim, in their bylaws, to adhere to IPD, studies prove democratic deficit in political parties functioning in Ethiopia such as the following.[152]

- Non-compliance with Bylaws- while all political parties have bylaw underlying the organizational and philosophical framework underlying their operation, there is a problem of non-compliance with their bylaw

[150]This quota system employed by the ruling party has played a significant role for the raise of numbers of women in the parliament in Ethiopia. See Mekdes Tadele & Tesfaye Abate, Women's Political Participation and Constitutionalism in Ethiopia, (paper presented on a Policy Dialogue on Constitutionalism and Human Rights, *organized by a Project on* Advanced Academic Partnership for Legal and Human Rights Education between KF University of Graz, Addis Ababa University Human Rights Center and Ethiopian Civil Service University (Mekelle, Nov.6-11, 2017).

[151]The Election Board reported 79 registered political parties to compete for both the regional and federal houses., *available at* www.electionethiopia.org/en, (Accessed on May 2017).

[152] Political Parties in East Africa: Diversity in Political Party Systems, (Report Prepared for the Institute for Democracy and Electoral Assistance(IDEA) as part of its Global Programme on Research and Dialogue with Political Parties 2007), at 44-48. Also see Kassahun Berhanu, Beleaguered Opposition under a Dominant Party System, at p. 7-8, *available at* https://www.cmi.no/file/?1315, (Accessed on 6 February, 2018.

- Dominance of Party leaders- accordingly, major decisions are made at party leaders level than decentralized decision making involving party members
- Less institutionalized- because party leaders assume huge political role, there is little institutionalization of party function.
- There is a problem of ensuring that members are constantly involved in party decision making and governance.

In his observation on party democracy in Ethiopia, Kassahun Birhanu noted that the number of complaints filed at the National Election Board and the Federal High Court by several party members alleging violations of party laws can prove the democratic deficit in the internal functioning of parties in Ethiopia.[153] He mentioned, as an instance, the cases of the Council of Alternative Forces for Peace and Democracy in Ethiopia on the question of who is eligible to lead the party, the case of the All Amhara People Organization in relation to the change of the nomenclature and its program, and the case of EPRDF when a split occurred in its top leadership on the issue of dealing with the Eritrean aggression in 2001.[154]

Others also made specific observation against the lack of internal democracy both in the oppositions and the ruling party. To start from the opposition, parties are often described as having weak and fragile organizational structure, vulnerable to endless internal infighting and conflict, formed by and largely depend on charismatic appeal of individuals than party institutions, and decision making is centralized on the hands of the party personalities.[155] Accordingly, political parties in the opposition are always characterized by mergers, splits and complete disappearances.[156] Some describe such party fragmentation is probably unseen anywhere in the world.[157] Party splits such as the split of Coalition for Unity and Democracy into two faction following the disputed election in 2005, the split of Oromo Nationalist Congress (ONC) into ONC and Oromo People's Congress (OPC), the split of All Ethiopia Unity Party's into another dozens of parties are among the various splits occurred in the oppositions.[158]

There is also strong criticism against the ruling party for its lack of internal democracy. EPRDF is criticized for its centralized decision making process where the leader allegedly is a key agent in formulating and executing party decisions. This is argued to be especially true during the late Prime Minister's (Meles Zenawi) party administration.[159] Meles Zenawi's influence and role in the party had even made the party to sometimes be referred by the name of

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[153] *Id.,* Kassahun Berhanu, at p. 7.

[154] *Id.*.

[155] Kassahun Berhanu, The Ethiopian Transition in Regional Perspective, Election processes, Liberation movements and Democratic change in Africa, a paper presented in conference Maputo 8-11 April 2010, CMI and IESE, 2010, at 3&8, *available at* https://www.cmi.no/file/?1007, (Accessed on 17 May, 2018) See also Assefa Fisseha, Endless Cycle of Infighting an Disintegration of Ethiopia's Opposition Parties, August 25, 2013, Tigary online , *available at* http://www.tigraionline.com/articles/ethio-opposition-quarrel.html, (Accessed on May 16, 2017)

[156] *Id,* Kassahun Berhanu.

[157] Assefa Fisseha, *supra* note 155, at p.83

[158] *Ibid.*

[159] International IDEA, *supra* note *152 at* 78.

the former.[160] The leadership vacuum, which the party claims to have occurred after his death, depicts the position which the Prime Mister had in the party. Gebru Asrat, former Head of Tigray Regional Government and now in the opposition, argues that EPRDF's self-evaluation of the party leadership in place following the death of Meles as weak proves the democratic deficit in the party.[161] He further argues in a party where there is an internal democracy, there is no chance a leadership vacuum or a weak leadership could occur.[162]

The often critic posed against the internal democracy in EPRDF is related to the relationship among its member parties. The EPRDF's bylaw underlies the equality of member parties of the coalition in all matters of party decision making.[163] It also notes that the survival of the coalition depends on the recognition of equality of member parties.[164] However, contrary to what is stated in the bylaw, critics often note the existence of unequal power and influence among members of the coalition in practice.[165] It is usual to find literatures denoting the dominance of TPLF in the coalition.[166] The past two years' unrests in parts of Amhara and Oromia Regional States are also said to be associated with the perceived dominance of TPLF.[167] The EPRDF's Executive Council, in its 17 days meeting of evaluation of the current situation, has also attributed the lack of IPD in the party as one of the causes of the crisis.[168] The following bold statements in relation to lack of IPD were noted in the party's press release concerning the 17 days party evaluation meeting:

> Absence of IPD has been exacerbated at every level of the leadership, particularly among the top level leadership. And this has hindered and relegated the environment for free deliberation of ideas in party, and as result, it has become difficult for the party's top leadership to reach into consensus of thought and action. The party further noted that the

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[160] *Id*.

[161] *The EPRDF that I knew: Interview with Gebru Aserat*, REPORTER NEWS PAPER, August 27, 2016, *available at* http://www.thereporterethiopia.com/content/eprdf-i-knew, (accessed on 19 May, 2018).

[162] *Id.*

[163] See Section II, General Organizational Principles, number 9 of the EPRDF Bylaw and its preamble.

[164] The whole message of the principle reads as follows: "EPRDF will protect its unity and realize its political programme where there is equality among member organizations. As a front political organization, the relationship among the member organizations will be based up on the principle of equality. Therefore, all members of the Front possess same rights and obligations including a right to consult equally on common issues; participate in decision making processes and to be represented equally in the leadership." See *Id*.

[165] Freedom House Country Report- Ethiopia, *available at* https://freedomhouse.org/report/freedom-world/2016/ethiopia, (Accessed on 18 June, 2018). See also Meles and the Plotters, The Economist, March 22, 2001, *available at* http://www.economist.com/node/541137, (Accessed on 18, June 18, 2018).

[166] *Id.,* See also Salih M. A. Mohamed, and Per Nordlund, Political Parties in Africa: The Challenge for Sustained Multi-Party Democracy, Africa, Regional Report Based on Research and Dialogue with Political Parties, (International Institute for Democracy and Electoral Assistance, 2007, Stockholm Sweden, 2007), at 62.

[167] See BBC's Report on what is behind Ethiopia's wave of protests?, *available at* http://www.bbc.com/news/world-africa-36940906, See Ethiopia: Ethnic Nationalism and the Gondar Protests *available at* http://www.aljazeera.com/indepth/features/2017/01/ethiopia-ethnic-nationalism-gondar-protests-170102081805528.html, Also watch the discussion with senior EPRDF executive members, broadcasted by EBC, *available at* http://www.habesha2day.com/watch.php?vid=04fc02b32, (Accessed on May 18, 2018)

[168] The EPRDF has been conducting a detailed evaluation of the country's current situation at party level for 17 days from December 12 to 30. As result, it has presented the public of its evaluation during the meeting. See EPRDF's Executive Committee statement, the Ethiopian Herald, *available at* http://www.ethpress.gov.et/herald/index.php/editorial-view-point/item/10478-eprdf-s-executive-committee-statement, (Accessed on 02, January 2018)

> problem that occurred mainly in relation to the wrong view and abuse of authority not only has weakened the democratic principles within the party, but has also posed a threat to our journey to make sure that that authority is only to serve the people.[169]

Seife Hailu, investigating the endurance of EPRDF, argues:

> Given that the party still retains its Leninist party structure and discipline principles, intra democracy is increasingly under erosion despite the party's loud rhetoric about democratic reforms. More democratic and transparent nomination and selection systems are not being encouraged at all levels of governance. Even in the election of party leaders and committees to different levels, it is now becoming increasingly common to see democratic ethos and principles are lacking.[170]

The EPRDF's cardinal principle of "democratic centralism", which is embedded in the party bylaw, which entail that a point once agreed upon is unchallengeable, is another problem which would make IPD unthinkable in the ruling party.[171] Opposition and dissenting views on what has been agreed upon by the party decision making bodies are not welcomed. For instance, in 2003, those who opposed the group led by Meles Zenawi were thrown out of government.[172] The influence of the founding leaders and party discipline also supposedly make the party more of personalistic.[173] The party discipline, in particular, which is often labeled as "strong"[174], is highly unlikely to allow free debate and dissenting opinions in the party. A rigid party discipline and IPD do not normally go together. If a political party becomes internally democratic, it means that its power to discipline its members is limited. In other words, the more rights and power enjoyed by party members, the fewer incentives they have to respect party doctrine. The existence of rigid party discipline obviously indicates the existence of restrictive environment for party members to express their views or hold dissenting views.

Following the 2 years of antigovernment strife in Ethiopia, a change in chairman has occurred in EPRDF. On the last week of March 2018, Dr. Abiy Amhed was elected as chairman of EPRDF with 108 votes out of 169 council members who voted.[175] The election of the new

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[169] *Id.*

[170] Seife Hailu, *Is the Ethiopian People's Revolutionary Democratic Front Rule Sustainable in Ethiopia?" A Critical Reflection*, 4 (11) PUBLIC POLICY AND ADMINISTRATION RESEARCH 64, 68 (2014).

[171] *Id*.

[172] Young and Medhane, *TPLF: Reform or Decline?, 30(7) JOURNAL OF REVIEW OF AFRICAN POLITICAL ECONOMY (2003)*, *available at* http://dx.doi.org/10.1080/03056244.2003.9659773, (Accessed on April 9, 2018).

[173] Alefe Abeje, *The Role Of The Federal System On The Structure And Operation Of Political Parties In Ethiopia*, 1EUROPEAN SCIENTIFIC JOURNAL 515, 515(2004).

[174] Temesgen Zewdie, 'One Year of Experience with Democracy in the Ethiopian Parliament,' *in* DEMOCRACY AND THE SOCIAL QUESTION: SOME CONTRIBUTIONS TO A DIALOGUE IN ETHIOPIA, (Ulrich Muller-Scholl ed., Addis Ababa University, 2009). Assefa Fiseha Legislative–Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform, at 22-23, *available at*, https://dullahomarinstitute.org.za/constitution-making-in-africa-conference/constitution-building-in-africaconference-papers/Assefa%20Fiseha%20-%20Legislativeexecutiverelationsinethsafricachapter.pdf, (Accessed on April 11, 2018).

[175] Dr. Abiy Ahmed Becomes A Prime Minister, The Legacy EPRDF Fought Against To The Bitter End. What Went Behind the Closed Doors And How Could That Shape His Premiership?, Addis standard, April 2, 2018, *available at* http://addisstandard.com/analysis-dr-abiy-ahmed-becomes-a-prime-minister-the-legacy-eprdf-fought-against-to-the-bitter-end-what-went-behind-closed-doors-and-how-could-that-shape-his-premiership, (Accessed on 8August, 2018).

chairman was unusual in the history of the party's leadership selection trend. The selection was not open to the public and also, unlike the pervious times, no one was able to predict who would be elected. Some suggested that the process of the election of Dr. Abiy has wrestled out the pervious influence of TPLF in the party and party's leadership selection process.[176] Yet critiques speculate that the election of the new chairman was not immune in itself from influence and behind door talks. Last minute decision of the Chairperson of the Amhara National Democratic Movement Party to withdraw from the competition was a display that there had been backdoor dealings behind the election.[177] The withdrawal of the Chairperson was said to be deliberate and orchestrated to back push TPLF's pressure to have the candidate of its penchant got elected.[178] Despite the speculation, the then head for the EPRDF's Office of Secretariat confirmed the press gathering that the process was transparent and went according to the party rules.[179] The election was made in secret ballot following debate on the nomination of the candidates.[180]

While it is very rush to judge internal democracy in EPRDF since the new leadership came to power, the sort of rival and words of war we are hearing among TPLF and the Dr. Abiy administration speaks unhealthy relationship in the coalition denoting fracture and risk of disintegration. As such, practices and widening of IPD is critical more than any time before. As long as EPRDF exist as party, and more importantly as a ruling party, equal participation in the decision-making by member parties plays critical role in securing the party and of course the country from another round of disorder.

VII. CONCLUSION

Practices such as centralized decision making, dominance of party figures, non-adherence to party rules and a weakened party institutionalization are reported to be the major features of the democratic deficit in the internal functioning of political parties in Ethiopia. If the multi-party system and the democracy in Ethiopia have to prosper, it is important that there are institutionally and pragmatically strong political parties. Besides, it is equally important that there are internally cohesive, sustainable and predictable political parties. This can, however, be true if the political parties manage to become internally democratic. The behavior of parties internally (whether they are democratic or not) certainly affects the democracy at state level. A political party, which does not behave and practice democracy internally, is hardly committed to establish a democratic system at state level. A political party, which does not behave in accordance with the party rules or does not respect party institutions internally, would lack the courage to respect rules and institution at state level. Moreover, a political party which is not habitude to respecting dissenting opinions internally would not easily accept oppositions and critics against its administration at state level. Internal Party Democracy is therefore important to develop a culture of democracy in political parties.

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[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] Watch the full press release at http://www.hahudaily.com/top/watch.php?vid=516561a1c, (Accessed on 8 August, 2018).
[180] *Id.*

Regulation, on the other hand, is a good institution which guarantees implementation of IPD. The regulation, either by prohibiting undemocratic practice or encouraging the practice of democracy internally, has an advantage of shaping the behavior of the parties through time towards adopting the norms of democracy. The democratic behavior of parties internally would in turn have a trickle up effect in forming a democratic government at state level.

Despite putting the tone of IPD in their statute, political parties in Ethiopia have actually failed to be abided by democratic principles in their day to day activity. If parties are regulated to follow the elements of IPD, they would not have a choice, but to implement IPD. Regulatory laws may also put IPD as a prerequisite for party formation. Accordingly, there would not be a political party formed without wishing to be democratic internally or without stipulating democratic procedures in their statute for party functioning internally. As it is the case in some European countries, regulation of IPD may even be adopted as ground for party cancellation. A political party which does not abide by or which violates the democratic principle may be subject to cancellation or other forms of responsibilities. As a political party cannot be established or function in the country while having a goal to subvert the constitutional order, the regulation of IPD would likewise make creation and operation of internally undemocratic parties impossible.

In addition, although the statutes of parties studied included some democratic principles to guide their internal activity, the scale the principles are incorporated in the statute of the parties varies considerably. Such variation has obviously come from the absence of a state law that set common standard for all parties. Setting a common standard through a law has a potential to promote IPD across all parties. This, in turn, could contribute in creating a level playing field among all parties in the electoral competition. The legal regulation of party democracy is also crucial to promote culture of democracy among all parties and their respective supporters.

Therefore, in Ethiopia, first, it is important that the Election Board follow up the implementation of some of the regulatory provisions already in place in the FDRE Constitution, the party registration law and the bylaws of political parties. Second, it is very important that there should be a comprehensive law that champion party democracy as a required behavior for political parties, and that it specifically regulates all aspects of internal democracy. The enactment of such a law would also give the Election Board of Ethiopia a clear mandate to inquire specific internal activities of political parties and hence to take corrective measures. It is equally important to build up the capacity of the National Election Board to follow up the implementation the requirements of the law.

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HARAMAYA LAW REVIEW ***Vol.*** 7(2018) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this Article:, Husen Ahmed Tura**,** *The Right to Food and Its Justiciability in Developing Countries,* HARAMAYA LAW REVIEW 7 (2018): 48-74

THE RIGHT TO FOOD AND ITS JUSTICIABILITY IN DEVELOPING COUNTRIES

Husen Ahmed Tura[*]

Abstract

This Article examines legal and jurisprudential developments on the right to food with a view to drawing lessons that could be important for food-insecure countries that strive to improve their legal and institutional frameworks to combat hunger and malnutrition. To this end, it reviews relevant laws and cases relating to the right to food and its justiciability. The right to food was first recognized in the Universal Declaration of Human Rights in 1948 and reaffirmed in subsequent UN and regional human rights instruments. An increasing number of countries have introduced concrete legislative and judicial measures to realize the right to food after the General Comment No. 12 and the Right to Food Voluntary Guidelines were adopted in 1999 and 2004 respectively. Nowadays, at least 30 constitutions explicitly recognize the right to food as a justiciable human right. 74 constitutions contain provisions that implicitly protect the right to food. Moreover, 167 States have adopted the ICESCR that expressly recognizes the right to food. Besides, many countries have adopted framework laws on the right to food or food security. Several cases relating to the right to food have also been litigated and victims of violations of the right have received judicial remedies in several developing countries. It is learned that existence of strong legal framework at domestic level, availability of liberal standing procedures that allow filing of collective and public interest litigations, and an active participation of NGOs have contributed to the success of the justiciability of the right to food at domestic levels.

Keywords: *Freedom from hunger, Food security law, Justiciability of the right to food, Right to food*

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I. INTRODUCTION

The right to food was first recognized as a component of the right to an adequate standard of living in Article 25(1) of the UDHR in 1948. Furthermore, Article 11 of the ICESCR recognizes the right to adequate food and the fundamental right to be free from hunger as two interconnected components of the right to food.[1] In addition, the 1996 World Food Summit (WFS) underlined the need for explaining the normative contents of the right to food and corresponding States obligations. In response, in 1999, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted the General Comment No.12 on the 'Right to Adequate Food'[2] that explains core contents of the right to food and corresponding States' obligations.

Moreover, the need to implement a right-based approach to combating hunger and malnutrition was emphasized in the Food and Agriculture Organization's (FAO) Right to Food Guidelines that was adopted by consensus of 180 States in 2004.[3] The Guidelines invite all Member States of the FAO, among others, to mainstream the right to food in the design and implementation of national food security policies and programmes. In particular, the Voluntary Guidelines recommend the establishment of sufficient legal framework at domestic levels which may involve the inclusion of the right to food in constitutions, adoption of a right to food or food security framework legislation, and empowerment of judicial and quasi-judicial institutions to adjudicate the right to food.[4]

Following the implementation of the Right to Food Guidelines, an increasing number of countries have incorporated the right to food into their constitutions. The FAO's database on the level of recognition of the right to food (as of 25 August 2018) shows that at least 30 constitutions recognize the right to food explicitly as a self-standing right while 74 constitutions contain provisions that implicitly protect the right to food as part of other broader rights.[5] Moreover, 97 countries recognise "international commitments as having the same status as constitutional provisions or the primacy of international obligations over national laws" which paved the way for the direct applicability of international instruments protecting the right to food at domestic level.[6] The constitutional recognition of the right to food demonstrates the strongest commitment of a country to realize the right. Several countries including Angola, Armenia, Azerbaijan, Bolivia, Brazil, Burkina Faso, Colombia, Indonesia, Mexico, Mozambique, Peru, India, and Tanzania have also adopted specific framework laws on the right to food or food

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[1] International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966) (herafter ICESCR).

[2] General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant) (1999).

[3] FAO, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (FAO, Rome, November 2004) *available at* <http://www.fao.org/docrep/009/y7937e/y7937e00.htm> (Accessed on 30 June 2018) (hereafter Right to Food Guidelines).

[4] *Id*.

[5] FAO, The Right to Food Around the Globe: Level of Recognition, *available at* <http://www.fao.org/right-to-food-around-the-globe/level-of-recognition/en/ (Accessed on 25 August 2018).

[6] *Id.*

security.[7] Furthermore, the Latin American Parliament (PARLATINO) introduced the Regional Framework Law on the Right to Food, Food Security and Food Sovereignty in November 2012 that represents a consensus among the continent's countries to implement a human rights-based approach to combating food and nutrition insecurity.[8]

In 2009, the Additional Protocol to ICESCR was adopted.[9] The Protocol enshrines complaint and inquiry procedures for filing violations of economic, social and cultural rights before the CESCR which facilitate the justiciability of the right to food at the international level. Moreover, the judicial enforcement of the right to food at the domestic level has been increasing over the last two decades. A study conducted by the International Development Law Organization (IDLO) shows that more than 60 cases involving the right to food have been litigated in many countries.[10] The adjudicated cases encompass three main issues: the failure to ensure freedom from hunger, the means to produce or procure food and the protection of vulnerable, marginalized and disadvantaged groups.[11]

Despite remarkable legal and jurisprudential developments regarding the right to food at national and international levels, most countries have not yet introduced appropriate measures in this regard. Lack of political will, lack of awareness relating to the right to food as well as institutional and structural constraints challenge the progressive realization of the right to food at domestic levels.[12] Despite widespread poverty and food insecurity in the world, many countries are still reluctant to constitutionally recognize the right to food as a justiciable human right.

This Article reviews international and national legal frameworks and cases relating to right to food in developing countries. The purpose of the Article is twofold. First, it builds on the literature that supports the justiciability of socio-economic rights in general and the right to food in particular. Thus, it seeks to take forward the thesis that the right to food is not a mere directive principle of state policy, but a justiciable human right. Second, it discusses good practices regarding the adoption of legislative and judicial measures pertaining to the enforceability of the right to food and aims at drawing important lessons for food-insecure countries that would utilize the law and courts as tools of combatting hunger and malnutrition. Accordingly, it assesses constitutional and legal recognition of the right to food and draws lessons from experiences of countries in Africa, Asia, and Latin America whose courts have enforced the right to food.

The remaining part of the Article is organized as follows. Following this introduction, the second and third sections review the UN and regional human rights treaties and soft laws that

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[7] FAO, Legal Developments in the Progressive Realization of the Right to Adequate Food (Working Paper, FAO, 2014), at 5, *available at* http://www.fao.org/right-to-food/resources/resources-detail/en/c/271813/, (Accessed on 23 March 2018) (*Hereafter* Legal Developments).

[8] *Id.*

[9] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, resolution/adopted by the General Assembly, A/ RES/63/117, (Accessed on 5 March 2009).

[10] IDLO, Realizing the Right to Food: Legal Strategies and Approaches, (2015) *available at* <http://www.idlo.int/publications/realizing-right-food-legal-strategies-and-approaches> (Accessed on 29 April 2018).

[11] *Id*. at 39.

[12] Hilal Elver, Access to Justice and the Right to Food: the Way Forward, Report of the Special Rapporteur on the Right to Food, UN Doc A/GRC/2865 (Accessed on 12 January 2014).

provide for the right to food and explain corresponding States obligations. The fourth section discusses several ways of incorporating the right to food into constitutions, adoption of framework laws on right to food or food security and the inclusion of the right to food in sector-specific laws. The fifth section reviews and analyses selected cases on the right to food and draws lessons that could be important for developing countries that seek to adjudicate the right to food. The last section presents the conclusion.

II. THE RIGHT TO FOOD UNDER INTERNATIONAL LAW

A. The UN Human Rights Treaties

Article 25(1) of the UDHR recognizes the right to adequate food as an element of the right to an adequate standard of living stipulating that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food." Moreover, the ICESCR, which is ratified by 167 States, enshrines two interrelated components of the right to food: the right to adequate food and the fundamental right to be free from hunger. Article 11(1) of ICESCR specifies that the "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food." The States Parties are required to adopt all appropriate steps to progressively ensure the full realization of the right to food to the extent of maximum resources available to them including any resource that could be accessible from the international community.[13] Likewise, sub-article 2 of the same provision enshrines the fundamental right of everyone to be free from hunger and requires States Parties to take appropriate measures that can improve methods of production, conservation, and distribution of food.

The right to food of specific groups including that of children, women, and persons with disabilities has also been recognized under international human rights treaties. For instance, the Covenant on the Rights of the Child (CRC) stipulates the right to food and nutrition of children.[14] Article 24(c) of the CRC obliges States Parties to combat disease and malnutrition through the provision of adequate and nutritious food and clean drinking water. Article 27 of the CRC further enshrines a child's right to an adequate standard of living. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contains two provisions that protect the right to food of women. Article 12 of CEDAW entitles women to adequate nutrition during pregnancy and lactation. Article 14 emphasizes the need to protect women's access to land, credit, income and social security programs as depriving women of such resources can lead to a violation of their right to food.[15] Similarly, the Convention on the Rights of Persons with Disabilities recognizes the right to health and to an adequate standard of living which also implicitly include the right to food.[16]

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[13] ICESCR, *supra* note 1, Arts. 11(1) and 2(1).

[14] Convention on the Rights of the Child, UNTS 1577, Arts. 24(c) and 27, (1989).

[15] Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13, arts 12 and 14 (entered into force 3 September 1981) (hereafter CEDAW).

[16] Convention on the Rights of Persons with Disabilities, 210 UNTS 131 (opened for signature 28 June 1952, entered into force 3 May 2008), Arts 25 and 28.

B. Regional Human Rights Treaties

Besides the aforementioned UN human rights treaties, there are also regional human rights instruments which explicitly or implicitly acknowledge the right to food.

1. Africa's Human Rights System

Although the African Charter on Human and Peoples' Rights does not expressly recognize the right to food, it enshrines that "all peoples shall freely dispose of their wealth and natural resources",[17] and access to and control over natural resources is crucial to realize the right to food. In fact, the African human rights system explicitly recognizes the right to food of women and children. In this respect, the right to food security of women is recognized in a protocol to the African Charter on Human Rights that obliges States Parties to "provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food and to establish adequate systems of supply and storage to ensure food security."[18] Moreover, the African Charter on the Rights and Welfare of the Child stipulates children's right to adequate nutrition as a component of the right to health.[19]

The African human rights system also acknowledges the right to food of Internally Displaced Persons. To this end, the States Parties to Kampala Convention are obliged to provide these persons with adequate humanitarian assistance, including food and water[20] and that members of armed groups must not deny internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, *food, water*, health, and shelter.[21]

2. The Inter-American Human Rights System

Though the American Convention on Human Rights predominantly covers civil and political rights, the Protocol of San Salvador expressly encloses the right to food.[22] Article 12 of the Protocol clearly states "everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development." It further stipulates that:

> In order to promote the exercise of this right (the right to adequate nutrition) and eradicate malnutrition, the State Parties undertake to improve methods of production, supply, and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.[23]

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[17] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, (June 1981), Art 21.

[18] Additional Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa, (African Commission on Human and Peoples Rights, 11 July 2003), Art 15, *available at* http://www.achpr.org/instruments/women-protocol/#16, (Accessed on 23 August 2018).

[19] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, (July 1990), Art. 14(c).

[20] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), (22 October 2009), Art. 9 (2) (b).

[21] *Id*., Art 7 (5) (c).

[22] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, opened for signature 17 November 1988, 28 ILM 156 (1989) (entered into force 16 November 1999). So far, the Protocol has been ratified by 16 States. See IDLO, *supr*a note 10.

[23] *Id*. Art 14. Arts 15 and 17, in particular, protect the right to food of children and the elderly.

The Protocol requires States to introduce domestic legislation based on their constitutional processes and the Protocol which may be necessary for making the rights a reality.[24]

3. The European Social Charter

Unlike the African and the Inter-American human rights systems, the European counterpart does not explicitly recognize economic, social and cultural rights in general and the right to food in particular. However, the European Social Charter,[25] revised in 1996,[26] contains some provisions which are relevant to the enjoyment of the right to food, including the right to safe and healthy working conditions (Art. 3), "the right to a fair remuneration sufficient for a decent standard of living for themselves and their families" (Art. 4), "the right to protection of health" (Art. 11), "the right to social security" (Art. 12), and "the right to benefit from social welfare services" (Art. 14).

4. ASEAN Human Rights System

There is no a binding regional human rights instrument in Asia. However, Article 28 (a) of the ASEAN (Association of Southeast Asian Nations) Human Rights Declaration enshrines that "every person has the right to an adequate standard of living for himself or herself and his or her family including the right to adequate and affordable food, freedom from hunger and access to safe and nutritious food."[27] The Declaration explicitly provides for the right to food. Its downside is that it is a non-legally binding instrument which makes its enforceability questionable. Its scope of application is also limited to 10 Member States of the ASEAN (i.e., Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam).[28]

C. Non-Binding International Instruments

In addition to the treaties overviewed earlier, several non-binding instruments[29] have been adopted under the UN human rights system to define the normative contents of the right to food

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[24] *Id*. at Art 2.

[25] European Social Charter, Turin, in European Treaty Series 35 (18 October 1961).

[26] European Social Charter (revised), Strassbourg, in European Treaty Series 163 (3 May 1996).

[27] ASEAN Human Rights Declaration (*ASEAN*, 19 November 2012), *available at* <http://asean.org/asean-human-rights-declaration/> (Accessed on 23 August 2018).

[28] *Id.* at Preamble, para 1.

[29] The development of International legal and policy instruments (binding and non-binding) can be put chronologically. Universal Declaration on Human Rights (Art. 25) (1948), UN World Food Conference (Universal Declaration on the Eradication of Hunger and Malnutrition) (1974), The International Covenant on Economic, Social, Cultural Rights (including Art. 11 on the right to adequate food entered into force) (1976), The Committee on Economic, Social, and Cultural Rights established– and began precise legal interpretation of ESC rights (1987), The Right to Food (Art. 12) in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the "Protocol of San Salvador") adopted, FAO Food World Summit convened and adopted Rome Declaration on World Food Security - the first coherent plan to make the right to food a reality (1996), The CESCR adopted General Comment N.12 on 'The Right to Adequate Food' (1999), The mandate of Special Rapporteur on the Right to Food was established by the Commission on Human Rights (2000), Adoption of the Millennium Development Goals, including Goal 1 to eradicate extreme poverty and hunger by 2015 (2000), Rome Declaration at the World Food Summit calling for the establishment of an intergovernmental working group to develop voluntary guidelines to achieve the progressive realization of the right to food (2002), Adoption of

and corresponding States obligations. For instance, the Rome Declaration on Global Food Security, which was adopted by 180 States at the World Food Summit in 1996, played a remarkable role in redefining the international policy on food security where States agreed to halve the number of undernourished people by 2015.[30] The Rome Declaration reaffirms the right of everyone to have access to safe and nutritious food, which is consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.[31] It defines food security as "existing when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life".[32] This definition involves four dimensions of food security: availability, access, utilization, and stability.[33] The FAO explains that a state of food security requires that: "sufficient food is available; all people have economic and physical access to the food they need; access and availability are ensured over time (stability), and the food is effectively utilized".[34] These pillars are applied cumulatively and food insecurity exists where one of them is not realized.

The 1996 WFS adopted a Plan of Action that outlines objectives and measures deemed crucial for implementation of the commitments contained in the Rome Declaration.[35] The Summit also underlined the need to clarify content of the right to adequate food and the fundamental right of everyone to be free from hunger and to give attention to implementation and full and progressive realization of this right as a means of achieving food security for all.[36]

In response, the UN Committee on Economic, Social and Cultural Rights (CESCR) introduced General Comment No. 12 on the Right to Adequate Food in 1999. The General Comment No. 12 forms the most authoritative interpretation of the right to food. It outlines the core contents of the right to food and explains corresponding States' obligations.[37] Moreover, in 2002, Member States of the FAO demanded the formulation of voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security to attain the progressive realization of the right to food.[38] In November 2004, the FAO Council

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FAO Voluntary Guidelines on the Right to Food which offers guidance to States on how to implement their obligations on the right to food (2004), Adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, making the right to food justiciable at the international level (2009), Adoption of the Sustainable Development Goals, including to Achieve food and nutrition security by 2030 (2015)

[30] FAO, Rome Declaration on World Food Security and the World Food Summit Plan of Action (13-17 November 1996), paragraph 18 of the Plan of Action.

[31] *Id*.

[32] *Id*.

[33] FAO, Food Security Policies Formulation and Implementation: Establishment of a Food Security Policy Framework, *available at* http://www.fao.org/elearning/Course/FP/en/pdf/trainerresources/learnernotes0419.pdf (Accessed on 17 May 2018).

[34] *Id.* at 4.

[35] Rome Declaration on World Food Security (13-17 November 1996, Rome). Plan of Action and Commitments are *available at* http://www.fao.org/docrep/003/w3613e/w3613e00.HTM, (Accessed on 2 August 2018).

[36] *Id*. See objective 7.4.

[37] General Comment No. 12, *supra* note 2.

[38] FAO, Declaration of the World Food Summit: Five Years Later (Rome, June 2002), para 10, *available at* <http://www.fao.org/worldfoodsummit/english/newsroom/news/8580-en.html> (Assessed on 6 September 2018).

adopted the Right to Food Guidelines by consensus[39] to be used as a practical tool by States in developing legislation, strategies, policies, and programs to achieve food security and realizing the right to food domestically.[40] In particular, Guideline 7 invites States to:

- include provisions in their domestic law which may include their constitutions, bill of rights or legislation that directly implement the right to adequate food,
- consider administrative, quasi-judicial and judicial mechanisms to provide adequate, effective and prompt remedies, particularly for members of vulnerable groups, and
- inform the public of all available rights and remedies within states that have already established a right to adequate food within their legal system.

The Guidelines are significant to improve legal and accountability frameworks of States. The FAO's recent data shows at least 30 countries include the right to food in their constitutions explicitly as a justiciable human right and that 74 constitutions contain provisions that protect the right to food implicitly as a component of other broader rights.[41] Dozens of countries have also enacted framework laws on the right to food or food security over the last few years.[42]

In 2012, the FAO Council adopted other voluntary guidelines regarding access to productive resources such as land, fisheries, and forests to support the progressive realization of the right to food in the context of national food security.[43] Likewise, the UN Human Rights Council introduced the Guiding Principles on Extreme Poverty and Human Rights in 2012 which contain a section dedicated to the right to food in the context of people in extreme poverty.[44]

III. MEANING OF THE RIGHT TO FOOD AND CORRESPONDING OBLIGATIONS OF STATES

A. Meaning of the Right to Food

In its General Comment No. 12, the UN Committee on Economic, Social, and Cultural Rights (CESCR) states that:

> The right to adequate food is realized when every man, woman, and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins, and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to

[39] FAO, Right to Food Guidelines, *supra* note 3.

[40] DUBRAVKA BOJIC BULTRINI, MARGRET VIDAR, & LIDIJA KNUTH, GUIDE ON LEGISLATING FOR THE RIGHT TO FOOD 12 (FAO, Rome, 2009).

[41] FAO, The Right to Food around the Globe, *supra* note 5.

[42] FAO, Legal Developments, *supra* note 7.

[43] FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Rome, May 2012).

[44] M Sepúlveda Carmona, Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/21/39, (18 July 2012).

> mitigate and alleviate hunger as provided for in paragraph 2 of article 11 even in times of natural or other disasters.[45]

Furthermore, Jean Ziegler, the first UN Special Rapporteur on the Right to Food, explained the right to food in the following manner:

> The right to food is the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.[46]

Oliver De Schutter, the second former Special Rapporteur on the Right to Food, also emphasized that:

> The right to food is not primarily the right to be fed after an emergency. It is the right for all to have legal frameworks and strategies in place that further the realization of the right to adequate food as a human right recognized under international law.[47]

Article 11(2) of the ICESCR recognizes the right to be free from hunger which is the minimum core content of the right to food. The CESCR underlined that "a State must ensure, for everyone under its jurisdiction, access to the minimum essential food which is sufficient, nutritionally adequate and safe to ensure their freedom from hunger."[48] It also stressed that States violate the ICESCR "when they fail to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger."[49] Scholars have also attempted to define the right to be free from hunger. For instance, Alston defines it as "the minimum content of the right to food.[50] Moreover, Texier defines freedom from hunger as the minimum threshold below which one should never, in principle, fall under any circumstances."[51] Golay, on his part, defines it as "the right to have access to the minimum essential food which is sufficient and adequate to ensure everyone is free from hunger and physical deterioration that would lead to death."[52]

B. Obligations of States

Like other economic, social and cultural rights, there are general and specific obligations related to the right to food.

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[45] General Comment No. 12, *supra* note 2, para 6.

[46] J Ziegler, Report by the Special Rapporteur on the Right to Food, Doc. U.N. E/CN.4/2001/53, (7 February 2001), para 14.

[47] Oliver De Schutter, Countries Tackling Hunger with a Right to Food Approach, United Nations Rapporteur on the Right to Food, UN Doc Briefing Note 01 (2010), *available at* <http://www2.ohchr.org/english/issues/food/docs/Briefing_Note_01_May_2010_EN.pdf (Accessed on 2 July 2017).

[48] General Comment No 12, *supra* note 2, para 14.

[49] *Id*. at para 17.

[50] Philip Alston, International Law and the Right to Food, *in* FOOD AS A HUMAN RIGHT 167 (Eide A., *eta, eds.,l* United Nations University, 1988).

[51] As cited in C GOLAY, THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS 14 (FAO, Rome, 2009).

[52] *Id*.

1. General Obligations of States

General obligations relating to the progressive realization of economic, social and cultural rights are contained in Article 2(1) of the ICESCR and explained in General Comment No 3.[53] States must take *all appropriate steps*, including legislative measures, to progressively achieve the full realization of economic and social rights. The measures must be "deliberate, concrete and targeted."[54] While the States are free to determine the appropriate steps in their contexts, appropriate measures may comprise enacting laws or implementing economic, administrative, educational, financial or social reforms.[55] To ensure the full realization of the right to food, the States Parties must "move as expeditiously and effectively as possible".[56] A State which might argue that it lacks resources to meet the minimum core obligation (i.e., to provide essential foodstuff) must show that it has made every effort by using resources at its disposal and resources obtained from the international community.[57]

There are also some obligations which must be applied immediately regardless of resource availability.[58] The obligations to ensure non-discrimination and the fundamental right to be free from hunger must be applied immediately. Articles 2(2) and 3 of the ICESCR enshrine all States Parties must ensure equal enjoyment of economic and social rights, including the right to food, by "providing objective and reasonably same protection for all persons regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[59] This obligation also requires States to identify the most vulnerable groups within its jurisdiction and take proactive steps, usually referred to as 'special measures', to bring the level of enjoyment of the right to food of these groups in line with the rest of the population.[60]

2. Specific Obligations of States

The CESCR explained the specific nature of States obligations in its General Comment No. 12. Like other human rights, the right to food imposes three types of specific obligations of States: to respect, protect and fulfil, which the CESCR explained as follows:

> The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood including food security. Finally, whenever

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[53] General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para.1, of the Covenant) (UN CESCR, 1990).

[54] *Id*. at para 9.

[55] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (*ESCR-Net*) *available at* <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (Accessed on 2 July 2017).

[56] General Comment No. 3, *supra* note 52, at para 9.

[57] General Comment No. 12, *supra* note 2, at para 36.

[58] *Id.* at para 5.

[59] ICESCR, *supra* note 1, at Art 2.2.

[60] IDLO, *supra* note 10, at 20.

> an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies to persons who are victims of natural or other disasters.[61]

The *obligation to respect* the right to food is a negative obligation and a State is required not to take any action that would impede people's existing access to food through production or procurement.[62] For instance, any government intervention that restricts people's access to natural resources that they use as a source of food, or threatening a well-functioning market may lead to a violation of this obligation.[63] A State also violates the obligation to respect if it introduces a law or policy that would cause an arbitrary eviction of people from their land, particularly, where the land is their main source of livelihood.[64] Likewise, a suspension or repeal of social security benefits in a situation where vulnerable people do not have an alternative means to provide for themselves might cause a violation of the obligation to respect the right to food.[65]

With respect to the *obligation to protect,* a State must take a proactive measure to regulate the conduct of non-state actors (third parties including individuals, corporations, and others) that can violate the right to food.[66] For instance, a State should take a regulatory measure against a company that grabs land or other natural resources that peasants and indigenous population depend on to feed themselves.[67] Enacting laws and policies governing consumer protection and food safety can also be regarded as part of the obligation to protect the right to food.

The *obligation to fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards full realization of the right to food. This obligation involves two elements: facilitate and provide. The duty to facilitate the right to food requires States to take steps aimed at enhancing people's ability to have means and resources to support their subsistence, for example, by adopting and implementing food and agriculture policies or enforcing minimum wage regulations.[68] In addition, the duty to facilitate the right to food requires States to implement policies that take into account the special need of vulnerable groups and create conducive environment to ensure access to food or a means of procuring it.[69]

Furthermore, a State must directly *provide* food for persons who cannot provide for themselves due to reasons beyond their control. A State would violate the obligation to fulfil if it fails to provide an emergency food aid for starving population in its territory where they do not

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[61] General Comment No. 12, *supra* note 2, at para 15.

[62] Husen Ahmed Tura, *Linking Land Rights and the Right to Adequate Food in Ethiopia: Normative and Implementation Gaps*, 35(2) NORDIC JOURNAL OF HUMAN RIGHTS 85 (2017).

[63] *Id*.

[64] Jean Ziegler, Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food, UN Doc. A/56/210, para 27, (Accessed on 23 July 2001).

[65] *Id*.

[66] *Id.* at para 28.

[67] *Id*.

[68] OHCHR and FAO, Fact Sheet No 34: The Right to Adequate Food (2010), at 18.

[69] Ziegler, *supra* note 64, at para 29.

have any other means to provide for themselves.[70] The obligation to provide is crucial to realize freedom from hunger which is the minimum core obligation of the right to food.

IV. ESTABLISHING APPROPRIATE LEGAL FRAMEWORK AT DOMESTIC LEVELS

To invoke a violation of the right to food, it must first exist in an applicable law (domestic, regional, international or combination of these). Therefore, the Right to Food Guidelines urges States to include provisions in their domestic law, which may include their constitutions, bills of rights or legislation, to directly implement progressive realization of right to adequate food.[71] There are several mechanisms to incorporate the right to food into a domestic legal system which include the following.

- Creation of a constitutional right to food,
- Adoption of a framework law on the right to food or food security and nutrition,
- Introducing sector-specific legislation that facilitates enforcement of the right to food, and/or
- Constitutional or legal recognition of direct applicability of international human rights treaties providing for the right to food

In what follows, we shall discuss the legal basis for the right to food at the domestic level which takes the form of constitutional recognition, framework legislation and/or sectoral laws.

A. Incorporating the Right to Food into Constitutions

The inclusion of human rights in a constitution provides the strongest protection since constitutions are the supreme laws of the land. Any legislative or administrative action that contradicts with a constitution is of no effect, and laws or a State's conduct which contradicts with constitutional provisions could be quashed through a judicial review procedure.[72] Moreover, it is not easy to amend a constitution which makes the removing of the right to food difficult.

States may constitutionally recognize the right to food in four ways: 1) explicit and direct recognition as a self-standing right, 2) implicit recognition as part of other rights, 3) explicit recognition as a goal or directive principle of state policy, and/or 4) recognition of the direct applicability of international or regional treaties providing for the right to food.[73]

1. Explicit Recognition as a Self-Standing Right

Explicit recognition of the right to food paves the way for its enforcement because it avoids the ambiguity of judicial interpretation. At least 30 countries expressly recognize the right to food for all, or for specific groups including children, prisoners or indigenous peoples.[74] These include but not limited to Brazil, Colombia, Costa Rica, Republic of Congo, Egypt, Fiji, Guatemala,

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[70] Husen, *supra* note 61; Ziegler *supra* note 64, at para 29.

[71] FAO, Right to Food Guidelines, *supra* note 3, at Guideline 7.

[72] De Schutter, *supra* note 47.

[73] FAO, The Right to Food around the Globe: Methodology, *available at* <http://www.fao.org/right-to-food-around-the-globe/methodology/en/> (Accessed on 25 August 2018).

[74] FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

Honduras, Kenya, Malawi, Maldives, Mexico, Moldova, Nepal, Nicaragua, Niger, Panama, Paraguay, Philippines, South Africa, and Zimbabwe.[75]

In this regard, Mexico's constitution enshrines "every person has the right to food that is nutritious, sufficient, and of quality. The state shall guarantee this right."[76] Article 27 of the South African constitution also states "everyone has the right to have access to: (b) sufficient food and water, (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance", and that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights."[77] In the same vein, Article 36(1-2) of the constitution of Nepal enshrines that "each citizen shall have the right to food" and that "every citizen shall have the right to be protected from a state of starvation, resulting from lack of food stuffs". Moreover, it states that "every citizen shall have the right to food sovereignty as provided for in law".[78]

Some constitutions explicitly recognize the right to food of certain groups such as children, indigenous peoples or prisoners. For instance, Article 44 of the Columbian constitution stipulates that "children have fundamental rights to life, integrity, health and social security and *adequate food*."[79] Similarly, the constitutions of Cuba, Guatemala, Honduras, Panama, and Paraguay contain explicit provisions protecting the right to food of children.[80] The right to food of prisoners and detainees is protected in the South African Constitution.[81]

2. Implicit Recognition as Part of Broader Human Rights

The right to food is linked to other several human rights. Thus, a constitutional recognition of broader rights like the right to adequate standard of living, the right to development and the right to human dignity leads to an implicit recognition of the right to food. A FAO study finds that the constitutions of Algeria, Burundi, Cuba, Cyprus, the Czech Republic, the Dominican Republic, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Indonesia, Iraq, Malawi, Senegal, Peru, Sao Tome and Principe, Seychelles, Syria, Thailand, Togo, Turkey, and Bolivia implicitly recognize the right to food.[82] For instance, Article 42 of the Constitution of Belarus provides that:

> Employees shall be guaranteed a just share of remuneration for the economic results of their labour in accordance with the quantity, quality and social significance of such work, but it shall not be less than the level which shall ensure an independent and dignified living for them and their families.[83]

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[75] FAO, Legal Developments, *supra* note 7.

[76] Constitution of the Mexican United States, 1917 (as amended to 2010).

[77] Constitution of the Republic of South Africa, s 27 (1996).

[78] The Constitution of the Federal Democratic Republic of Nepal, (2015).

[79] Republic of Colombia Constitution, (1991, as amended to 2011).

[80] Lidija Knuth and Margret Vidar, Constitutional and Legal Protection of the Right to Food around the World' (2011), 21, *available at* <http://www.fao.org/docrep/016/ap554e/ap554e.pdf>, (Assessed on 23 March 2018); FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

[81] Constitution of South Africa, *supra* note 77, at s 35.2(e).

[82] FAO, Legal Developments, *supra* note 7, at 3; FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

[83] Belarus's Constitution of 1994 (as amended to 2004).

Similarly, Article 43 of Constitution of Ethiopia enshrines the "Peoples of Ethiopia as a whole, and each Nation, Nationality, and People in Ethiopia in particular, have the right to improved standards of living and to sustainable development"[84], and that "the basic aim of development activities shall be to enhance citizens' capacity for development and to meet their basic needs."[85]

3. Directive Principles of State Policy

The right to food can also be included in "directive principles"[86] of state policy in which States are committed to realizing economic, social and cultural rights for all citizens without stipulating claims of rights holders. At least 102 constitutions stipulate a State's obligation to facilitate access to food under directive principles of state policy.[87]

Although the inclusion of access to food in directive principles of state policy does not automatically create a legal basis for the justiciability of the right to food, courts can use such principles as tools of judicial interpretation and thereby protect the right.[88] For example, the Indian Supreme Court, while interpreting Article 47 of the Indian Constitution,[89] in *Olga Tellis v. Bombay Municipal Corporation,* ruled that "the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country."[90] Subsequently, the Court enforced the right to food as part of the right to life (Article 21) by interpreting Article 47 (that obliges the government to improve the level of nutrition of its people).[91]

4. Direct Applicability of International Treaties in Domestic Legal Systems

Several countries have incorporated international and regional human treaties into their domestic laws via their constitutions and paved the way for the direct applicability of ratified treaties in their jurisdictions. In fact, international treaties have different status in *monist* and *dualist* systems. In countries that adopt a *monist* system, for example, France and the Netherlands, international human rights treaties are directly applicable as the international law is automatically included into domestic law. On the other hand, in *dualist* systems, including the UK and Australia, international law does not immediately become part of the domestic law as additional steps must be taken to include treaties into the domestic legal system.[92]

Even though the status of international human rights instruments varies depending on legal systems, the inclusion of statements in constitutions regarding the direct applicability of the

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[84] CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 43(1).

[85] *Id*. at Art 43(4).

[86] Directive principles of state policy are "the values to which a society aspires although at the time of drafting they may not reflect a broad societal reality, which guides governmental action but do not necessarily provide individual or justiciable rights." Knuth and Vidar, *supra* note 80, at 33.

[87] FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

[88] IDLO, *supra note* 10, at 24.

[89] Constitution of the Republic of India, Art 47 (1949, as amended to 2012).

[90] *Olga Tellis v Bombay Municipal Corporation* 2 Supp SCR 51 (1985).

[91] M J McDermott, *Constitutionalizing an Enforceable Right to Food: A Tool for Combating Hunger*, 35(2) BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 543 (2012).

[92] C Courtis, Socio-Economic Rights before the Courts in Argentina, *in* JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS 309, 314 (F Coomans eds., 2006).

international standards at the domestic level has resulted in the adjudication of the right to food in some countries. For instance, the Kenyan Supreme Court cited the ICESCR and the African Charter besides the Kenyan Constitution to render its judgment in *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*.[93]

B. Adoption of Legislation on the Right to Food or Food Security

The constitutional recognition of economic, social and cultural rights is obviously significant, but insufficient condition to put the rights into practice. As constitutional provisions are normally written in general terms[94], it is important to enact a specific legislation and/or regulations, which "set out in more detail mechanisms for implementation, assign specific responsibilities, and provide for redress mechanisms in the event of violations."[95] There are two approaches to adopting a national legislation on the right to food or food security: introducing an overarching framework legislation or including the right to food into a sector-specific legislation.

1. Framework Laws on the Right to Food or Food Security

Specific framework legislation is crucial to operationalize the right to food as it elucidates on the general principles.[96] A framework law on the right to food or food security:

- can determine the scope and content of the right,
- sets out obligations for state authorities and private actors,
- establishes necessary institutional mechanisms,
- provides for a legal basis for subsidiary legislation and other necessary measures, and
- provides grounds for redress.[97]

The FAO methodology for assessing framework laws pinpoints two distinctive sets of framework laws: 1) framework laws that acknowledge and support the realization of the right to food, and 2) framework laws that are not overtly founded on human rights but specify an institutional framework for coordination and implementation.[98]

A food security framework law under the first category must satisfy the following criteria: "1) an explicit recognition of the right to food as a human right, the objective of the law being the realization of the right to food, or substantive provisions of the right to food; and 2) incorporation and consideration of at least three human rights principles for the implementation of the law, including participation, accountability, non-discrimination, transparency, human dignity, empowerment, rule of law, and equality."[99]

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[93] *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* (2011) eKLR Constitutional Petition No 2 (2011).

[94] F Coomans, *supra* note *92., at 7-8.*

[95] Oliver De Schutter, A Rights Revolution: Implementing the Right to Food in Latin America and the Caribbean: Briefing Note 6 (2012).

[96] BULTRINI *et al*, *supra* note 40, at 57.

[97] *Id*., at 53–65.

[98] *Id*.

[99] FAO, Legal Developments, *supra* note 7, at 5.

An increasing number of countries have adopted right to food or food security framework laws which create food security and nutrition coordination mechanisms and/or clearly enshrine the right to food. These are: Republic of Angola (2010), Argentine Republic (2003), Armenia (2002), Republic of Azerbaijan (1999), Bolivia (2011-2014), Brazil (2006) Burkina Faso (2007-2008), Republic of Cabo Verde (2013), Colombia (2009), Republic of the Congo (2008-2009), Ecuador (2008-2009), El Salvador (2009), French Republic (2010), Guatemala (2005) India (2013), Honduras (2010-2011), Indonesia (2012), Kyrgyzstan (2008), Mexico (2004), Republic of Mozambique (2010), Nicaragua (2009), Panama (2012), Paraguay (2013), Peru (2008-2013), Republic of Tajikistan (2010), Turkmenistan (2000), Venezuela (2008), and Tanzania (2011).[100]

Furthermore, the Latin American Parliament (PARLATINO) implemented the "Regional Framework Law on the Right to Food, Food Security, and Food Sovereignty" in 2012. This framework law demonstrates a heightened commitment of the Latin American countries to implement a human rights-based approach to combating hunger and malnutrition.

2. Sectoral Laws

Sectoral laws can also play a positive role to realize the right to food. For instance, a legislation pertaining to access to land and other natural resources can enhance access to food for rural populations who produce food not only to feed themselves but also supply a surplus to the market for procurement to feed urban dwellers.[101] A trade legislation also affects food affordability. Agricultural laws scaffold situations for food production. Labour laws are also significant to regulate a minimum wage and social protection to sustain an adequate standard of living. Other examples of sectoral legislation which could facilitate the progressive realization of the right to food include:

- A legislation creating entitlements to food subsidies and transfers in cash or in kind for food security (India, 2013);
- Food safety and consumer protection legislation (Montenegro, 2007); and
- School feeding legislation (Brazil, 2009 and Peru 2013).[102]

V. JUSTICIABILITY OF THE RIGHT TO FOOD

Justiciability can be defined as "the possibility of a human right, recognised in general and abstract terms, to be invoked before a judicial or quasi-judicial body that can, first, determine, in a particular concrete case presented before it, if the human right has or has not been violated; and second, decide on the appropriate measures to be taken in the case of violation."[103] Several international, regional and national laws provide for the justiciability of economic, social and cultural rights in general and the right to food in particular. For instance, the UDHR enshrines "everyone has the right to an effective remedy by the competent national tribunal for acts

[100] *Id*.
[101] *Id*. 6; Husen, *supra* note 61.
[102] FAO, Legal Developments, *supra* note 7, at 7-8.
[103] *Id*. at 9.

violating the fundamental rights granted to him by the constitution or law."[104] Similarly, the General Comment No. 9 of the CESCR states that "appropriate means of redress or remedies must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability."[105] Moreover, the General Comment No 12 enshrines "any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies including those provided by quasi-judicial mechanisms."[106]

The success of justiciability of the right to food depends on three main conditions: existence of a strong legal basis that can be invoked by rights holders, availability of legal remedies and their application to protect the victims from violations of the right to food and the recognition of the right to food by implementing bodies and their ability to ensure the respect, protection, and fulfilment of the right.[107]

Some scholars, who consider economic, social and cultural rights as imprecise, resources demanding, and subject to available resources and progressive realization, argue that the right to food is not a justiciable right.[108] There are also practical obstacles to the justiciability of the right which stem from lack of government's political will, lack of awareness of rights holders, and structural as well as institutional constraints.[109] Cases involving the right to food are limited in practice although an increasing number of countries are enforcing the right to food over the last few years. In this regard, the International Development Law Organization reviewed more than 60 cases involving a government's failure to ensure: the right to be free from hunger, the means to produce or procure food, and the protection of vulnerable, marginalized and disadvantaged groups.[110] The cases relating to the States' failure to ensure freedom from hunger were brought before courts in Argentina, Brazil, Colombia, India, and Nepal.[111] Moreover, cases involving the means to produce or procure food have focused on land and fishing as sources of livelihood and the economic means to obtain food and the role of the State.[112] In addition, cases concerning the protection of vulnerable, marginalized or disadvantaged groups have targeted the right to food of prisoners or detained persons, indigenous peoples, children, and refugees or asylum seekers.[113]

A. Cases Involving the Right to Food

This section investigates selected cases involving the right to food which were brought before courts in Asia, Latin America, and Africa. The cases were selected purposely based on important

[104] Universal Declaration of Human Rights (1948), Art 8.
[105] CESCR, General Comment No. 9, E/C.12/GC/19, para 9, (4 February 2008).
[106] General Comment No. 12, *supra* note 2, at para 32.
[107] Christophe Golay, The Right to Food and Access to Justice: Examples at the National, Regional and International Levels, (FAO, Rome, 2009), at 59, *available at* <http://www.fao.org/right-to-food/resources/resources-detail/en/c/49305/> (Accessed on 23 March 2018).
[108] FAO, Legal Development, *supra note* 7, at 12.
[109] Elver, *supra* note 12.
[110] IDLO, *supra* note 10, at 39.
[111] *Id*., at 37-40.
[112] *Id*., at 40-44.
[113] *Id*., at 45-48.

issues involved in them such as the justiciability of core contents of the right to food and corresponding States obligations discussed earlier.

1. India

India has taken exemplary steps in enforcing the right to food in general and the right to be free from hunger in particular. Its parliament adopted the Food Security Act in 2013 and the Indian Supreme Court has enforced the constitutional right to food as a part of the right to life since 2001. The *People's Union for Civil Liberties v. Union of India* is one of the most cited cases in relation to the right to food.[114] This case was brought before the Indian Supreme Court regarding the occurrence of chronic famines and hunger-related deaths in drought-affected regions of the country, in particular, the State of Rajasthan.[115]

People's Union for Civil Liberties (PUCL), which is a prominent human rights organization in India, instituted a public interest petition before the Supreme Court in 2001 alleging that the government has failed to provide essential foodstuff to the people exposed to hunger due to successive droughts for three years. The PUCL contended that the right to food, which obliges the State to provide food to people in drought-affected areas who cannot purchase or produce it themselves, is implicitly recognized in the right to life under Article 21 of the Constitution.[116] The PUCL requested the Court to order the government to enforce food distribution schemes, policies and legislation in force that stipulate the release of grain stocks in times of famine.[117] The petitioners emphasized that it was unacceptable for the government not to tackle hunger and starvation in the situation where there were surplus grain supplies which remained unexploited and depreciated in warehouses because of insufficient storage facilities.[118]

The Supreme Court notably recognized that plenty of food is available, but the distribution of the same amongst the very poor and the destitute is scarce and non-existent.[119] It found that "the basic cause of the hunger and malnutrition was hardly lack of resources, but ineptitudes and failure to apply legislation and policies in force."[120] The Court further argued that mere schemes without any implementation are of no use and emphasized that "what is important is that the food must reach the hungry."[121] The Court issued numerous interim orders demanding the government to apply existing policies, schemes, and legislation. It also specified actions to be adopted, particularly regarding vulnerable groups, to safeguard the implementation. Among others, the Court ordered that every state government must afford cooked mid-day meals for all children in

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[114] *People's Union for Civil Liberties v Union of India* (2003) Writ Petition (Civil) No 196 of 2001 and Interim Order of 2 May 2003.

[115] L Birchfield and J Corsi, *'Between Starvation and Globalization: Realizing the Right to Food in India*, 31 (4) MICHIGAN JOURNAL OF INTERNATIONAL LAW 691, 697-698 (2010).

[116] *People's Union for Civil Liberties v. Union of India* (n 113), at para 50.

[117] *Id.,* at paras 49 and 50.

[118] *Id*., at para 11.

[119] *People's Union for Civil Liberties v Union of India and Others,* Interim Order of 23 July 2001(2001).

[120] V. GAURI AND D. BRINKS, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Cambridge University Press) 348 (2008).

[121] *People's Union for Civil Liberties v Union of India and Others, supra* note 114.

public schools or government-assisted school programs.[122] It also computed the minimum amounts of food to be allocated to each child.[123]

The Court also gave numerous interim orders in subsequent years. For instance, in 2003, the Court ordered, *inter alia*, that:

- grain allocation for the Food for Work schemes be doubled and financial support for schemes be increased;
- ration shop licensees must stay open and provide grain to families below the poverty line at the set price;
- the government should publicize the rights of families below the poverty line to grain to ensure that all eligible families are covered; and
- all individuals without means of support (older persons, widows, disabled adults) are to be granted a ration card for free grain.[124]

Interim orders of the Supreme Court eventually resulted in the transformation of the government's food schemes in place into legal entitlements deriving from the right to food that is embedded in the Constitution, and the beneficiaries into "stakeholders of justiciable rights."[125]

2. Nepal

The 2007 Interim Constitution of Nepal protects the right to food and the country has ratified the ICESR.[126] Thus, the Supreme Court of Nepal has interpreted this right in the light of the right to adequate food and the right to be free from hunger that is enshrined in Article 11 of the ICESCR.[127] In *Kumar Basnet v. Prime Minister & Ors*, the petitioners instituted a writ before the Supreme Court to order the government of Nepal to provide food for populations exposed to hunger.[128] Although the Court clearly acknowledged that the government is responsible to protect the right to life, it failed to eventually pass the order that was sought by the petitioners.[129]

Another case involving the violation of the right to food in Nepal was brought before the Supreme Court in 2008. In *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v. Government of Nepal*, the petitioners claimed that the shortage of food, inefficiencies in food distribution, and the dissemination of rotten food caused pervasive hunger and disease in some parts of the country.[130] The petitioners sought the adoption of a sufficient legal framework, the establishment of infrastructures, storage facilities, and the

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[122] *People's Union for Civil Liberties v Union of India and Others* (2001) Interim Order of 28 November 2001.
[123] *Id*.
[124] IDLO, *supra* note 10, at 40.
[125] HUMAN RIGHTS LAW NETWORK, FOOD SECURITY & JUDICIAL ACTIVISM IN INDIA, (Human Rights Law Network, 2007).
[126] *Id*.
[127] M Langford and A Bhattarai, *Constitutional Rights and Social Exclusion in Nepal*, 18 INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 387, 402 (2011).
[128] *Kumar Basnet v Prime Minister & Ors*, Writ No 3341, (1998).
[129] Langford and Bhattarai, *supra* note 127, at 402; IDLO, *supra* note 10, at 40.
[130] *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v Government of Nepal*, as cited in *id*. at 402-403.

introduction of an effective food distribution scheme.[131] The Supreme Court stayed a final judgment but issued an interim order that acknowledged the fundamental right to a dignified life and demanded the concerned government bodies to directly provide food in affected districts.[132] Moreover, the Court passed the final judgment in 2010 and reiterated that "the right to food, health… social security is all basic human rights" and that the State is obliged to realize them.[133] It is worth noting that Article 36 of the Constitution of Nepal (as amended in 2015) explicitly recognizes the right to food and food sovereignty.

3. Malaysia

In 2002, a case concerning the link between land and indigenous people's means of livelihood was brought before the Malaysian Court of Appeal. In *Kerajaan Negeri Johor v. Adong bin Kuwau*, members of the *Orang Asli* indigenous community in Malaysia invoked a violation of their right to life following the Malaysian government's decision to build a dam on their ancestral land.[134] Their claim was based on provisions of the constitution, in particular, the right to life, domestic legislation (i.e., the Aboriginal Peoples Act), and common law.[135] The Malaysian Court of Appeal ruled in favor of the claimants and found that "the community's livelihood depended on hunting animals and collecting forest products on their land"[136] and argued that "it was settled beyond argument in our jurisdiction that deprivation of livelihood may amount to a deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds."[137]

4. Brazil

Brazilian courts have adjudicated cases involving the state's failure to realize the right to food and tackle extreme poverty. For instance, a case was filed against the Municipality of *Maceió* in 2007 concerning the deteriorating living conditions affecting about 1,500 families.[138] This case becomes an important precedent regarding the justiciability of economic, social and cultural rights of vulnerable communities in the country.[139]

The National Rapporteur on the Right to Food, Water, and Land studying the community's condition discovered that residents of the *Orla Lagunar favelas* in the city of *Maceió* subsisted in "extreme poverty, used mud and plastic sheeting for housing, lacked basic infrastructure and adequate sanitation, and children suffered from severe malnutrition."[140] The principal sources of

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[131] IDLO, *supra* note 10, at 40.

[132] Langford and Bhattarai, *supra* note 127, at 403.

[133] IDLO, *supra* note 10, at 40, See also B Adhikari, Nepalese Supreme Court Decision on the Right to Food in Right to Food and Nutrition Watch *in* CLAIMING HUMAN RIGHTS: THE ACCOUNTABILITY CHALLENGE (2011) at 94-95.

[134] *Kerajaan Negeri Johor & Another v. Adong bin Kuwau & Others,* Malaysian Court of Appeal, (2002).

[135] *Id*.

[136] IDLO, *supra* note 10, at 41.

[137] Kerajaan Negeri Johor, *supra* note 133, at para 7.

[138] Action No 4.830/07, 2ª Vara da Infância e Juventude de Maceió (2007) s II (1-10). Translation by FAO, Right to Food: Making it Happen Progress and Lessons Learned through Implementation (2011).

[139] De Schutter, *supra* note 47, at 11.

[140] FAO, Right to Food Case Study Brazil, UN Doc. IGWG RTFG /INF 4/APP.1 (2004); IDLO, *supra* note 10.

subsistence were found to be a garbage dump and small-scale fishing.[141] Not all residents were beneficiaries of the social benefits programs in force, especially those who did not have the necessary documents for eligibility, including a birth certificate or identity card were ineligible.[142] According to an FAO study, public programs particularly focusing on the community were insufficient and programs in force were underfunded.[143] Moreover, the community did not qualify as a "high approach priority" region because it was an urban community inside the State capital.[144]

In reaction, some public prosecutors from the State Public Ministry (Ministério Público Estadual) brought a public interest litigation against the municipality asking the fulfilment of the right to food, life, and well-being of children and teenagers living within the area.[145] The court rendered a judgment in September 2007 which is later described as one of the sharpest defences of economic, social and cultural rights in Brazilian jurisprudence to date.[146] The court held the Municipality of *Maceió* accountable for violating the rights to food, health, and education of the children and teenagers of the *Orla Lagunar* communities. Both international human rights treaties[147] and domestic provisions stipulating the right to food[148] were utilized in the court's reasoning and judgment.

Several specific remedies were ordered to remedy the violations of the right to food, housing, health, and education of the children of the affected communities. The court fixed a 60-day due date for the municipality to stretch out social administrations to the inhabitants of the affected communities.[149] The court also required the district to submit a proposal for the usage of an extensive variety of public policies and strategies, including:[150]

- establishing a multidisciplinary commission to analyze the socio-economic profile of children and adolescents living in the favelas within 30 days;
- ensure that sufficient resources are allocated to these solutions in the municipality's budget and prepare a contingency plan if enough resources cannot be found; and
- expediting the registration of children and adults.

5. Kenya

The Kenyan High Court considered the link between the right to food and the right to housing in *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*.[151]

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[141] De Schutter, *supra* note 47, at 11.
[142] FAO, Brazil, *supra* note 140, at 56.
[143] IDLO, *supra* note 10, at 38.
[144] *Id*.
[145] The claim was filed with the District Court for Children and Adolescents (28ª Vara Cível Da Capital - Infância e Juventude, Estado de Alagoas).
[146] De Schutter, *supra* note 47; IDLO, *supra* note 10, at 38.
[147] The rights of the child protected in Article 19 of the American Convention on Human Rights.
[148] Article 277 of the Brazilian Federal Constitution (as amended by Constitutional Amendment No 65, 2010) recognizes the right to food of children and adolescents.
[149] Action No 4.830/07, *supra* note 138, at 70.
[150] IDLO, *supra* note 10, at 51.
[151] *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security*, Kenyan High Court, Constitutional Petition No 2 (2011).

The Kenyan government forcefully evicted more than 1,000 people from their homes on public land that they had to possess since the 1940s.[152] Their homes were eventually demolished and building materials and family goods had been destroyed in the course.[153]

The High Court realized that after the eviction, the claimants have been forced to stay and sleep in the open without housing, meals, water, sanitation, and healthcare[154] and moved to an environment where there was no single basic necessity of life and disabled not to feed themselves.[155] The Court held the right to life and to be free from hunger were violated along with the right to adequate housing, the right to water and sanitation among others.[156] The Court primarily grounded its ruling on the Kenyan constitution, the ICESCR, and the African Charter emphasizing that any international treaty ratified by Kenya is a part of the domestic law.[157]

The court passed a mandatory injunction obliging the state to return the petitioners to the land from which they were displaced and to rebuild their homes and/or deliver substitute housing and other facilities such as schools.[158] Moreover, the government was ordered to restrain from taking a similar conduct in the future and to compensate all petitioners.[159]

6. South Africa

Kenneth George and Others v. Minister of Environmental Affairs & Tourism (South Africa) involved a marine resources law that introduced a quota system for fishing.[160] Several communities lost access to the sea and their means of survival. Their nutritional condition worsened considerably as they encountered growing food insecurity and poverty.[161] Some NGOs assisted the communities to bring a class action against the Minister of Environmental Affairs and Tourism before the High Court (Cape of Good Hope Provincial Division). After an extensive negotiation, the fishing communities and the government reached a settlement that allowed the traditional fishermen to fish and sell their products.[162] The High Court, moreover, gave an order entailing the assignment of permits to the fishermen and the introduction of a new legislative and policy framework that would accommodate traditional fishers more effectively.[163] The court specified that "such a framework should take into account international and national legal obligations and policy directives to accommodate the socio-economic rights of these fishers and to ensure equitable access to marine resources for those fishers."[164]

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[152] *Id*., at 12 and 13.
[153] *Id*., at 8.
[154] *Id*., at 13.
[155] *Id*., at 19.
[156] *Id*., at 20.
[157] *Id*., at 11.
[158] *Id*., at 20.
[159] *Id.,* at 20-21.
[160] Golay, *supra* note 107, at 54-55.
[161] *Id*.
[162] *Kenneth George and Others v. Minister of Environmental Affairs and Tourism*, SA 297 (EqC), High Court (Cape of Good Hope Provincial Division) (2005).
[163] *Id*., at para 8.
[164] *Id*.

A commercial fishermen's association later opposed an agreement between the South African government and small-scale fishermen that discharged the latter from legislation outlawing some fishing practices and fishing of certain species such as lobsters.[165] Nevertheless, the agreement was upheld by the Western Cape High Court that endorsed the claim that "the small-scale fishermen relied on the resources delivered by the sea and traditional fishing methods as the only means to feed themselves and their families."[166]

7. Nigeria

A case was brought before the African Commission alleging that the Nigerian government had violated the right to food of indigenous communities. In the *SERAC v. Nigeria*,[167] the claimants contended that:

> The Nigerian government destroyed and threatened Ogoni food sources through a variety of means. The government participated in irresponsible oil development that poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops, and animals created malnutrition and starvation among certain Ogoni communities.[168]

The claimants alleged the Nigerian government had violated its obligations to respect and protect the right to food of the Ogonis by directly destroying their food sources and by failing to monitor and control the actions of oil companies on the Ogoni land that had violated the right to food.

The African Commission, on its part, argued that the right to food is implicitly recognized under the African Charter in relation to the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22)[169] and held that:

> The right to food requires that the Nigerian Government should not destroy or contaminate food sources. The government has destroyed food sources through its security forces and State Oil Company and through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian Government, hence, is in violation of the right to food of the Ogonis.[170]

The Commission ordered the Nigerian government to implement various activities including payment of compensation and tidying up dirtied or damaged soil and rivers.[171] The Commission also requested the government to undertake social and ecological impact assessments before

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[165] *West Coast Rock Lobster Association v Minister of Envtl. Affairs & Tourism* 532/09 (2010) ZASCA 114.
[166] IDLO, *supra* note 10, at 44.
[167] *Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights v. Nigeria (African Commission on Human and People's Rights, Communication No. 155/96, May 2002)*, para 9.
[168] *Id*.
[169] *Id.,* at paras 64-66.
[170] *Id.,* at paras 65-66.
[171] *Id*., at paras 70-72.

implementing future oil projects.[172] The Commission also encouraged the government to provide information to the community on health and environmental effects of oil operations.[173]

B. Lessons Learned from the Cases Involving Right to Food

In general, the following lessons can be drawn from the cases reviewed earlier.

***Legal Framework*:** The existence of a clear and sufficient legal framework is essential to claim the enforcement or violation of the right to food. In the countries where the right to food was litigated successfully, there has been a strong legal basis deriving from both international and domestic laws. The countries have ratified international conventions stipulating the right to food and explicitly recognize the right in their constitutions that form the legal basis for claims of the petitioners and judgments of the courts. For instance, constitutions of Brazil, Kenya, Nepal, and South Africa explicitly recognize the right to food as a justiciable human right. Moreover, their parliaments have enacted specific framework legislation on the right to food or food security. The courts have applied international human rights instruments such as the ICESCR in addition to domestic laws while adjudicating cases involving the right to food.

Widening Standing has a huge impact on the justiciability of socio-economic rights. The success of strategic litigations concerning the right to food is strongly linked to legal procedures that allow individuals or groups to file suits without necessarily having a vested interest on a case particularly relating to collective interests of certain groups or public interest litigations. Many Latin American countries like Argentina, Brazil and Columbia have introduced the *Amparo* (protection) procedure in which any person can file a claim before the courts, including constitutional court, to request measures to stop or prevent unlawful act by a public authority violating a constitutional right.[174] Argentina and Brazil, in particular, allow for collective complaints to be filed by any person. In Brazil, collective interest is protected by the *ação civil pública* (public civil action), which can be initiated by the public prosecutor or trade unions and NGOs regarding environmental rights, consumer rights or any other 'collective interest'.[175]

In India and Nepal, domestic laws or judicial practice empower the courts to entertain public interest litigation or collective claims filed by any person without necessarily being a victim or representing all victims.[176] Legal standing requirements in Kenya, which allow an initiation of the public interest litigation by every person representing himself or others including an association acting in the interest of one or more of its members, are enclosed in Article 22 of the Constitution.[177] In general, the experience demonstrates that introducing a legal procedure that would facilitate the filing of collective interest or public interest litigation plays a crucial role in enhancing the judicial enforcement of economic and social rights.

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[172] *Id*., at para 71.
[173] *Id*.
[174] IDLO, *supra* note 10; at 29.
[175] *Id*.
[176] *Id*.
[177] Constitution of the Republic of Kenya 1969 (as amended to 2010) s 22.

Justiciable matter: The reviewed cases involve several issues relating to core contents of the right to food and corresponding States obligations. For instance, the government's failure to ensure freedom from hunger has been the basic issue in the cases adjudicated in India and Nepal. The protection of the right of children was also subject of litigation in the cases of *People's Union for Civil Liberties v. Union of India* and the *Maceio* case in Brazil. Moreover, violations of State obligations to respect, protect and fulfil the right to food have been the subject of litigation in the cases. For instance, the High Court of Cape of Good Hope Province held that the government of South Africa had violated its duty to respect the right to food of fishing communities by limiting their access to marine resources since it adopted a repressive marine law.[178] In the *Ogoni* case, the African Commission held the Nigerian government responsible for violating the obligation to respect by destroying the *Ogoni's* food resources.[179] Moreover, the Nigerian Government was held accountable for violating its obligation to protect the right to food of the *Ogonis* by failing to control the oil companies that had destroyed and contaminated food sources of the communities.[180] Furthermore, the justiciability of the obligation to facilitate the right to food has been established in cases litigated in Brazil, India, and Nepal among others. The protection of the right to food of indigenous peoples, which is greatly linked to their access to land (in Malaysia and Kenya), fishing communities (South Africa), and the food assistance programs based on the right to life (Indian case), has been adjudicated at national levels. The government's failure to distribute available food to areas where there had been starvation due to a shortage of physical availability of food has also been a justiciable matter in India and Nepal.

Therefore, a lesson that could be drawn from the experiences is that various issues related to the right to food can be justiciable matters. The right to food can be violated when a government fails to ensure the fundamental right to be free from hunger (the minimum core obligation of the right to food) by not providing an essential foodstuff for people exposed to starvation due to reasons beyond their control; when the government restricts an existing access to natural resources (such as land, fishery and forest) that people use as basic sources of food or its procurement; when a government fails to control and monitor private entities who encroach access to food; and when a government fails to protect the right to food of specific groups such as children, women, prisoners, indigenous peoples, and refugees.

***Role of NGOs*:** The success of litigations concerning the right to food was also enhanced by an active participation of NGOs. As discussed earlier, most public interest or collective litigations were brought before the courts by various NGOs. For instance, the People's Union for Civil Liberties (PUCL) in India, Forum for Protection of Public Interest in Nepal, Centre for Minority Rights (Kenya) and Civil Liberties Organization in Nigeria have actively participated in the public interest litigations on behalf of vulnerable, marginalized or disadvantaged groups. In particular, the PUCL has extensively promoted the right to food and its justiciability in India since 2001 by conducting a series of awareness-raising campaigns. Thus, poor countries should not underestimate the role of NGOs in protecting and promoting socio-economic rights.

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[178] *Kenneth George and Others v Minister of Environmental Affairs and Tourism, supra* note 161, at paras 94-96.
[179] *SERAC v Nigeria, supra* note 167, at paras 65-66.
[180] *Id*.

Remedies: Availability of remedies in a national legal system enhances the judicial enforcement of the right to food. Victims of violations of the right must be entitled to adequate remedies which may take the form of restitution, compensation, satisfaction, or guarantees of non-repetition.[181] Existing remedies at the domestic level may vary based on the facts of the case and the legal, political and social setting where judges work.[182] Some constitutions comprise provisions on remedies. For instance, the Constitution of India stipulates that the "Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari which may be appropriate for the enforcement of any of the rights conferred by this Part (Part III.—Fundamental Rights)."[183] The South African Constitution also gives the judges enough discretion to determine effective remedies enshrining that "when deciding a constitutional matter within its power, a court may make any order that is just and equitable."[184] In the aforementioned cases, more conventional remedies such as compensation, restitution, and declarations were issued. In addition, detailed orders (including interim orders and mandatory injunctions) were delivered.

VI. CONCLUSION

The ICESCR and other UN and regional treaties recognize the right to adequate food and the fundamental right to be free from hunger. Over the last two decades, the right to food has developed as a justiciable human right. This development was passed through three important phases. First, the 1996 World Food Summit decided that the normative contents of the right to food and corresponding states obligations must be defined. In response, the UN CESCR adopted the General Comment No.12 on the Right to Adequate Food in 1999. Moreover, the FAO then adopted a comprehensive Right to Food Guidelines in 2004. Among others, the Voluntary Guidelines encourage States to take legislative and judicial steps to ensure the progressive realization of the right to food. Following the Right to Food Guidelines, an increasing number of countries have amended their constitutions and afforded constitutional protection to the right to food. While some countries explicitly recognize the right to food as a justiciable human right, others implicitly recognize it as part of broader human rights like the right to adequate standard of living, the right to a dignified life or the right to development. Some constitutions include food security in directive principles of state policies which oblige governments to facilitate access to food without enshrining claims of rights holders. In counties such as India, directive principles are transformed into justiciable human rights through judicial interpretation of the right to life.

Including the right to food into constitutions is an important step but insufficient condition in itself to enforce it. Thus, scores of countries have adopted specific right to food or food security framework laws that define the normative contents of the right to food and corresponding States obligations and establish a legal basis for judicial enforcement of the right at domestic levels. Some countries include provisions on the right to food in sectoral laws.

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[181] General Comment No.12, *supra* note 2, at para 32.
[182] IDLO, *supra* note 10.
[183] Constitution of the Republic of India, Art 32(2) (1950).
[184] Constitution of the Republic of South Africa, Section 172(1)(b) (1996).

The justiciability of ESCR has long been contested. Obstacles such as lack of political will, lack of awareness, and institutional as well as structural constraints hinder the justiciability of the right to food in many countries. This Article shows, however, that an increasing number of countries are using the right to food as a tool for combating hunger and malnutrition in their jurisdictions. Several cases involving violation of the right have been successfully litigated and victims have received effective remedies in many countries in Africa, Asia, and Latin America.

It is found that a clear and sufficient legal framework at domestic level, widening of standing rules, active participation of NGOs in the protection and promotion of human rights and availability of remedies in a domestic legal system enhance the justiciability of the right to food. Thus, States should strive to strengthen their legal frameworks on the right to food and empower courts to adjudicate cases involving economic and social rights. In particular, governments should work towards incorporating the right to food into their constitutions and should adopt framework laws on the right to food or food security to define the contents of the right and recognize its justiciability. To ensure accountability for violation of the right to food, States should also allow initiation of public interest litigations by any person including NGOs thereby ease the requirement of legal standing. States should also raise the awareness of rights holders concerning their right to food. Moreover, governments should renew their political commitment to adopt and implement policies that ensure the progressive realization of the right to food.

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HARAMAYA LAW REVIEW ***Vol.*** 7 (2018) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this Article: Zakariyas Berhanu Tufa, *Foreign Capital Outflow Regulation under Ethiopian Bilateral Investment Treaties and Domestic Investment Laws*, HARAMAYA LAW REVIEW 7 (2018): 75-93

FOREIGN CAPITAL OUTFLOW REGULATION UNDER ETHIOPIAN BITS AND DOMESTIC INVESTMENT LAWS

Zakariyas Berhanu Tufa[*]

Abstract

In foreign investment, investors need to repatriate their capital and the investment returns to their home country or third country at any time they want. On the other hand, host states require foreign capital for balance of payment and need to control capital outflow in fear of large currency outflow. At the same time, states, particularly developing ones, need to attract foreign investment. In this regard, states' regulation of foreign capital outflow has significant implication. Like others, Ethiopia attempts to regulate repatriation of investment capital and its returns through its BITs and domestic investment laws. The aim of this Article is to investigate whether the Ethiopian investment laws are designed to meet the development need of the country when they regulate repatriation of foreign investment. To this end, the Article examines the relevant provisions of Ethiopian BITs and domestic investment laws. It also consults relevant literatures and foreign experiences. By so doing, it reveals that most of the Ethiopian BITs fully liberalize repatriation of investment capital and its returns which may affect the ability of the country to control capital outflow. Besides, the domestic investment laws are not clear enough on whether they allow repatriation of foreign capital though they expressly allow the repatriation of current account transactions. This could affect the objective of attracting foreign investors to come to Ethiopia. Accordingly, the BITs and domestic investment laws shall be revisited to allow the country to control foreign capital outflow when it is necessary and to create certainty for the foreign investors about the possibility and conditions of investment repatriation.

Keywords: *Bilateral investment treaties, capital account, current account, foreign direct investment, foreign capital, foreign investors*

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I. INTRODUCTION

Nowadays, it is a fact that foreign investment, largely in the form of FDI and portfolio, is the largest mechanism by which huge capital revolves throughout the world. It is also known that FDI inflow and technology transfer are increasingly concentrated in a handful of countries while the developing countries and least developed countries are marginalized though they liberalize their investment legal regime.[1] In FDI, the foreign investors aim at generating profit from their investment. As a result, they need to be sure if they are, *inter alia*, allowed to repatriate their foreign capital and other returns from their investment. This means that they require liberalization of foreign capital outflow. To define it, liberalization of capital outflow means the abolition of government restrictions on both initial capital (capital that foreign investors brought to host state at entry level) and payments related to transactions.[2] On the other hand, host states need to get foreign capital and also to regulate its outflow for various reasons including solving or preventing balance of payment problem. Hence, compromising these two conflicting interests remains a headache for policy and law makers.[3]

Unlike international trade, which is largely regulated through various multilateral agreements, the international investment regime is mainly regulated through BITs. BITs are concluded specifically to protect foreign investment[4], and their core objectives are promotion and protection of foreign investment which include facilitation of free transfer of capital. BITs are introduced to ensure that investments are secured from political and other risks in host states.[5] The 1959 BIT between Germany and Pakistan being the first, there are about 3000 BITs in the world to facilitate the foreign capital flows.[6] BITs in general have the goal of strengthening economic co-operation between states and creating favorable conditions for investors.[7] It does not, however, mean proliferation of BITs in facilitation of foreign capital flow from capital exporting countries to host state may always guarantee development of host states.[8]

Foreign capital flow liberalization is said to have both advantages and disadvantages. On one hand, the liberalization can enhance managerial efficiency, promote financial sector competitiveness and facilitate greater productive investment in a state.[9] It can support long-term

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[1] SIMA MOTAMEN-SAMADIAN, CAPITAL FLOWS AND FOREIGN DIRECT INVESTMENTS IN EMERGING MARKETS, 145(2005).

[2] STEPHANY GRIFFITH-JONES, *et al*, THE OECD EXPERIENCE WITH CAPITAL ACCOUNT LIBERALIZATION 5 (Institute of Development Studies, University of Sussex Brighten, UK) (2000), at foot note 6.

[3] Frank L. Bartels & S.A.de Crombrugghe, *FDI Policy Instruments: Advantages and Disadvantages,* (UNIDO, Research and Statistics Branch Working Paper), (2009), at 2

[4] M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT 172 (3rd ed, Cambridge University Press) (2010).

[5] *Id.*

[6] JAN PETER SASSE, AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES 1 (1st ed., Gabler Verlag) (2011)

[7] Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, INTERNATIONAL INVESTMENT PERSPECTIVES, 145 (2006).

[8] *Id*. at 177-178

[9] INTERNATIONAL MONETARY FUND, THE LIBERALIZATION AND MANAGEMENT OF CAPITAL FLOWS: AN INSTITUTIONAL VIEW, 2(2012), *available at* :http://www.imf.org/external/np/pp/eng/2012/111412.pdf (Accessed on 15 September 2016).

growth with short term policy challenges.[10] It is also alleged that there is positive correlation between capital account openness and economic growth.[11] On the other hand, most empirical studies show that there is rare consensus among professionals on whether full capital account liberalization and economic growth are positively related.[12] Accordingly, it is noted that the balance of costs and benefits of capital flow liberalization must depend on the domestic political economy, institutions, ideological inclinations and level of economic development of the country in question.[13] Furthermore, it is claimed that free capital mobility would have potential problems like appreciation of exchange rate, exposure of domestic manufacturers to stiff competition, sudden withdrawal of large fund, dislocation or accumulation of foreign currency and loss of monetary autonomy that affect a state's monetary regulation and policy.[14] Given the above facts, countries should devise the appropriate ways in the regulation of capital outflow from investment and other sources.

In the same fashion, the investment law and policy of Ethiopia have the mission of enhancing investment and promoting investment opportunities.[15] Till 2018, Ethiopia has signed about 34 BITs among which 21 are in force.[16] Most of the BITs signed by Ethiopia allow full liberalization of capital outflow for foreign investors though they use different terms like "any kind of asset" or "free transfer of investment" to refer to transfer of foreign capital. In addition, there are few BITs that put restriction on free transfer of capital when the transfer may cause or threaten to cause serious difficulties for operation of monetary policy, exchange rate and balance of payment. The BITs that Ethiopia has with France[17], UK[18], Israel[19] and Brazil[20] have such exceptional conditions. From this, it can generally be concluded that the Ethiopian BITs can be categorized into two based on how they regulate foreign capital outflow. As such, there are BITs that fully liberalize foreign capital outflow and that which allow transfer of foreign capital on the fulfillment of certain conditions.

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[10] STEPHANY GRIFFITH*, supra note* 2, at 2.

[11] Mihir A. Desai, *et al*, *Capital Controls, Liberalizations, and Foreign Direct Investment,* (The Review of Financial Studies, Vol. 19 No. 4 2006), at 1436.

[12] Barbara Friz & Daniela Prates, *The New IMF Approach to Capital Account Management and its Blind Spots: Lessons From Brazil and South Korea*, INTERNATIONAL REVIEW OF APPLIED ECONOMICS 210, 212 (2014).

[13] PIERRE-OLIVIER GOURINCHAS AND OLIVER JEANNE, ON THE BENEFITS OF CAPITAL ACCOUNT LIBERALIZATION FOR EMERGING ECONOMIES 4*(*2002).

[14] Mihir A. Desai, *supra* note 11*,* at 1433

[15] Elias N. Stebek, *The Investment Promotion and Environment Protection Balance in Ethiopia's Floriculture*: *The Legal Regime and Global value Chain*, (Phd Dissertation, War Wick School of Law), (2012), at 9-10.

[16] UNITED NATION CONFERENCE ON TRADE AND DEVELOPMENT, INVESTMENT POLICY FRAME WORK, *available at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/67 , (Accessed on 25 April 2018).

[17] Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, signed on 25/6/2003, Art 6(3)

[18] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and Ethiopia for the Promotion and Protection of Investments, signed on 19/11/2009, Art 6.

[19] Agreement between Ethiopia and the Government of The State of Israel for the Reciprocal Protection and promotion of Investments, signed on 26/11/2003, Art 6.

[20] Agreement Between the Federative Republic of Brazil and Ethiopia on Investment Cooperation and Facilitation, signed on 11/4/2018, Art 10(2 &3).

Practically speaking, the above categorization may be superficial. Through the application of Most Fovoured Nation (MFN) principle, foreign investors can use other BITs signed by Ethiopia to benefit from treaty obligations that arise from such BITs.[21] Hence, foreign investors may still claim the repatriation of their capital and returns according to those BITs that fully liberalize repatriation of foreign capital outflow. Based on this, one may be interested to question the approach that Ethiopia has followed to regulate repatriation of foreign capital through its various BITs. On the other hand, when it comes to the relevant domestic legislations that regulate repatriation of foreign capital in Ethiopia, there exist certain issues that worth close consideration. The relevant domestic laws in the regulation of repatriation of foreign capital primarily include Ethiopian Investment Proclamation No.769/2012 (Investment Proclamation), Ethiopian Investment Incentive Regulation No.270/2012 (Investment Regulation) and the Ethiopian Customs Duties Proclamation No. 859/2014.

The Investment Proclamation contains rules that are meant to regulate repatriation of foreign investment. As can be read from Article 26 of the Investment Proclamation, there are lists of 'funds' that the investor is allowed to remit out of Ethiopia. In so doing, there is no express stipulation under Article 26 that allows remittance of foreign capital. The proclamation is explicit as to remittance of funds related to current account like remittance of profit, dividend, proceeds from sale or liquidation of enterprise, and proceed from sale of share. Since Article 26 (1(f)) of the Proclamation allows remittance of '*proceeds from sale or liquidation of the enterprise* (investment)', it may be argued that it is possible for the foreign investors to remit foreign capital including the initial capital.[22] Despite this, the Investment proclamation is not clear at all whether or not the foreign investors are allowed to repatriate their capital in kind rather than selling it in Ethiopia or if it is possible to relocate the investment before liquidation. In respect of repartition of capital in kind, one should investigate the Ethiopian Investment Incentive Regulation No.270/2012 if it can have any help. However, this regulation seems to deal with how the foreign investor can transfer some duty free imported capital goods, construction materials or vehicles to another investor with same privileges or in the form of re-exporting.[23]

Therefore, Article 15(3) of the regulation does not seem to allow foreign investors to repatriate their capital goods. It is rather concerned with the requirements, including payment of custom duties, to transfer those imported goods. Even if this provision can be interpreted to allow transfer of capital goods, the practice in Ethiopia tells us that capital goods entered the country can be re-exported in exceptional circumstances as this will be discussed in this article. The Custom Duty Proclamation also contains provisions that require payment of customs when duty-free imported goods are to be re-exported.[24] Therefore, it is worthwhile to examine whether the Ethiopian domestic investment regime allows repatriation of foreign capital in general and

[21] Martha Belete Hailu & Tilahun Ismael Kassahun*, Rethinking Ethiopia's Bilateral Investment Treaties in Light of Recent Developments in International Investment Arbitration*, 8(1) MIZAN LAW REVIEW 117, 143 (2014).

[22] *Investment Proclamation,* Proclamation No.769/2012, FED. NEGARIT GAZETTE, 18thYear No. 63, Addis Ababa, (2012), Art 26(1,f).

[23] *Investment Incentive and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation,* Regulation No. 270/2012, FED. NEGARIT GAZETTE,19th Year No.4, Addis Ababa, (2012), Art 15(3)

[24] *Customs Proclamation*, Proclamation No. 859/2014, FED. NEGARIT GAZETTE, 20th Year No.82, Addis Ababa, (2014), Art 71(6&7).

foreign capital in kind in particular that relate to foreign investment and the related effects that it may have.

Moreover, it is recommendable that there should be consistency between BITs and domestic investments laws when they regulate repatriation of foreign capital. It is known that the International Monetary Fund (IMF) Articles of Agreement, under Article VI (3), gives the power to Member States to regulate capital movement while it requires them to liberalize their current accounts. In regulating transfer of foreign capital in relation to investment, Member States can thus use BITs or/and their domestic laws. Through these laws, countries can liberalize or control capital outflow. At this junction, it would be inevitable to raise an issue when there may be a conflict between BITs and domestic investment laws in their treatment of capital outflow from foreign investment. Indeed, the Vienna Convention on Law of Treat (VCLT) prohibits Member States to invoke the provision of domestic law to justify failures to perform a treaty.[25] As such, it provides us with a means to handle the issue when there is conflict between BITs and domestic laws. Despite this, having similar objective of attracting foreign capital via investment, compatibility between Ethiopian BITs and its domestic investment laws foreign capital outflow regulation is essential to build confidence of investors to invest in Ethiopia.

The aim of this Article is therefore to examine the above mentioned and other issues that arise in connection with the regulation of capital outflow under the BITs signed by Ethiopia and its domestic investment laws. To this end, the Article investigates the relevant provisions in the BITs and domestic laws. In addition, the Article consults relevant literatures and BITs signed by other countries and their domestic laws. In particular, experiences of South Korea, Kenya and South Africa are given particular attention. This is due to their historical economic policy and current legal practice regarding the issues addressed in this study.

The remaining part of the Article is organized into four sections. Section II discusses the regulation of capital outflow under major international legal instruments. This includes regulation of foreign capital outflow under the IMF Articles of Agreement, OECD Code of Liberalization and generally under BITs. Section III presents experiences from Kenya, South Korea and South Africa on the regulation of capital outflow from foreign investment. Section IV, on its part, examines the regulation of foreign capital outflow from investment in Ethiopia. It separately discusses the regulation of repatriation of investment capital under Ethiopian BITs and under the relevant domestic investment laws. It also singles out the problems that arise in relation to the regulation of repatriation of investment in Ethiopia. Finally, section V provides conclusion and recommendations.

II. FOREIGN CAPITAL FLOW REGULATION UNDER DIFFERENT INTERNATIONAL INSTRUMENTS

In addition to domestic laws of each state, there are certain international instruments that regulate international capital flow. This section briefly discusses the major international instruments that regulate capital flow.

[25] *Multilateral Vienna Convention on Law of Treaty*, No. 18232, UN, (1969), Art 27.

A. Regulation of Capital Flow under IMF Articles of Agreement

The issue of international monetary regulation in general and international capital flow regulation in particular came into attention at the Bretton Woods Conference of 1944.[26] As a result, IMF was established with the objective of regulating the international financial system.[27] With regard to capital flow regulation, IMF distinguishes two types of capital flow management measures (capital control): residency based and others.[28] Residency-based refers to capital control by a country based on residency of the capital owner through taxes, regulations and others, and 'other capital flow measures' refer to prudential policies generally introduced to influence cross-border capital flow like reserve requirement or foreign exchange deposits.[29] Capital control is necessitated since its full liberalization does not perfectly complement a country's development needs at all time and in all conditions. Countries have diverging interests which demand them to put control on movement of capital and at the same time they need to liberalize their capital flow regulation to attract FDI to meet their development needs.[30]

Under the IMF Articles of Agreement, Members are given full discretion to regulate capital transfer from or to their country.[31] However, the IMF Articles of Agreement is keen in regulation of exchange rate, elimination of restriction on payment for current account transactions and international liquidity.[32] Art VI (3) of IMF Articles of Agreement provides:

> Members may exercise such controls as are necessary to regulate *international capital movements*, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV Section 2.[33]

This sub-article indicates that the IMF Articles of Agreement regulates international money/financial transfer in two nature/forms, **capital account** and **current account** transfer, which are interdependent and useful to know the balance of payments condition of a country. Both capital account and current account transfers are components of balance of payment record which is important to describe a country's international transaction and its linkage with domestic

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[26] ASIF H. QURESHI, INTERNATIONAL ECONOMIC LAW 109 (Sweet & Maxwell, London) (1999).

[27] ROBERT O'BRIEN & MARC WILLIAMS, GLOBAL POLITICAL ECONOMY: EVALUATION AND DYNAMICS 209-210, (2nd *ed*, Palgrave Macmillan, New York) (2007)

[28] IEO Independent Evaluation Office of the International Monetary Fund, *The IMF's Approach to Capital Account Liberalization: Revising the 2005 IEO evaluation*, 5 (2015), available at: www.ieo imf.org/ieo/.../The%20IMFs%20Approach%20to%20Capital%20Account%.. (Accessed on 3 January 2017).

[29] *Id.*

[30] Mihir A. Desai, *et al*, *Capital Controls, Liberalizations, and Foreign Direct Investment,* 19 (4) THE REVIEW OF FINANCIAL STUDIES 1433(2006).

[31] International Monetary Fund, Articles of Agreement, Art VI(3).

[32] *Id*, Art IV(3)

[33] *Id*, Art VI(3)

economy.[34] Moreover, it tells that IMF has jurisdiction over regulation of current account transfer (liberalization), but not over capital account movement.[35]

According to Black Law Dictionary, the term 'capital' refers to as "Money or asset invested or available for investment, in business", and also 'total assets of a business that helps generate profits.'[36] This definition shows that the term 'capital' refers to the accumulation of money (both in kind and cash) prepared for investment or which already started investment. This would be equivalent with 'initial capital' as provided under different investment laws. Capital account similarly refers to the statistical record of investment flows between a country and the rest of the world which results in transfer of capital.[37] It covers financial flow mainly from FDI, portfolio, foreign loan/ bank borrowing which are common acquisitions of assets in one country by residents of the other country.[38]

Capital account transfer has special characters which differentiate it from current account transfer. Capital account transfer includes transfer of capital in kind when ownership of fixed asset is transferred[39] and transfer of capital in cash when it is linked to the acquisition or disposal of a fixed asset (for example, an investment grant) by one or both parties to the transaction.[40] On the other hand, current account transfer consists of all transfers not included under capital account transfer.[41] Current account transfer is more related to current transactions among a government or individuals and companies of other countries. It can also be transfer in kind (gifts of food, clothing, medical supplies, consumer goods, etc.) or in cash (workers' remittance, current tax on income, social benefit, refund of taxes, interest, debt, dividend, reinvested earnings etc) between governments of different countries or between governments and international organizations (foreign investors).[42]

In principle, Member States are not allowed to control transfer of current account as per Article VI(3) of IMF Article of Agreement. In two exceptional conditions, however, it is possible to control transfer of current account transactions. The first is when the Fund declares the scarcity of currency of the country in which payment was required.[43] The second is when the

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[34] ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW, INTERNATIONAL ECONOMIC LAW SERIES 508-509 (Oxford University Press, New York, 2002).

[35] M. Ayhan Kose & Eswar Prasad, Liberalizing Capital Account Restrictions, *in* FINANCIAL GLOBALIZATION: THE IMPACT ON TRADE, POLICY, LABOUR, AND CAPITAL FLOWS, A COMPILATION OF ARTICLES FROM FINANCIAL & DEVELOPMENT, (Jeremy Clift & Elisa Diehl, *eds.,* International Monetary Fund, 2007), at 6

[36] BRYAN A. GARNER, BLACK'S LAW DICTIONARY, 200 (7th ed., 1999).

[37] INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENT MANUAL 74 (5th *ed*, International Monetary Fund, 1993)

[38] BLACK LAW DICTIONARY, *supra* note 36, at 6

[39] INTERNATIONAL MONETARY FUND MANUAL, *supra* note 37

[40] *Id.*

[41] *Id*.

[42] *Id*., at 75-79

[43] IMF Articles of Agreement, Art VII (3, b). Foreign investor may need payment to be made in a currency of a country which was already declared by the IMF as scarce. In such conditions, the country from which the investor requires payment cannot be forced to perform payment even if it is current account.

Member notified the Fund that it is under transitional arrangement preparing itself to accept the obligations of IMF Articles Agreement.[44]

B. Regulation of Capital Flow under the OECD Code of Liberalization

Since developed countries were not satisfied with the capital flow regulation under the IMF Articles of Agreement which authorizes member state to control capital movement (either directly or indirectly), they have moved to establish the Organization for Economic Cooperation and Development (OECD) with a view to have capital flow liberalization strategy in 1961.[45] The OECD Code of Liberalization is an important instrument which provides Member States with the necessary mechanism for ordinary capital flow liberalization.[46] It dictates Members to progressively abolish restriction on capital movement.[47] However, this guideline applies only between the Members which are developed countries.

To accommodate interests of its Members, the OECD Code recognizes the possibility of reservation and derogation by a Member State. Reservation is allowed when a country accedes to the organization or when new rule is added to the Code.[48] And derogation is also possible for a Member by totally suspending the application of the Code of liberalization.

C. Regulation of Capital Flow under BITs

Foreign capital can originate and flow from one country to the other in the form of FDI, Portfolio investment and foreign loan.[49] Among these, FDI has huge effect on the economic growth of both the home and host states. It is an essential wealth creating asset that has significant impact on the economic development of the host and home states.[50] The home state expects to benefit from foreign capital through repatriation of the investment. On its part, the host state hopes to benefit, directly or indirectly (like through employment and technology transfer), from foreign capital gain. The effectiveness of FDI depends, however, on the economic policies, laws and the performance of key sectors of the state.[51] On the other hand, portfolio is a form of foreign investment by which movement of capital is made through buying share in company/enterprise formed or functioning in other country.[52] Foreign loan is also another form of foreign capital flow which entails capital outflow on repayment of the loan. Mostly developing countries and least developed countries use foreign loan to expand their investment activities.

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[44] IMF Articles of Agreement, Art XIV (2), Member of IMF, as exception to Art VI(3), can restrict transfer of current international transaction through foreign exchange rate policy to secure its balance of payment.

[45] OECD Code of Liberalization of Capital Movements, Promoting Ordinary Capital Flows: The Approach of the Code 1 (2015), available *at* www.oecd.org/daf/investment/flows (Accessed on 18 October 2016).

[46] STEPHANY GRIFFITH JONES, *supra* note 2, at 5.

[47] Organization for Economic Co-operation and Development, *OECD Code of Liberalization of Capital Movements*,(2013), Art 1(a).

[48] *Id*. Art 2(b).

[49] M. Ayhan Kose & Eswar Prasad, *supra* note 35.

[50] BIJIT BORA *ed.,* FOREIGN DIRECT INVESTMENT RESEARCH ISSUES 1(Taylor & Francis e-Library, 2002).

[51] Tibabu Aragie, *Nexus between Foreign Direct Investment and Domestic Private Investment in Ethiopia,* (LL.M Thesis, Addis Ababa University, (2014), at 2.

[52] M.SORNARAJA, *supra* note 4, at 8.

In relation to investment, multilateral regulation of investment was dropped from Havana Charter which was intended to form International Trade Organization including foreign investment regulation.[53] Consequently, countries start resorting to conclude BITs among themselves[54] to regulate investment including the sensitive issue of liberalization of foreign capital repatriation. BITs are instruments which attract capital by shifting consumption of domestic investment and stimulating new international capital investment, and by initiating or arranging international capital flow.[55] Almost all BITs contain certain core provisions that deal with issues like national and most favored nation treatment, fair and equitable treatment, full protection and security, free transfer of capital and investment proceeds, transparency and performance requirement and due process of law.[56]

It is said that repatriation of capital including its returns to home state or to a third state is among the major purposes of foreign investors while host states need to control it since they may suffer from financial instability and serious balance of payment problem due to large currency outflow.[57] BITs do not oblige capital exporting countries to ensure capital inflow. Rather they stipulate the duties of the host state in relation to protection of investment and investors of which ensuring free transfer of capital and returns is the main.[58]

BITs govern transfer of capital and investment proceeds in different ways. Some BITs provide exceptional situations where free transfer of foreign capital may be restricted and others allow free transfer of investment and return/proceeds. However, they do not provide definition of free transfer of investment or proceeds from investment.[59] Restriction of free transfer of capital and investment proceeds would have adverse consequence by decreasing investors' confidence to invest.[60] On the other hand, full liberalization of transfer of investment and its proceeds/returns requires special attention as it may not be advantageous for all countries.

III. REGULATION OF CAPITAL OUTFLOW FROM INVESTMENT: EXPERIENCES OF SELECTED COUNTRIES

The approaches that states would follow in relation to capital flow liberalization differ based on their financial and economic standards. Among different developing countries and least developed countries, Kenya, South Korea and South Africa are selected since their historical and development policy on foreign investment resembles to Ethiopia. Their historical experience and recent condition in regulation of foreign capital outflow would be given consideration.

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[53] Kenneth J. Vandevelde, A *Brief History of International Investment Agreements*, 12 JOURNAL OF INTERNATIONAL LAW & POLICY 157, 162 (2005).

[54] *Id*, at 169

[55] Zachary Elkins *et al*, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, International Organization*, 825 (Vol. 60, No. 4, Cambridge University Press, 811-846, 2006).

[56] Amanuel Debessay Gebregergis, *The Role of Bilateral Investment Treaties in Securing Foreign Investments in Ethiopia,* (LL.M Thesis, University of South Africa, 2015), at 17-18.

[57] Zachary Elkins*, supra* note 55, at 191.

[58] Marie-France Houde, *supra* note 7, at 163.

[59] Amanuel Debessay Gebregergis, *supra* note 56, at 43.

[60] *Id*.

A. Regulation of foreign Capital Outflow in Kenya

Kenya regulates repatriation of foreign capital both under its domestic laws and BITs. Kenya's domestic investment law regulates the issue of capital remittance expressly and almost all Kenyan BITs have provisions which force foreign investors to fulfill domestic tax regulation before remittance.[61] Kenya has a Foreign Investment Act which is promulgated to protect the interest of foreign investors independently from the domestic investors and the Act guarantees capital repatriation or remittance of dividends and interest to foreign investors.[62] The Act allows foreign investors to get certificates showing the assets proposed to be invested or initial capital of their investment.[63] Among other things, the certificate should state "capital, being deemed to be a fixed amount representing the equity of the holder…" [64] This means that foreign investor, who had certified his initial capital (capital proposed for investment as per Art 3(4i) of the Act), can request and repatriate it freely to home state or other third country. Hence, the Act allows foreign investors to repatriate their initial capital asset, whether in cash or in kind, if the capital has been mentioned in the certificate.[65] Any additional amount not mentioned in the certificate is not allowed for repatriation by the foreign investor.[66]

So far, Kenya has signed 19 BITs among which 11 are in force.[67] Though with slightly different wordings, almost all of these BITs include provisions related to capital transfer. Most of them fully liberalize foreign capital outflow.[68] During repatriation, these BITs impose obligation to obey domestic tax regulations and other relevant law as conditions to transfer of capital.[69] On the other hand, there are BITs which provide exceptional conditions when contracting parties can restrict or delay capital transfer. The Kenya-Japan BIT[70], Kenya-Korea BIT[71] and Kenya-Slovakia BIT[72] provide exceptional conditions under which the contracting party can restrict capital repatriation from investment. In the Kenya-Korea BIT, under Article 6(3&4), bankruptcy or insolvency, protection of creditors, trading or dealing in securities, criminal or penal offences, taxation, serious balance of payment problem are provided as grounds to restrict capital transfer.

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[61] For example, see Art 7(b) of Kenya-United Kingdom BIT and Art 7(3) of Kenya-Slovakia BIT.

[62] United State of America Department of State, *Kenya Investment Climate Statement*,(2015), at 9.

[63] UNCTAD Compendium of Investment Laws, *Kenya Foreign Investment Protection Act*, (1964),Art 3(1)

[64] *Id*, Art. 3(4, i).

[65] *Id*, Art. 7(b).

[66] *Id.*

[67] UNCTAD, INVESTMENT POLICY FRAMEWORK, *at* http://investmentpolicyhub.unctad.org/IIA/CountryBits/108 (Accessed on 25, April 2018).

[68] For example, see Art. 5(a) of Kenya-Germany BIT, Art. 6 of Kenya-United Kingdom, and Art. 6(1) of Kenya-Burundi BIT.

[69] Kenya's BITs which does not impose fulfillment of domestic tax obligation are the Kenya-Slovakia BIT, Kenya- German BIT, Kenya-Finland BIT, while BITs which have such exceptional conditions are the Kenya-Burundi BIT, Kenya-Netherland BIT, Kenya-Iran BIT, Kenya-UK BIT, Kenya-Switzerland BIT, and Kenya-Italy BIT.

[70] Agreement between the Government of Japan and the Government of Republic of Kenya for the Promotion and Protection of Investment, signed on 28/8/2016, Art 13(3).

[71] Agreement between the Government of Republic of Korea and the Government of the Republic of Kenya for the Promotion and Protection of Investment, signed on 8/7/2014, Art 6(3,4).

[72] Agreement between the Government of the Slovak Republic and the Government of the Republic of Kenya for the Promotion and Reciprocal Protection of Investments, signed on14/12/ 2011, Art 7(3,6).

There are also similar exceptional conditions in the BITs Kenya has with countries like Japan (2016) and Slovakia (2011) to protect its economy and finance from sudden risk.

B. Regulation of Foreign Capital Outflow in South Korea

South Korea is selected to be reviewed under this article for its past experience of capital flow liberalization and controlling mechanism during financial crises especially from 1990s onward. It is noted that South Korea has been considered as model of Ethiopian economic development and it has provided different assistances.[73] It had experienced Developmental State Model (where government plays great role in economy) from 1960-1990s.[74] South Korea had experienced rapid economic growth in presence of capital controls for several decades though the country had encountered with financial crisis when it adopted capital flow liberalization.[75]

Before the 1997 Asian financial crises, FDI had much less role in the development of South Korea due to the economic model it had been following.[76] From 1997 to 2010, however, South Korea was engaged in reforming its policy on FDI by removing statutory barriers and liberalizing investment.[77] After 2010, South Korea started taking capital control measures to address issue of exchange stability and balance of payment problems through putting series of regulations on foreign exchange derivative and other investments.[78] Few South Korea BITs including its BITs with China and Kenya have exceptional conditions to impose restriction on free transfer of investment and its returns, like event of serious balance of payment and cause or threaten to cause external financial difficulties and other conditions like bankruptcy, implementation of legal order, protection of right of creditors which is subjected to the domestic law and regulation.

On other hand, South Korean Foreign Investment Promotion Act allows foreign investors to transfer capital goods entered duty-free on confirmation by the Minister of Knowledge Economy.[79] The investor has to apply to the Minister in advance to get certificate allowing transfer of capital goods and the same procedure is applicable for transfer of stock/equity investment.[80] However, the act does not provide the criteria to allow or reject transfer of foreign capital.

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[73] Mohammed Yimer, *Economic and Social Transformations of Korea; Lessons for Developing Countries with a Particular Relevance to Ethiopia*, 3(3) INTERNATIONAL JOURNAL OF POLITICAL SCIENCE AND DEVELOPMENT 138, 139(2015).

[74] Philippe Burger, *How suitable is a 'Developmental State' to Tackle Unemployment, Inequality and poverty in South Africa?* 1(2014), *available at*:www.econ3x3.org/.../how-suitable-'developmental-state'-tackle-unemployment-inequ. (Accessed on 17 March 2017).

[75] *Id.*

[76] Francoise Nicolas *et al*, *Lesson From Investment Policy Reform in Korea*, (OECD Working Papers on International Investment, (2013), at 7.

[77] *Id,* at 8.

[78] Brittany A. Baumann & Kevin P.Gallagher, *Post-Crisis Capital Account Regulation in South Korea and South Africa*, (Political Economic Research Institute, University of Massachusetts Amherst, Working Paper Series No. 320,2013), at 2.

[79] Republic Of Korea Ministry of Legislation, Foreign Investment Promotion Act, Amended by Act No. 10232,(2010), Art 22(1).

[80] *Id*. Art 23(1).

C. Regulation of Foreign Capital Outflow in South Africa

South Africa is currently dissatisfied with the impacts of its BITs on its development and has moved to govern the issue of foreign investment including the capital outflow under its domestic law by terminating its BITs.[81] Like the BITs signed by Ethiopia and other developing countries, most of its BITs allow full transfer of foreign capital.[82] The decision of South Africa to represent BITs with domestic law alarmed foreign investors for the inevitable change of proprietary right through the new policy, and scholars have proposed that South Africa could avoid such negative signal by joining the third-generation (new generation) investment agreements where it can preserve its regulatory space.[83] This is because foreign investors rely more on BITs for the protection of their investment than domestic investment regulations. However, scholars argue that the mere representation of BITs with domestic investment legislation could not create problem as far as international principles and standards of protection of investment are properly included.[84]

On other hand, South Africa Protection of Investment Act regulates the capital transfer in a very general term which says "A foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation."[85] The Act does not define the term 'fund', and not clear as to which legislation may be applicable in repatriation of fund except tax law. Regarding definition of fund, black law dictionary defines it as "A sum of money or other liquid assets established for a specific purpose…"[86] Based on this definition, one may argue that South African Investment Act allows only repatriation of liquid money rather than capital in kind which makes it similar with Ethiopian investment proclamation. However, unlike Ethiopian Investment Proclamation, South African Investment Act expressly rejects free transfer of capital in kind. Using contextual rule of interpretation, the term 'fund' may also refer to all forms of capital engaged for investment in the country which obviously includes capital goods and shares. Hence, based on the second way of interpretation one may conclude that the Act allows repatriation of funds including capital goods on fulfillment of some requirements. Nevertheless, the writer is convinced with the first line of interpretation.

IV. REGULATION OF REPATRIATION OF INVESTMENT UNDER ETHIOPIAN INVESTMENT REGIME

Currently, the Second Five-Year Growth and Transformation Plan (GTP-II) and Sustainable Development Goals are driving Ethiopian's demand for foreign capital from investment to meet

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[81] Engela C. Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy*, Foreign 31 INVESTMENT LAW JOURNAL 167, 167(2016).

[82] There are few South African BITs which allow contracting party to restrict repatriation of capital under exceptional conditions. These are South Africa-Canada BIT (Art 9(3)), South Africa-Israel BIT(Art 6(4)), South Africa-United Kingdom (Art 7).

[83] Azwimpheleli Langalanga, *Imagining South Africa Foreign Investment Regulatory Regime in a Global Context*, (South African Institute of International Affairs, Occasional Paper 214, 2015), at 20.

[84] *Id*. at 21.

[85] UNCTAD Compendium of Investment Laws, South Africa Protection of Investment Act, No.22, (2015), Art 11.

[86] BRYAN A. GARNER, BLACK LAW DICTIONARY 1982 (8th ed, (2004).

its objective of becoming a middle-income country by 2025.[87] Accordingly, achieving 11% of annual average real GDP growth rate is among the four main objectives of GTP-II.[88] To be successful in her plan, Ethiopia strives to create favorable investment climate for foreign investment by giving consideration for more efficient process in the areas of registration (one-stop-shop), logistics, and for tax incentives. In addition, Ethiopia allows repatriation of the investment capital by the foreign investor.

Ethiopia is currently able to attract a huge amount of foreign capital through foreign investment. As already said, it is clear that there is an issue of capital outflow regulation when a country allows foreign investors to repatriate their investment. This is also true in the case of Ethiopia. In the following sub-sections, the manner Ethiopia attempts to regulate repatriation of foreign capital under its BITs and domestic investment laws and related issues are briefly discussed.

A. Foreign Capital Repatriation under Ethiopian BITs

With respect to regulation of capital outflow, it is said somewhere above that the Ethiopian BITs can be categorized as BITs which fully liberalize foreign capital outflow and BITs which provide exceptional conditions to control repatriation of capital in case of serious balance of payment problems or other monetary dispositions.[89] Also, it is alleged that the way most of the BITs that fully liberalize repatriation have used to regulate repatriation of investment may trigger certain questions to arise. These BITs try to list the payments related to current accounts including dividend, profits, interest, payments for loan agreement, royalties, and payment of proceed from the sale or liquidation of enterprise etc.[90] It is not, for instance, clear whether or not they include 'initial capital' to be repatriated. In fact, there are Ethiopian BITs which clearly allow repatriation of initial capital.[91] As such, it is inevitable that foreign investors would invoke MFN principle to claim application of these BITs to get repatriation of initial capital. And no Ethiopian BIT disregards inclusion of MFN principle. Hence, whether or not initial capital is clearly allowed under Ethiopian BITs, foreign investors can request full transfer of their capital by claiming MFN principle.

In addition, another concern may arise if we examine the time of repatriation as regulated under the BITs signed by Ethiopia. In relation to timing of repatriation, the Ethiopian BITs commonly use terms like "without delay", "immediately" or "without unnecessary delay".

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[87] African Development Bank Group, *Federal Democratic Republic of Ethiopia Country Strategy Paper 2016-2020, available* at https://www.afdb.org/fileadmin/.../afdb/Documents/.../ETHIOPIA_CSP_BPPS_EN.pdf (Accessed on 2 February 2017).

[88] Federal Democratic Republic of Ethiopia, Growth and Transformation Plan II(GTP II), Volume I, Main Text, National Planning Commission, Addis Ababa, (2016), at 80.

[89] Ethiopia-France BIT, Ethiopia-United Kingdom BIT, Ethiopia-Israel BIT and Ethiopia-Brazil. See *supra* note 12, 13, 14 and 15. These BITs are those that include exceptional conditions while the remaining Ethiopian BITs are categorized as treaty that fully liberalize foreign capital outflow.

[90] For example, see Art 9 of Ethiopia-Iran, Art 6(1) of Ethiopia-Algeria, Art 6(1) of Ethiopia-China, Art 6(1) of Ethiopia- Libya BIT.

[91] For instance, see Art 7(1a) of Ethiopia-Austria BIT, Art 7(1,a) Ethiopia-Kuwait, Art 7(1,a) of Ethiopia-Finland BIT.

Despite this, the BITs do not define such technical expressions to avoid vagueness. Only Ethio-Germany BIT[92] and Ethiopia-Iran BIT[93] have defined the term 'without delay'. In both BITs, it is stated that "a transfer shall be deemed to have been made *without delay* if effected within such period as is normally required for the completion of transfer formalities."[94]

Let alone for capital account, foreign investors in Ethiopia are practically required to wait for a long period of time to repatriate their payments (current account) due to shortage of foreign currency in the country.[95] Foreign investors in Ethiopia usually encounter the difficulty of delays of repatriation of high USD sales up to 2 years and they usually wait 3 weeks to 3 months due to shortage of foreign currency.[96] The problem that relate to the timing of repatriation and the absence of exceptional condition under the BITs that permit Ethiopia to restrict the payment in the BITs could have some negative effects. First, the investors may sue the country for non-performance of BIT provisions on such delay of payment. Second, the practical delay of payment for foreign investors may affect capital outflow which may, in turn, discourage potential foreign investors to invest in the country.

Let us now turn to briefly discuss the Ethiopian BITs that have provided exceptional conditions to restrict or control the full liberalization of foreign capital outflow. These exceptions aim at giving safety valve for the parties during the time of financial crises or threat of balance of payment problem. In this regard, the Ethiopia-France BIT includes exceptional provision which states the following.[97]

> When, in exceptional circumstances, capital movements from or to third countries *cause or threaten to cause a serious disequilibrium to its balance of payments,* each Contracting Party may *temporarily apply* safeguard measures to the transfers, provided that these measures shall be *strictly necessary,* would be imposed in an equitable*, non-discriminatory and in good faith* basis and shall not exceed in any case a *six months* period.

Apart from the above, some of the BITs signed by Ethiopia incorporate interesting stipulations with respect to enforcement of transfer of foreign investment and returns. For example, the Ethiopian BITs with China, Libya, Sudan, Malaysia, Russia, Turkey and Yemen, regarding the implementation of transfer of foreign investment, have the phrase "*subject to the laws and regulation of contracting parties*."[98] No doubt, this reference is given for domestic laws

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[92] Ethiopia-German BIT, Art 6(2).

[93] Agreement on Reciprocal Promotion and Protection of Investments between The Government of the Federal Republic of Ethiopia and the Government of the Islamic Republic of Iran, signed on 21/10/2003, Art 9(3).

[94] *Id*. Art 9(3), However, still there is vagueness to determine the 'normal time' required to transfer the capital.

[95] United States of America Department of State, *Ethiopia Investment Climate Statement*, 6 (2015), *available at* https://www.state.gov/documents/organization/241767.pdf accessed on 10/9/1016. See also Art 9(3) of Ethiopia-Iran BIT Ethiopia-German BIT Art 6(2). The payment should be made before 6 month from the date of request.

[96] *Id*.

[97] Ethiopia- France BIT, *supra* note 12. Those qualifications provided under Ethiopia-France are also included directly or indirectly including threat or serious balance of payment difficulties or serious difficulties for the operation of the exchange rate/monetary policy, the measure must be necessary to remedy the situation, the restriction must expire within six months, the contracting party should inform the other about the controlling measures taken and its time table for extinction and those measures should be applied in equitable, non-discriminatory and in good faith.

[98] See the first paragraph of Art 6 of Ethiopia-China BIT, Ethiopia-Libya BIT, Ethiopia-Sudan BIT, Ethiopia-Malaysia BIT, Ethiopia-Malaysia BIT, Ethiopia-Yemen BIT, and Art 5 of Ethiopia-Turkey BIT.

to regulate foreign capital outflow from investment. This may enable Ethiopia to use its domestic laws to control capital outflow through implementation mechanism though the BITs fully liberalize capital transfer. It may also be possible for the host state and the foreign investor to enter into private investment contract (concession agreement) to regulate capital transfer. Such private investment contracts "usually derive their validity from the domestic law of the host state."[99] Since it is independent contract, based on general principle of freedom of contract, parties (host state and foreign investors) may agree on terms related to capital transfer. It is also possible to regulate the foreign capital transfer requirements expressly in the domestic investment law.

When dispute arises, there may still be a problem as foreign investors usually prefer to invoke BIT provisions than the terms of their concession agreement. In addition, except the above few BITs, the other BITs signed by Ethiopia do not give reference to the application of domestic laws in case of foreign capital repatriation. Even if the country wants to use such BITs to control the capital outflow, investors from such countries may claim the application of other BITs which have not given reference to domestic law by the MFN principle. This may oblige Ethiopia to extend the application of the BITs that fully liberalize capital outflow even in the existence of the BITs that refer to the application of domestic laws to regulate foreign capital repatriation. This shows that the existence of few BITs which refer to the application of domestic law does not provide a meaningful restriction on capital repatriation, even with respect to these BITs, because of the possibility of invoking MFN treatment.

B. Foreign Capital Repatriation under Ethiopian Domestic Investment Laws

Besides the BITs, the relevant domestic laws in connection with regulation of repatriation of investment in Ethiopia include the Ethiopian Investment Proclamation (herein after, Investment Proclamation) No.769/2012, Ethiopian Investment Incentive Regulation No.270/2012 and Ethiopian Custom Duties Proclamation No. 859/2014.

The Investment Proclamation defines "capital" as "local or foreign currency, negotiable instruments, machinery or equipment, buildings, working capital, property rights, patent rights or other business assets."[100] Obviously, capital consists of both cash and in kind items. The Investment Proclamation further defines foreign capital as "capital obtained from foreign sources, and includes the re-invested profit and dividend of foreign investors."[101] This indicates that profit and dividend of foreign investors would be categorized as foreign capital if the investors used them for re-investment rather than repatriation. Moreover, the proclamation defines foreign investor as:

> a foreigner or an enterprise wholly owned by foreign nationals having invested in Ethiopia or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly

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[99] Yuval Shany, *Contract Claims v. Treaty Claims: Mapping Conflicts Between ICSID Decisions Multi Sourced Investment Claim*s, AMERICAN JOURNAL OF INTERNATIONAL LAW, 835(2005).

[100] Ethiopian Investment Proclamation, s*upra* note 22, Art 2(3).

[101] *Id*. Art 2(7).

> investing with a domestic investor, and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor.[102]

In examining the relevant provisions that are meant to regulate repatriation of investment, it is worthwhile to briefly discuss some issues. The Investment Proclamation provides that "any foreign investor, as defined above, shall have the right, in respect of his approved investment, to make the following remittances out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance":[103]

- Profit and dividends accruing from the investment;
- Principal and interest payment on external loans;
- Proceeds from the transfer of shares or of partial ownership of the enterprise to a domestic investor;
- Proceeds from the sale or liquidation of the enterprise; and

Many of the above remittance relate to current account. Among others, Article 26 (1f) of the Investment Proclamation allows remittance of "proceeds from the sale or liquidation of 'enterprise." Here, it may be noted that enterprise is defined as "undertaking established for the purpose of profit making."[104] Hence, it may be argued that the 'proceeds from the sale or liquidation of enterprise' may include the total capital of the investment including the initial capital. However, whether the investor can repatriate the capital in kind rather than selling domestically or without liquidation for different reasons like the relocation of the investment is not clear. The phrase '….in convertible foreign currency…..' under Article 26(1) of the Investment Proclamation may lead us to conclude that the foreign investor cannot repatriate his capital in kind. This means that foreign investors are allowed to repatriate their capital in convertible foreign currency rather than in kind.

In practice, foreign investors cannot repatriate capital goods (capital in kind) from Ethiopia.[105] The same is true where an enterprise is liquidated voluntarily and the foreign investor wants to repatriate the capital goods, and such capital goods may be permitted to be re-exported under two exceptional conditions.[106] First, it may be allowed if the goods are encountered with damages and cannot be maintained domestically. Secondly, if the capital goods were imported temporarily, the goods may be re-exported on expiry of the period without payment of customs duty. Obviously, requiring the foreign investor to sale or liquidate his investment to get its cash value may be disadvantageous for the investor. At times, it may even be impossible to dispose the investment so that it cannot be converted into cash.

The other laws which should be investigated with regard to repatriation of foreign capital are the Investment Incentives Regulation and the Ethiopian Customs Proclamation. The Investment Incentives Regulations, under Article 15, regulates how the investor can transfer capital goods which are imported free of duty. Indeed, this Article deals only with transfer of duty-free

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[102] *Id*. Art 6.
[103] Ethiopian Investment proclamation, *supra* note 22 Art 26(1).
[104] *Id*. Art 2(2).
[105] Interview with Ato Eliyas Hailemeskel, Custom Duty Information Center Director, Ethiopian Revenues and Customs Authority, on 1st February 2017, Addis Ababa.
[106] *Id.*

imported goods by the investor. The investor may transfer such duty-free imported goods to a person within Ethiopia or may re-export them. Domestically, the investor may transfer to persons with similar duty-free privileges or to persons having no similar duty-free privileges.[107] In the later case, the transfer shall be made up on effecting the appropriate custom duties. The regulation is silent as to payment of custom duty when the duty-free imported goods are to be re-exported. At this time, it is essential to consult the provisions of the Ethiopia Customs Proclamation No. 859/2014. It should be remembered here that the tax system could offer one method to control foreign capital outflow in the form of repatriation.

This Customs Proclamation, under Article 71(1), enumerates the goods that may be temporally imported without payment of custom duties.[108] Among the goods mentioned, it can be noted that some of them can be imported by investors. For instances, the provision mentions goods necessary for construction works and consultancy services as part of the goods that may be imported duty-free. What is more, Article 71(1) states that spare parts and other consumable goods may not be temporarily imported. This may mean that they cannot be imported duty free. In addition, the Custom Proclamation requires the temporarily imported goods to be re-exported with a given time limit. This is regulated under Article 73 of the proclamation. For example, goods imported for the purpose of tourism, cultural exchange or technology transfer shall be re-exported with 6 months and those goods imported for trade promotion and welfare service shall be re-exported within 2 months.[109] In addition, it is stated that goods imported for construction works, consultancy services and welfare services shall be re-exported within the period specified in the project agreement or within 3 months after completion of the project.[110] On failure to re-export within the time limitation, the goods shall be transferred to government treasury.[111] In practice, as mentioned above, foreign duty-free imported capital goods for investment are not normally allowed to be repatriated.

A systematic domestic control of foreign capital outflow as discussed above may have positive effect for the economy of the country. However, it would create mismatch with Ethiopian BITs which fully liberalize foreign capital outflow. Since BITs are governed by the principle of freedom of contract in which countries can willingly limit their freedom to control capital movement, the domestic investment law needs to be compatible with BITs standards. The standard of the law may affect transparency and predictability in attraction of foreign investment with respect to regulation of foreign capital -repatriation.

Generally, it can be observed that a similar pattern of regulation of foreign capital repatriation is not adopted by the BITs signed by Ethiopia and the relevant domestic laws regulating the same. Particularly, the practice and the domestic laws do not commonly allow repatriation of capital in kind which contradicts with those BITs that fully liberalize repatriation

[107] Investment Regulation, *supra* note 23, Article 15(1) (2).

[108] Goods necessary for trade promotion, technology transfer, tourism and cultural exchange, construction works, consultancy service or relief may temporary be imported upon the authorization of the Authority without payment of duties and taxes subject to their re-export.

[109] Custom Proclamation, s*upra* note 24 Art 73(1&2).

[110] *Id*. Art 73(3).

[111] Id. Art 73(5).

of foreign capital from investment. In fact, it is a generally recognized principle that a country cannot evade its obligation under treaties through its domestic laws. In relation to the conflict between BITs and domestic laws, it is noted that "many states have argued before international investment tribunals that they have a right to adopt regulatory measures and any foreign investor entering the country should assume the risk of being regulated by the host state."[112] This argument is based on the principle of economic sovereignty and the right of economic self-determination of sate which contends to qualify international principle of jus cogens.[113] However, it is also known that states can willfully give up part of their sovereignty through concluding BITs. For example, in case between *BG Group* v. *Argentina*, US Court found that Argentina could not be exempted from its responsibilities to investors by invoking economic crisis of 2002 since Argentina's policies contributed to the crisis and the measure taken was not the only way for it to safeguard its interest.[114]

V. CONCLUSION

In relation to foreign investment, the issue of capital outflow is one of the very sensitive issues for the host states and foreign investors. As the foreign investors are profit makers, they need to repatriate their capital and returns at any time they want. On the other hand, host states need to attract foreign capital through foreign investment and to control outflow of such capital for various economic reasons. Therefore, states should have well-articulated laws (both domestic and BITs) to strike a balance between the conflicting interests of host states and foreign investors on capital outflow.

It is revealed that countries use both their domestic laws and BITs in the regulation of foreign capital repatriation. Similarly, Ethiopia attempts to regulate capital repatriation from foreign investments through various BITs and its domestic investment laws. However, the BITs and the relevant domestic laws are not consistent in regulating foreign capital outflow from foreign investments. On one hand, the BITs Ethiopia has signed, except few, have fully liberalized foreign capital outflow. Apart from re-export of certain goods which are entered the country for specific period of time, the domestic investment legal regime does not allow foreign investors to repatriate their capital in kind. Besides, the practice in Ethiopia does not allow foreign investors to repatriate their capital in kind. They are rather permitted to repatriate in a convertible currency at the time of repatriation. Such control on foreign capital outflow may be compatible with the economic need of the country.

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[112] SURYA P SUBEDI, INTERNATIONAL INVESTMENT LAW RECONCILING POLICY AND PRINCIPLE 170(Hart Publishing Ltd, Oxford and Portland, Oregon, 2008).

[113] *Id.*

[114] Arturo C. Porzecanski, *The Origin of Argentina's Litigation and Arbitration Saga, 2002-2014*, (School of International Service American University, Washington, DC, Working Paper, (2015), at 5. There were three investment cases decided against Argentina in 2014 by U.S. court which were the first dispute involving BIT (U.S-Argentina) presented before U.S court. In all cases, decision was made against Argentina which had tried to defend itself based on the sovereign immunity and necessity conditions of financial crisis for the failure to abide by its obligation under the BIT. Example, BG Group (*British multinational Oil and Gas Company) v. Argentina* was decided against Argentina on March 5, 2014.

However, it should be noted that control on foreign capital outflow should not arbitrarily affect the interest of foreign investors in the country. In this regard, it may be said that the domestic investment laws should incorporate clear provisions which, in principle, liberalize foreign capital outflow like the BITs. At the same time, the domestic laws should be conspicuous about the exceptional grounds on which foreign capital outflow can be delayed or restricted. Of course, this should also work for many of the BITs which are silent regarding such kinds of exceptional grounds. Absence of such legal basis would prevent Ethiopia from putting controls when that is essential for the country like in the case of maintaining balance of payment, assurance of judicial order and protection of creditors. Furthermore, the Ethiopian BITs and domestic investment laws do not seriously regulate the timing for the repatriation which should be given attention as foreign investors may complain for any delay.

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HARAMAYA LAW REVIEW ***Vol.*** 7 (2018) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this Article: Leake Mekonen Tesfay, *The Freedom to Withdraw From Political Party Membership under the Ethiopian Law: A Case Comment,* HARAMAYA LAW REVIEW 7 (2018): 94-109

THE FREEDOM TO WITHDRAW FROM POLITICAL PARTY MEMBERSHIP UNDER THE ETHIOPIAN LAW: A CASE COMMENT

Leake Mekonen Tesfay[*]

Abstract

One of the fundamental rights that the FDRE Constitution acknowledges is the freedom of political party membership. To this effect, the Revised Political Parties Registration Proclamation, which regulates the details of political party membership, allows a political party member to withdraw from membership at any time. It does not provide for any formality. Despite this, the Cassation Bench of the Federal Supreme Court has decided in Unity for Justice and Democracy Party v. Blue Party (File No.112091, Miyazia 28, 2007 E.C.) that a political party member cannot withdraw and be a member of another political party without notifying the former political party in writing. This case comment examines the appropriateness of this decision from the perspective of the right to political party membership. To this end, the case comment analyses the constitutional and other legal provisions pertinent to the right to political party membership in Ethiopia. Relevant provisions of international human rights instruments are also explored. To share a lesson from comparative experience, experiences from Israel, Papua New Guinea, Kenya and Cambodia are consulted. This author argues that the law does not require a written withdrawal notice. This enables a political party member to terminate his/her membership not only with written withdrawal notice, but also through all other possible ways including by taking new membership in another political party.

Keywords: *Cassation decision, freedom of political party membership, freedom to withdraw, limitations on human rights, right to association.*

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I. INTRODUCTION

In contrast to its political past,[1] Ethiopia is now a multiparty federation. The Federal Democratic Republic of Ethiopia (FDRE) Constitution recognizes the right to political party membership in many folds. Firstly, it guarantees the freedom of association for any lawful purposes.[2] This includes association for political purposes which would establish the foundation for the freedom to form or join a political party. Secondly, the Constitution provides that everyone has the right to be member to and be elected into a position in organizations including political organizations (political parties).[3] Thirdly, it provides that political power is assumed and government is led by a political party or coalition of political parties having the highest number of seats in the House of Peoples' Representatives.[4]

Besides, the right to form and join a political party is an element of the freedom of association under the international human rights instruments which Ethiopia has ratified. The Universal Declaration of Human Rights provides that "Everyone has the right to freedom of … association"[5] and "No one may be compelled to belong to an association."[6] This shows the voluntary nature of membership to any association. Similarly, the International Covenant on Civil and Political Rights[7] and the African Charter on Human and Peoples' Rights[8] guarantee the freedom of association.

In Ethiopia, the power to legislate on issues relating to elections and political parties is given to the federal government.[9] Accordingly, the House of People's Representatives has proclaimed the Revised Political Parties Registration Proclamation which, among other things, provides that every Ethiopian has the right to form or join a political party.[10] The freedom to establish or join a political party carries the other side of the coin, i.e. the right to leave membership. In connection with this, referring to a decision by the European Court (*Sigurjonsson v. Iceland*, European

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[1] Multiparty democracy was incepted only after the regime change in 1991 and was embodied in the Charter of the Transitional Government of Ethiopia. See Kassahun Berhanu, Party Politics and Political Culture in Ethiopia, *in* AFRICAN POLITICAL PARTIES: EVOLUTION, INSTITUTIONALIZATION AND GOVERNANCE 115, 117 (M.A. Mohamed Salih ed., 2003). See Transitional Period of Ethiopia Charter, No.1, Art. 1 (a)(1) which guarantees the right to unrestricted political participation and to organize political parties. Following the Charter, a law was proclaimed to provide for the details, and it provided for the right to form or join a political party and the right to withdraw from political party membership at any time. See *Political Parties Registration Proclamation* No. 43/1993, FED. NEG. GAZETA, 52nd Year, No. 37 (now repealed) Art. 4(1), 16 and 20.

[2] CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 31.

[3] *Id*., Art. 38(2)-(4).

[4] *Id*., Art. 56 and 73(2).

[5] Universal Declaration of Human Right*s,* adopted on 10 December 1948 at New York, G.A. Res. 217A, U.N. GAOR, 3rd Sess, Pt. at 71, U.N. Doc. A/810 (1948) (hereinafter UDHR), Art. 20(1).

[6] *Id*., Art. 20(2).

[7] International Covenant on Civil and Political Rights, adopted on 19 December 1966 at New York and entered into force on 23 March 1976.999 U.N.T.S. 171 (1966) (hereinafter ICCPR), Art. 22(1).

[8] African Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) (hereinafter ACHPR), Article 10(1).

[9] FDRE CONSTITUTION, Art. 51(15) and 55(2)(d).

[10] *Revised Political Parties Registration Proclamation*. No. 573/2008, FED. NEG. GAZETA, 14th Year, No. 62 (hereinafter Revised Political Parties Registration Proclamation), Art. 4(1).

Court, (1993) 16 EHRR 142), Nihal Jayawickrama wrote that "the right to freedom of association encompasses not only a positive right to form or join an association, but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association."[11] In the same vein, as political parties are associations, this applies to the right to freedom of membership to a political party. Therefore, where unjustifiable withdrawal procedures, conditions or formalities are provided for, it cannot be said that freedom of political party membership is sufficiently guaranteed. In the Ethiopian case, the RPPRP provides that "A member of a political party may at any time withdraw from his membership."[12] Apart from this, it does not require any condition or formality.

On the other hand, the right to political party membership is not immune from limitations.[13] Limitations on human rights are, however, required to be prescribed by law and to be proportional. This means the limitations shall be only to the extent necessary for the protection of others' rights or public interest. In this regard, the UDHR provides that human rights and freedoms shall not be limited except as "determined by law" if necessary to respect the rights of others, public morality and democratic order.[14] Similarly, the ICCPR[15] and the ACHPR[16] provide that the right to association cannot be limited except as prescribed by law and where necessary to protect "the rights and freedoms of others"; public safety, order, health or morals; solidarity of the family and community; and national security, independence and territorial integrity. Due to the nature of their work, members of the armed forces and the police can be prohibited by law from membership to associations.[17]

Thus, the right to freedom of political party membership can be limited by law only when it is necessary to protect the rights of others or public interest. Although what is necessary can be explained on a case-by-case basis, Lord Diplock's expression: "you must not use a steam hammer to crack a nut if a nutcracker could do"[18], in a decision by the House of Lords in the United Kingdom, describes it well. In other words, the very essence of proportionality test is that

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[11] NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE, 752 (2002), (hereinafter NIHAL JAYAWICKRAMA).

[12] Revised Political Parties Registration Proclamation, *supra* note 10, Art. 31(3).

[13] While some rights are absolute, some rights can be limited to protect rights of others or public interest. See Jill Marshal, *Personal Freedom Through Human Rights Law? Autonomy, Identity and integrity under the European Convention on Human Rights*, 98 INTERNATIONAL STUDIES IN HUMAN RIGHTS 38, 38-39 (2009). (hereinafter JILL MARSHALL)

[14] UDHR, Art. 29(2). Particular to the right to freedom of political party membership, the Vince Commission said that restrictions should be prescribed by law and proportional with the specified purposes they are intended to achieve in the interest of a democratic society. See VENICE COMMISSION, GUIDELINES ON POLITICAL PARTY REGULATION, adopted by the Venice Commission at its 84th Plenary Session, (15-16 October 2010) at 9-10.

[15] ICCPR, Art. 22(2).

[16] ACHPR, *supra* note 8, Art. 10(2) and 29.

[17] ICCPR, Art. 22(2).

[18] R *v*. Goidstein [1983] 1WLR, 151, 155, cited *in* The Focus, The principle of proportionality and the concept of margin of appreciation in human rights law, 15 BASIC LAW BULLETIN, 2, 2 (December 2013). See also Margaret, Allars, Proportionality, Tradition and Constitutional Framework: Borrowing Foreign Legal Notions in Australian Public Law, *in* LAW AND LEGAL CULTURE IN COMPARATIVE PERSPECTIVE 287, 291 (Gunther Doeker-Mach and Klaus A. Ziegert *eds*., 2004); and M. B. Rodriguez, Ferrere, Proportionality as a Distinct Head of Judicial Review in New Zealand (Unpublished, LL.B Thesis, University of Otago, October 2007) at 9.

legislatures should impose limitations only if respecting the right of others or public interest is impossible otherwise.

In Ethiopia, the FDRE Constitution does not provide for limitations on the right to freedom of association in general and the right to freedom of political party membership in particular.[19] What the Constitution provides is that the objectives of associations, including political parties, should be legal[20] and associations can set requirements[21] according to which political parties can specify criteria for admission and interparty elections for their members. It is clear that international conventions ratified by Ethiopia are integral parts of the Ethiopian law.[22] Moreover, human rights provisions in the Constitution are required to be interpreted in line with the UDHR and other international human rights instruments ratified by Ethiopia.[23] Therefore, pursuant to the international human rights instruments discussed above, the right to freedom of political party membership can be limited by law to protect the rights of others and public interest.

The Revised Political Parties Registration Proclamation provides that judges, members of the Defense Force and members of the Police Force cannot be members of political party unless they leave their work. If they take political party membership, it should be assumed that they have left their job willfully.[24] This is justified by the need to ensure their nonpartisan service to the public.[25] However, other limitations not prescribed by law shall not be imposed on the right to political party membership.

Whether a political party member can withdraw from membership without a written notice, however, has been subject of controversy in the Ethiopian judicial discourse. Particularly, in *Unity for Justice and Democracy Party v. Blue Party,*[26] the Cassation Bench of the Federal Supreme Court has decided that a political party member cannot withdraw from political party membership and take new membership in and be registered as a candidate representing another political party without a written withdrawal notice to the political party of his/her former membership. This case comment examines the issue whether this decision is appropriate from the perspective of the right to freedom of political party membership. To address this, the relevant constitutional and legal provisions in Ethiopia are closely examined. Provisions of international human rights instruments pertinent to the right to freedom of political party membership are also explored. A comparative analysis is also made with the Israeli experience,

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[19] However, the Constitution does not provide for a general limitation clause or specific limitations does not necessarily mean all rights are absolute. See Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia,* 3 MIZAN LAW REVIEW 288, 315-316 (2009), (hereinafter Tsegaye), Abdi Jibril Ali*, Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the CUD Case* 1HARAMAYA LAW REVIEW 1, 7-9 (2013)

[20] FDRE CONSTITUTION, Art. 31.

[21] *Id*., Art. 38(2).

[22] *Id*., Art. 9(4).

[23] *Id*., Art. 13(2).

[24] Revised Political Parties Registration Proclamation, *supra note* 10, Art. 58(1)-(2).

[25] See also FDRE CONSTITUTION, Art. 87(5) and *Amended Federal Judicial Administration Council Establishment Proclamation,* Proclamation No. 684/2010, FED. NEG. GAZETA, 16th Year, No. 41, Art. 11(2).

[26] *Unity for Justice and Democracy Party v. Blue Party,* Fed Supreme Court, Cassation Bench, File No.112091 (06 May 2015) (28 Miyaziya 2007 E.C) Vol. 18, at 421-435.

selected for the reason that a similar experience is mentioned in the Court's decision, and the Kenyan experience selected for its detailed provisions regarding the issue of withdrawal from political party membership.

The remaining parts of this case comment are organized as follows. Section II presents the summary of facts of the case. Section III is devoted to comment and analysis on the Court's decision. Finally, section IV provides concluding remarks.

II. SUMMARY OF FACTS OF THE CASE

The litigation on the case between Unity for Justice and Democracy Party *vs*. Blue Party[27] commenced in Amhara Regional State, Western Gojjam Zone, Daga Damot District Constituency Grievance Hearing Committee. Unity for Justice and Democracy Party (the petitioner) petitioned that Ato Girma Bitew, Ato Meles Zeleke, W/ro Yirgedu Tadege and Ato Yihune Tilahun, whom the Blue Party (the respondent) nominated as candidates for the 5th National Election of 24 May 2015, had been its members until they were registered as candidates of the respondent and requested their disqualification from candidacy. The Committee rejected the candidature of the above individuals. While so ruling, the committee reasoned that they cannot be registered as candidates for the election representing the respondent because they are members of the petitioner, and not that of the respondent.

Blue Party (the respondent) appealed to the Grievance Hearing Committee in the Branch Office of the National Electoral Board of Ethiopia in Amhara Region which confirmed the decision of the lower committee. The respondent, still dissatisfied, appealed to the Supreme Court of Amhara Region which also confirmed the decisions of the Committees on two grounds. Firstly, the Supreme Court reasoned that the respondent did not present evidences to prove that the candidates it presented for the election have withdrawn from their previous membership in the petitioner upon written notice in accordance with the petitioner's by-laws.[28] Secondly, the Supreme Court reasoned that the respondent did not show that these candidates have become its members having passed through the six weeks time which they have to wait before they become its members according to its by-laws,[29] and concluded, similar to the decisions of the committees, that the above named candidates are not the members of the respondent.

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[27] *Id*. For ease of access, the summary of facts of the case presented in this section are taken as summarized and reported in the decision of the Cassation Bench of the Federal Supreme Court. Because of this, it is not possible to include the reasoning in the decisions of the committees, the Amhara National Regional State Supreme Court and the Cassation Bench of the Amhara National Regional State Supreme Court in detail. The author, however, is of opinion that this did not basically hinder readers from understanding the nature of the case and the main concerns at issue.

[28] To be understood from this is that the petitioner has a provision in its by-laws which requires its members to submit a written notice upon withdrawal. There is no indication in the decision of the Cassation Bench of the Federal Supreme Court as to whether or not the committees had raised the requirement of written withdrawal notice as an issue in their decisions. The Regional Supreme Court has, however, concluded that withdrawal from political party membership is possible only upon written notice pursuant to the petitioner's by-laws.

[29] It is possible to understand from this that the respondent has provided in its by-laws that for individuals to become its full members they are required to wait for a six weeks time of provisional membership. It seems that this is designed to help it make sure that the members it recruits are suitable to its policies and objectives. It is also

Still dissatisfied, the respondent petitioned to the Cassation Bench of Amhara National Regional State Supreme Court. By a majority vote,[30] the Bench decided for the respondent. It reasoned that the above named candidates have the right to withdraw from their membership at any time and be members and candidates of the respondent although they were the members of the petitioner. It also stated that upon their registration as members of the respondent, it should be assumed that they have resigned from their previous membership of the petitioner. The Cassation Bench also added that the respondent has included a provision in its by-laws enabling it to accept individuals as its members and nominate them as its candidates for an election without necessarily observing the six weeks check-time provided for membership in its by-laws.[31]

Lastly, the petitioner argued before the Cassation Bench of the Federal Supreme Court (the Court) a person cannot be registered as a member and be nominated as candidate of another political party without a written withdrawal notice to the political party in which he was a member. It claimed that the respondent cannot accept these individuals as members and nominate them as candidates without making sure that they have given notice of their resignation to the petitioner and the public. The respondent, on the other hand, argued that previous membership cannot be a bar against new membership in another party because withdrawal from membership is possible at any time and a political party cannot, in its by-law, limit that right. It added that individuals shall not be forced to remain members of a political party which they did not need to continue with under the pretext that they have not formally withdrawn.

The Court, reversing the Amhara National Regional State Supreme Court Cassation Bench's majority decision, held that a political party member cannot withdraw from membership and be a member and election candidate of another political party without a written withdrawal notice to the political party of his previous membership. Putting its conclusion in other words, the Court said that a political party cannot accept as members and nominate as election candidates former members of another political party without making sure that the individuals have withdrawn from their previous political party membership upon a written notice.

The Court, in so ruling, based its reasoning on two grounds. First, the Court said that allowing a political party member to withdraw from her/his membership and to take a new

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possible to understand in the case of our discussion, however, that it has accepted the above named candidates as its full members without observing the six weeks time of provisional membership.

[30] Although the case comment is written in view of examining the decision of the Cassation Bench of the Federal Supreme Court, it would be better if the dissenting opinion in the decision of the Cassation Bench of the Amhara National Regional State Supreme Court was entertained in the case comment. This was impossible for the reason that the Cassation Bench of the Federal Supreme Court did not state the contents of this dissenting opinion in its decision. The author, however, is of opinion that the dissenting opinion in the Cassation Bench of the Amhara National Regional State Supreme Court may be similar with the decision of the Cassation Bench of the Federal Supreme Court. If this was not the case, the Court would, according to this author's view, not fail stating it in its decision.

[31] According to this, it is clear that the respondent has provided in its by-laws that it, in principle, accepts individuals as its full members after a six weeks time of provisional membership. It has also provided in its by-laws that it can accept individuals as its full members if it thinks fit, without necessarily observing the six weeks time of provisional membership, according to which it accepted the candidates in the case of our discussion.

membership in and to be registered as a candidate for an election representing another political party without written notice to the former political party does not enable the former to know which of its members have left from those who have continued their membership, and get ready for elections accordingly. Related to this, it added that this violates the peaceful relationship between political parties on the one hand and the required loyalty (genuine membership) of members on the other, creates distrust between political parties and their members, and lets the relationship between political parties be based on hatred and conspiracy. Although it did not state it explicitly, the Court, in its analysis with respect to the relationship between political parties and their members, seems to have concluded that withdrawing from membership and taking new membership in another political party without a written withdrawal notice to the former political party is equivalent with simultaneous political party membership. It said that an individual cannot be a member of two or more political parties simultaneously. Second, the Court, similarly, said that allowing a political party member to withdraw from her/his membership and to take a new membership in and to be registered as a candidate for an election representing another political party without written notice to the former political party contravenes the right of the electorate (public) to have informed choices. In finalizing its analysis, the Court has also mentioned similar experience from Israel.

III. ANALYSIS AND COMMENT ON THE DECISION OF THE COURT

The issue that the Court was required to decide in this case was whether a political party member can withdraw from membership and take new membership in another political party without notifying the party of his/her previous membership in writing. The legal provision directly relevant for this provides that "*a member of a political party may at any time withdraw from his membership*."[32]

The above provision does not require a written withdrawal notice. And there is a well-known maxim that where the law is clear courts cannot give it a meaning different from its words.[33] In this regard, a prominent judge and scholar notes that "Judges as interpreters are not authorized to write the statute anew."[34] This means that a law shall not be given a meaning what the words used in it cannot say. Taking the words in the provision that "a member of a political party may at any time withdraw from his membership", it is hardly possible to conclude that a political party member cannot withdraw from membership without a written notice. Had it been its desire to restrict withdrawal from political party membership to be only upon written notice, it would have been possible for the law to expressly provide it. The fact that the legislature did not provide for the requirement of written withdrawal notice cannot also be considered as lack of legislative foresight and legal lacuna which interpreters should bridge through interpretation. Rather, it is the conviction of this author that this provision is deliberately designed to enable political party members to liberally withdraw from their membership without any formality and

[32] Revised Political Parties Registration Proclamation, *supra* note 10, Art. 31(3).

[33] Congressional Research Service, Statutory Interpretation: General Principles and Recent Trends, CRS Report, at 44-46 (September 24, 2014), John Burrows, *The Changing Approach to the Interpretation of Statutes*, 33 VUWLR, 995 (2002).

[34] AHARON, BARAK, PURPOSIVE INTERPRETATION IN LAW 20 (2005), (Translated from Hebrew by Sari Bashi).

restriction.[35] From this, therefore, this author contends that the provision clearly shows that the legislature did not have the intention to impose the requirement of written withdrawal notice.

Accordingly, a withdrawing member is not required to submit a written notice to the political party from which s/he withdraws. S/he is left free to express the fact that s/he does not want to continue membership not only with written notice, but also through all other possible ways. For example, this may be expressed by taking a new membership in another political party, to state the real case in our discussion. If withdrawal were provided to be only upon written notice, it would be exaggeration of formalism at the expense of the member's freedom to withdraw and take new membership in another party.

On another view, the FDRE Constitution provides that human rights embodied in the Constitution "shall be interpreted in a manner confirming" to the principles of the UDHR and other international human rights covenants to which Ethiopia is a party.[36] In this regard, the UDHR prohibits restrictive interpretation.[37] Accordingly, those who are responsible to give a practical meaning to human rights clauses, including courts, are required to interpret them liberally.[38] Therefore, the provision that "A member of a political party may at any time withdraw from his membership" should have been interpreted in a way enabling the political party members to effectively utilize their right to freedom of political party membership. Seen from this perspective, it does not mean a political party member cannot withdraw from membership except upon a written notice. The requirement of written withdrawal notice, on the other view, is a limitation[39] on the freedom to withdraw from membership. In the case of our discussion, the requirement of written withdrawal notice is not prescribed by the relevant law.

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[35] With respect to a political party nominee withdrawing from election, the legislature has provided in the Electoral Law that "a political party candidate who has withdrawn from the election ... shall notify his decision in writing to the political party that nominated him." See *Electoral Law of Ethiopia Amendment* Proc. No. 532/2007, FED. NEG. GAZETA, 13th Year, No. 54 (hereinafter Electoral Law), Art. 54(2). With respect to a political party member withdrawing from her/his membership, however, the legislature did not provide in the Revised Political Parties Registration Proclamation for the requirement of written withdrawal notice. As the time these laws were proclaimed was proximate, it is possible to understand that the legislature did not intend to limit withdrawal from political party membership to be only upon written withdrawal notice as opposed to the withdrawal of political party nominees withdrawing from an election. As it will be made clear below, there is a difference between a political party member withdrawing from membership and a political party nominee withdrawing from election.

[36] FDRE CONSTITUTION, Art. 13(2).

[37] It states: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." UDHR, Art. 30.

[38] Tsegaye Regassa, *supra note* 19, at 318-319 & 328, NIHAL JAYAWICKRAMA, *supra* note 11, at 164.

[39] The requirement of written withdrawal notice may seem a "mere" procedural requirement and "too simple" to consider it a limitation. Moreover, it may not seem prohibiting a member from withdrawing or forcing him to remain member unwillingly. However, as one noted, "... Definition of the limits of the rights is calculated on the basis of the concrete situation and the values at stake." See JILL MARSHALL, *supra* note 13, at 40. Limitations, therefore, are imposed as policy makers and legislatures may envision as necessary to achieve specified purposes to balance between competing rights. Accordingly, limitations on some rights may be stringent conditions while limitations on other rights may be simple procedural requirements or formalities. In our case, especially, what makes the requirement of written notice a limitation on the right to freedom of political party membership is because the nonobservance of it has resulted a far-reaching effect - i.e., dismemberment from other political parties and disqualification from candidature in election. This does not have a lesser effect than prohibiting a member from withdrawing or forcing him/her to remain member unwillingly. Nothing beyond this can be termed a limitation.

Therefore, it does not seem proper for the Court to impose the requirement of written withdrawal notice which the law does not require. Be this as it may, let us examine if the requirement of written withdrawal notice has purposes to serve vis-à-vis the Court's reasoning.

The first reason of the Court is related to the interest of the political party from which the members withdraw. Undoubtedly, political parties have an interest in distinguishing their active members from those who have left. This enables them to know their members, to have an updated register thereof, and to mobilize their members.[40] In the present case, however, the petitioner had already known that its former members have taken new membership in the respondent by the simple fact that they were registered as election candidates of the latter. This is sufficient notice for the petitioner to know that they did not want to continue with it. This makes the requirement of a written withdrawal notice of no purpose.

A related issue the Court raised is the enhancement of smooth interparty relation and the loyalty of their members. It is true that peaceful interparty relation is required for the development of a democratic political culture. To this end, political parties are required to make all possible efforts to have continuous communication with other parties.[41] To peacefully resolve possible controversies between political parties, Joint Political Parties' Council is also established.[42] Similarly, election campaigns are required to be conducted in accordance with the Constitution and other laws, and respecting the rights of other parties.[43] Similarly, the basic rights and duties of political party members are provided by law. Accordingly, political party members have the right to democratic participation in the decision making and to be elected into positions in the political party of their membership.[44] They have also the duty to pay membership fees and observe party by-laws to mention some.[45]

A question relevant here is whether the petitioner (or another political party) can provide in its by-laws for the requirement of a written withdrawal notice without which withdrawal is impossible. A political party is free to regulate its internal affairs in its by-laws, including the details of membership rights and duties.[46] Party by-laws, however, are required to be consistent with the rights and duties of political party members provided in law and cannot have the effect of abridging the rights of a member guaranteed to him as a citizen.[47] One of the legal rights of a political party member is the right to withdraw at any time, which, as already argued earlier, enables to leave membership even without a written withdrawal notice. In this view, the Court should not have given legal effect to the provision in the petitioner's by-laws for the requirement of written withdrawal notice.

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[40] MICHAEL CHEGE, POLITICAL PARTIES IN EAST AFRICA: DIVERSITY IN POLITICAL PARTY SYSTEMS 47 (2007).

[41] *Electoral Code of Conduct of Political Parties Proc*lamation, No. 662/2009, FED. NEG. GAZETA, 15th Year, No. 8 (hereinafter Electoral Code of Conduct), Art. 16.

[42] *Id*., Art. 20-22.

[43] *Id*., Art. 11. See also Electoral Law, *supra* note 35, Art. 58.

[44] Revised Political Parties Registration Proclamation, *supra* note 10, Art. 28 and FDRE Constitution, Art. 38(2).

[45] *Id.,* Revised Political Parties Registration Proclamation, *supra* note 10, generally see Arts. 29 and 15.

[46] *Id*., Art. 15(1) & 16.

[47] *Id*., Art. 15(2) & (3) and 31(4).

Therefore, the withdrawal of the members of the petitioner without giving a written notice and the fact that the respondent accepted them as its members cannot be considered a violation of the duty to have peaceful interparty relationship by the respondent and a violation of party by-laws by the withdrawing party members. However, if the act of the respondent admitting former members of the petitioner can be considered a violation of the duty to have peaceful interparty relation, whether the members withdraw with or without a written notice should not make a difference. From its very inception, there is no reason for the political parties to create enmity between themselves due to this for it is the freedom of the individuals to choose the political party of their membership. Hence, the problem in this context lies not on the fact that former members of the petitioner have taken new membership in the respondent without regard to the requirement of written withdrawal notice provided for in the petitioner's by-laws. It, rather, lies on the misreading of the petitioner, or other political parties which have similar view, that its members should not be able to freely leave their membership and/or take new membership in another political party at any time. As all other political parties with such misconception may do, the petitioner may therefore fall in to hatred with other political parties which accepted its former members as their new members. However, such a problem is to be rectified not by restricting withdrawal from political party membership to be only upon written notice. Rather, it can be rectified by developing adherence to the freedom of the political party members to withdraw from their membership and take new membership in another political party at any time, even without written withdrawal notice.

The other related point that the Court raised leads to issues related to candidature in election**.** For political party nominees to be registered as candidates, their nomination evidence including evidence of their consent for the nomination "along with details of candidature" is required to be presented to the Electoral Board.[48] The phrase "details of candidature" talks about the manner in which political party candidates are elected. This requires evidences to be presented to show that the candidates are elected in a democratic manner in which political party members duly participated as provided in the Constitution and in the Political Parties' Proclamation.[49] As to this author's understanding, this is meant to develop intraparty democracy in candidate election. The Court has, however, misinterpreted this provision as if it requires a political party that accepts previous members of other political parties as its members and nominates them as its candidates for an election to present evidences to show that these members have withdrawn from their previous membership with a written withdrawal notice.

The Electoral Law on the other hand, provides that "A political party candidate who has withdrawn from the election ... shall notify his decision in writing to the political party that nominated him."[50] The Court has made a passing reference to this provision to support its reasoning. However, the provision has a purpose different from what the Court sees. It is possible to understand that the purpose of the Electoral Law here is to enable the political party

[48] Electoral Law, *supra* note 35, Art. 46(2) & (3).

[49] FDRE Constitution, Art. 38(3); Revised Political Parties Registration Proclamation, *supra* note 10, Art. 28, 15(1)(b), (d), (e) & (i).

[50] Electoral Law, *supra* note 35, Art. 54(2).

to nominate a substitute candidate for the election.[51] In the case of a party member withdrawing from membership, however, there is no such an interest of nominating a substitute. The Court has analogized two contrary things and applied this provision for a purpose it is not intended for.

The second reason the court raised is the interest of the electorate (public) to have informed choices. It is true that the need to multiparty election is to enable citizens to choose their representatives freely and based on informed decisions.[52] For this to be achieved, political parties and candidates competing in an election should be able to sufficiently communicate with the electorate to introduce their objectives equally.[53] In this regard, the Electoral Law provides that every candidate can conduct election campaigns "up till two days before" the polling date.[54] To this effect, candidates, political organizations and their supporters are entitled to equal access to the state owned mass media including free access to airtime.[55] For these rights to materialize, government organs have the obligation of creating conducive conditions.[56] Similarly, to enable the public distinguish between symbols, designations, emblems and flags which political parties and candidates use, political parties and candidates in an election campaign are required to use distinctive symbols.[57] Political parties are also prohibited from imitating, stealing, disfiguring or destroying the symbols of other political parties.[58] Moreover, it is provided that the designation, emblem and flag of a political party shall not be similar or confusing with that of other political parties or commercial, social or international organizations.[59]

Provided that all of these legal requirements are duly observed, contesting political parties and candidates can be able to sufficiently communicate with the electorate. Particularly, it is expected that political party nominees during election campaigns will express which party they represent together with their policy alternatives to the public. Based on this, the electorate can be able to have sufficient information enabling it to decide whom to vote for without any confusion. In this perspective, whether the political party members withdraw from their previous membership upon written notice cannot be the concern of the electorate. Hence, the requirement of written withdrawal notice does not have a public purpose to serve.

The last point to be raised is the Court's reference to "similar" experience from Israel while that is not the case. The relevant provision reads:

> A Knesset member seceding from his faction and failing to tender his resignation as a Knesset member in close proximity to his secession, shall not be included, in the election for the next Knesset, in the list of candidates submitted by a party that was represented by

[51] *Id*., Art. 54(2) cum 54(4).
[52] *Id*., fourth paragraph of the preamble and Art. 5(3).
[53] *Id*., fourth paragraph of the preamble and Art. 5(2).
[54] *Id*., Art. 58(1)-(5).
[55] *Id*., Art. 59(1) & (2).
[56] *Id*., Art. 60.
[57] *Id*., Art. 52.
[58] Electoral Code of Conduct, *supra* note 41, Art. 12.
[59] Revised Political Parties Registration Proclamation, *supra* note 10, Art. 27(1) & (2).

> a faction of the outgoing Knesset; This provision does not apply to the splitting of a faction under the conditions prescribed by law.[60]

According to this, a Knesset member who resigns from her/his faction without documenting resignation to the Knesset[61] cannot be nominated as candidate in the coming election by a political party having a seat in the outgoing Knesset unless his/her resignation was caused by legally recognized party splitting.[62] This means that Knesset members who defect from their membership in one political party to another due to a promise for a safe seat in the next Knesset will be forced to resign from their membership in the Knesset.[63] The purpose of this anti-defection provision is to avoid government failure in the Knesset. This can be understood from the provision that secession from membership includes voting against one's faction in the Knesset with respect to the vote of confidence or no confidence.[64] This does not indicate the intention of requiring a withdrawing member to present a written notice to the political party from which s/he withdraws.

In addition, although different jurisdictions may enact anti-defection legislations, they are not always accepted. An example for this can be the experience of Papua New Guinea. It was provided in Papua New Guinea's Organic Law on the Integrity of Political Parties and Candidates that a parliament member (MP) can resign from her/his membership in a political party only upon accepted grounds with written notice to the president of the political party specifying the reasons for his/her resignation.[65] Resignation without accepted grounds was also provided as an offence against official duty.[66] Procedurally, upon receipt of the resignation notice, the president of the political party sends such a resignation notice to the registrar of political parties, which in turn sends it to the Ombudsman for investigation and decision as to whether there are accepted grounds for resignation or the member is guilty of resignation without accepted grounds.[67] Pending the investigation, the MP was required to remain member of the political party from which s/he intends to resign.[68] Moreover, it was provided that an MP's vote against the resolution of the political party of her/his membership in parliamentary votes,

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[60] Israel's Constitution of 1958 (with Amendments through 2013), *available at* http://www.constituteproject.org/constitution/Israel_2013.pdf, (Accessed on 31st of July 2017) (hereinafter Israeli Constitution), Article 6A(a).

[61] The Israeli legislative council is called Knesset.

[62] For splitting to be legally recognized, at least 7 Knesset members should split from the political party having a seat in the Knesset. See Zvi Ofer and Brenda Malkiel, *Reforming Israel's Political System: Recommendations and Action* (hereinafter Reforming Israel's Political System), at 20 (October 2011).

[63] For the development of such anti-defection law, see Csaba Nikoleyni and Shaul Shenhave, In Search of Party Cohesion: The Emergence of Anti-Defection Legislation in Israel and India (paper prepared for delivery at the Annual Meeting of the American Political Science Association, Toronto, Canada, 3-6 September 2009).

[64] Israeli Constitution, *supra note* 60, Art. 6(A)(b).

[65] Organic Law on the Integrity of Political Parties and candidates 2003, *available at,* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/88056/100575/F2099356900/PNG88056.pdf, (Accessed on 31st of July 2018) (hereinafter OLIPPC) Section 57, 58 and 65. The accepted grounds for resignation were 1) if the party or its executive officer committed serious breach against the party constitution and 2) if the party is declared insolvent according to relevant law. *Id*., Section 57(2).

[66] *Id*., Section 57(3) and 68.

[67] *Id*., Section 59 and 60.

[68] *Id*., Section 61.

including in vote of confidence or no-confidence is not counted.[69] Independent MPs, who initially support the election of a prime minister were also required to vote in support of her/him if a vote on confidence or no-confidence motion is held during his/her term, in votes for constitutional amendment and votes for national budget.[70]

These provisions were developed to remedy repeated government failure due to defection by MPs and "vote of no confidence" against government.[71] This is because volatility of party alliances and vote of no confidence leading to loss of government have long been the features of Papua New Guinea's political system since its independence from Australian administration under United Nations trusteeship in 1975.[72] These provisions, however, have been declared unconstitutional.[73] Papua New Guinea's Supreme Court has invalidated these provisions in its decision on 7th of July 2010 on the reason that they are unreasonable restrictions on constitutional democratic freedoms.[74] Particularly, the Supreme Court stated that these provisions contravene the constitutionally guaranteed right to association and political party membership, right to hold public office and exercise public functions, and "powers, privileges and immunities of Members of Parliament."[75] Therefore, while the issue whether anti-defection legislations (provisions) are required in Ethiopia is not the main subject of this case comment,[76] the Court's reliance on the Israeli anti-defection experience in our case seems also defective even if viewed from the perspective of the validity of anti-defection laws.

Although the Court's reference to other jurisdictions' experience is commendable, a reference should have been made to jurisdictions having sufficient provisions on similar subject matter. For example, the Kenyan Political Parties Act provides that a withdrawing political party member is required to give prior written notice to the political party or to the House of Parliament or county assembly of his/her membership as the case may be.[77] On the other hand, it has provided for other facts by which voluntary resignation is to be presumed. It provides that a political party member who forms or joins another party, or in any way publicly advocates the

[69] *Id*., Section 65(1)(c) and 66.

[70] *Id*., Section 70, 71, 71, 72 and 73.

[71] Henry Tadap Okole, A Critical Review of Papua New Guinea's Organic Law on the Integrity of Political Parties and Candidates: 2001-2010 (Australian National University, SSGM Discussion Paper 2012/5), *available at* http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/2012_5_0.pdf, (Accessed on 18th September 2018) (hereinafter Okole) at 1-2.

[72] See United Nations, Division for Public Administration and Department of Management (DPADM) Department of Economic and Social Affairs (DESA), Independent State of Papua New Guinea: Public Administration Country Profile (Unpublished, March 2004), at 2.

[73] Okole, *supra* note 71, at 2.

[74] *Id*., at 2-4.

[75] Peter, Donigi, OLIPPAC and the Supreme Court ruling (July 8, 2010), available at https://www.thenational.com.pg/olippac-and-the-supreme-court-ruling/, (Accessed on 19th of September 2018).

[76] Article 54(4) of the FDRE Constitution provides that members of the House of People's Representatives are governed by the Constitution, "the will of the people" and their conscience. This author is of the view that this constitutional provision enables MPs to vote for what they believe is constitutional and serves public interest irrespective of issues related to party discipline and party cohesion, hence precludes the enactment of anti-defection legislations (provisions).

[77] Political Parties Act, in National Council for Law Reporting, Republic of Kenya, Laws of Kenya (Rev. Ed.), Section 14(1) (a)-(c) (2012) (hereinafter Kenyan Political Parties Act).

formation of another party or the ideologies, interests or policies of another party "shall be deemed to have resigned from the previous political party."[78]

In cases when a political party member is found to have joined another political party without written notice to the political party of his/her previous membership, controversy could be created whether the law allows this. The Kenyan Political Parties' Act has, however, validly avoided the potential confusion and controversy by clearly providing for other grounds to presume withdrawal from membership other than a written withdrawal notice. Particularly, if it is known that a member has taken new membership in another party, the presumption is that s/he has willfully resigned from his/her previous political party membership.

Cambodia's Law on Political Parties has also provided for a different approach which supports the freedom to withdraw from political party membership. It provides that a political party member can withdraw from membership as of right.[79] Moreover, it provides that, if an individual joined many political parties, the membership to the last political party is considered valid.[80] It is clear from this that the new membership in the last political party is given validity based on a presumption that upon new membership in another political party, the membership in the former political party is terminated. Therefore, a political party member cannot be prohibited from taking new membership on the ground that s/he has not withdrawn formally upon written withdrawal notice. In consideration of these experiences, therefore, the Court's comparison with the Israeli system in our case seems to suffer form the problem of bad example.

This, however, is not to disregard the Court's concern regarding the possible challenge of simultaneous political party membership. Indeed, the fact that political party members are left free to withdraw from their membership and take new membership in another political party without any formality may, unless remedied, be an incentive for a potential challenge in this regard. Hence, the Court's stance that a person cannot simultaneously be member of two or more political parties is acceptable. Other jurisdictions have also outlawed simultaneous membership. For example, in the Israeli system, simultaneous membership is a crime.[81] Similarly, the Kenyan Political Parties Act and Cambodia's Law on Political Parties clearly prohibit simultaneous party membership.[82] In addition, the Kenyan law provides that political parties are required to keep register of their members.[83] The Kenyan Registrar of Political Parties is also empowered to take reports thereof and publicize the verified list of all political party members.[84] This enables

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[78] *Id*., Section 14(5). It provides "… notwithstanding the provisions of subsection (1) or the provisions of any other written law …" This, however, does not apply to advocating the formation of a coalition or promoting the common objectives of a coalition. See *Id*., Section 14(6); see also OFFICE OF THE REGISTRAR OF POLITICAL PARTIES, GUIDE TO POLITICAL PARTY MEMBERSHIP, 5-6 (2014).

[79] Law on Political Parties, 1997, Royal Kram (Law) No. 1197/07, *available at* http://www.parliament.am/library/Political%20parties/cambodjia.pdf, (Accessed on 25th of July 2018) (hereinafter Cambodia's Law on Political Parties), Article 13.

[80] *Id*., Article 15.

[81] Reforming Israel's Political System, *supra* note 62, at 18.

[82] Kenyan Political Parties Act, *supra* note 77, Section 14(4) and Cambodia's Law on Political Parties, *supra* note 79, Article 15.

[83] Kenyan Political Parties Act, *supra* note 77, Section 17(1)(a).

[84] *Id*., Section 18(1) & (2) and Section 34(d).

political parties know who of their members have taken new membership in another political party and update the register of their members accordingly.

These or other similar mechanisms can be recommended to be adapted to the Ethiopian system to control simultaneous political party membership. However, it would have been possible to say that the individuals in our case were simultaneous members of both parties[85] if evidences were presented to show that they had been participating in the intraparty affairs of both parties "equally"[86] or, more strongly, if they were found to have accepted simultaneous nomination by both parties for the election,[87] obviously, without the knowledge of the parties. If that was the case, it would be impossible to say they have terminated their former membership in the petitioner so that it might be possible to conclude that they have taken simultaneous membership in both parties. The mere fact that they withdrew from the petitioner without a written withdrawal notice and joined the respondent does not mean, however, that they have taken simultaneous membership.

In a nutshell, the Court's ruling that a political party member cannot withdraw from membership without a written resignation notice and take new membership in another political party is unjustifiable limitation on the right to freedom of political party membership generally and on the freedom to withdraw from political party membership particularly. Once it is known that the members of the petitioner have taken new membership in the respondent, it should be assumed that, as stated by the majority decision of the Amhara National Regional State Supreme Court Cassation Bench, they have terminated their former membership upon their will without necessarily resorting to a written withdrawal notice.

IV. CONCLUSION

The FDRE Constitution guarantees the right to freedom of political party membership. Similarly, the Political Parties Proclamation provides that every Ethiopian, except acting judges, members of the Police Force and Defence Force, has the right to form or join a political party. The proclamation also allows a political party member to withdraw from membership at any time without providing for any formality upon withdrawal. The Cassation Bench of the Federal

[85] Although it did not clearly state it, it is possible to understand the Court's view is that withdrawing from previous membership without a written notice and taking new membership in another party amounts to simultaneous membership.

[86] To conclude that the individuals participated in the intraparty affairs of both parties equally, the petitioner should have argued and presented evidences to show that they acted as its members (by partaking in intraparty meetings, decision-making, paying membership dues etc...) even after they were registered as members of the respondent.

[87] Express prohibition that an individual cannot accept nomination by more than one political party may be important. For example Papua New Guinea's OLIPPC has expressly provided that a person cannot run for an election both as an independent candidate and as a political party nominee and that a candidate cannot accept nomination by more than one political party for an election. See OLIPPC, *supra note* 65, Section 54(1) and 56(1)(c). Moreover, if a candidate who accepts endorsement by more than one political party wins an election, it provides that her/his election is void. See *Id*., Section 56(5)(b). In the Ethiopian case, there is no clear prohibition of simultaneous nomination in the Electoral Law. However, a political party can nominate "only one candidate for a single council seat in a constituency." Similarly, a person can run as a candidate only in one constituency. See Electoral Law, *supra* note 35, Art. 46(4) and 56(1). From these provisions, it is possible to conclude that simultaneous nomination is not allowed.

Supreme Court, however, has decided in *Unity for Justice and Democracy Party vs. Blue Party* that a political party member cannot withdraw from membership and be a member and election candidate of another political party without submitting a written notice of withdrawal to the political party of his previous membership. According this author's view, this is an undue limitation on the right to freedom of political party membership in general and right to withdraw from political party membership in particular. This is neither prescribed by the relevant law nor justifiable in the interest of the political party from which the member withdraws or the public. Nor can this be learned from the experience of other jurisdictions as the Court alleged. The fact that former members of the petitioner have taken new membership in the respondent should have been sufficient to presume that they have terminated their membership with the petitioner upon their will without necessarily resorting to written withdrawal notice. Therefore, the Amhara National Regional State Supreme Court Cassation Bench's majority decision should have been confirmed.

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HARAMAYA LAW REVIEW ***Vol. 7*** (2018) ISSN: 2227-2178 (P) & 2305-3739 (E)

To cite this Article: *ዳንኤል በሀይሉ ገብረአማኑኤል, የቻይና ኢንቨስትመንት አንድምታ በአፍሪካ፡ኢትዮጵያን እንደ ማሳያ*, HARAMAYA LAW REVIEW 7 (2018): 110-122

የቻይና ኢንቨስትመንት አንድምታ በአፍሪካ፡- ኢትዮጵያን እንደ ማሳያ

ዳንኤል በሀይሉ ገብረአማኑኤል[*]

Abstract

China is fast becoming the leading trading partner, sources of investments and project financing fund in Africa. African leaders are widely engaged in what is called 'closed window' deals with China. On the other hand, the role of the western nations is ever diminishing while China's role is ever expanding. Ethiopia is one at the forefront of hosts of deals with China. Such engagements definitely brought with it both opportunities and challenges. Among the challenges are massive piling debts and servicing these debts via natural resource as debts are largely repaid in kind via natural resources. On the other hand, multiple opportunities, like technology transfer and availability of funds, can be seen in this collaboration. This Article is set out to question the relationship of Africa with China by taking the experiences of Ethiopia. The aim is to encourage debates, discussion and further researches on China-Africa relation.

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ሀ. መግቢያ

ስለቻይና እድገት እንዲሁም የእድገቷ መስመር እና አንድምታ ከምእራባውያኑ ባለፀጋ አገሮች ፍላጎት፣ አስተሣሠብ፣ የሠብአዊ መብት እና ሌሎች መመዘኛዎች አንጻር ብዙ ተብሏል። በተለይ የምዕራባውያኑን አገራት ምሁራን እና ፖለቲከኞች የቻይና በአፍሪከ ውስጥ ጎላ ያለ እንቅስቃሴ ማድረግ ቀልባቸውን ሠቅዞ ይዞታል፤ ስጋትም አሳድሮባቸዋል።[1] ምዕራባዊያን በጉዳዩ ስጋት አድሮባቸዋል፤ የማጥላለት ስራም ሲሰሩ ይስተዋላል።[2] አፍሪካ በበኩሏ (ኢትዮጵያን ጨምሮ) እንደተለመደው አንቀላፍታለች። ጎላ ያለአቋም ወስዳ እና ጠንካራ ተቋም አቋቁማ የቻይናን እንቅስቃሴ በመከታተል እና በመገምገም ረገድ ከፍተኛ ድክመት ይታይባታል ወይም እየገመገመች አይደለችም። በዚህ ረገድ ያለው ስጋትም ከምዕራባውያን ጋር ያቃረናት ምክንያት ከቻይና ጋርም ይደገም ይሆን የሚል ነው።[3]

እንዲያው በደፈናው የአፍሪካ መሪዎች ከቻይና ጋር ያላቸውን ግንኙነት በአወንታዊ ጎኑ ብቻ የማየት አባዜ እና ግንኙነቱ መልካም እና አዋጪ ነው ማለታቸው በየመገናኛ ብዙሀኑ ይስፈፋል። ከደቡብ አፍሪካ ውጭ ያሉ አገራት የጥናት ተቋም እንኳን አቋቁመው ጉዳዩን እያዩት/እየፈተሹት አይደለም። የአፍሪካም ምሁራን ትችትም ሆነ ውዳሴ የሚቀዳው የምዕራባውያንን ምሁራን አጀንዳ (ideas, thoughts and teachings)[4] በማራገብ ወይም በጥቂቱ ደግሞ በመቃረን ነው። በተለይ በኢትዮጵያ የቻይና እንቅስቃሴ ከመንግስት እይታ ውጭ (ያም የሚመነጨው ከመንግስት አቋም ነው) ሌላ ድምጽ መስማት የተለመደ አይደለም። የዚህ ጽሁፍ ዓላማ ምሁራን እና ፖለቲከኞች የራሳቸውን አቋም በጥናት ላይ አስደግፈው እንዲይዙ እና እንዲተነትኑ መገፋፋት ነው። በተለይ አሁን ካለው የመንግስት የኢንቨስትመንት አተያይ ለውጥ ጋር ሊቃኝ ይገባዋል። ሆኖም የዚህ ጽሁፍ ዓላማም ከቻይና የሚመጣን ኢንቨስትመንት መቃወም ሳይሆን የቻይናን የኢንቨስትመንት ፖሊስ ከአፍሪካ ብሎም ከኢትዮጲያ ታሪካዊ ዳራ እና የወደፊት የዕድገት አቅጣጫ/ትልም ጋር የተቃኘ ጥናት፣ ተቋማት እና

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[1] See generally DOROTHY-GRACE GUERRERO and FIROZE MANJI (eds), CHINA'S NEW ROLE IN AFRICA AND THE SOUTH: A SEARCH FOR A NEW PERSPECTIVE, (Fahamu Books, 2008). 'What I find a bit reprehensible is the tendency of certain Western voices to raise concerns about China's attempt to get into the African market because it is a bit hypocritical for Western states to be concerned about how China is approaching Africa when they have had centuries of relations with Africa starting with slavery and continuing to the present day with exploitation and cheating. Open any newspaper and you would get the impression that the African continent, and much of the rest of the world, is in the process of being 'devoured' by China. Phrases such as the 'new scramble for Africa', 'voracious', 'ravenous' or 'insatiable appetite for natural resources' are typical descriptors used to characterise China's engagement with Africa. In contrast, the operations of Western capital with the same ends are described with anodyne phrases such as 'development', 'investment', 'employment generation.'

[2] See generally, JING MEN AND BENJAMIN BARTON (ed)., CHINA AND THE EUROPEAN UNION IN AFRICA-PARTNERS OR COMPETITORS? (Ashgate publishing Limited, 2011): '*China has simultaneously become a possible model for developing nations, whilst acting as a potential rival for developed countries, whether economically, politically or even from a security perspective*.' Also see *Okeowo,* The Newyorker*, available on* https://www.newyorker.com/news/news-desk/china*,* The Chinese have managed to accomplish at least one impressive thing in Africa. They have made everyone else uncomfortable. The Americans are uneasy, worried about (and perhaps jealous of) China's rapid and profitable investments throughout the continent and the developmental assistance that it has started to provide in some areas. Europeans have only to look at trade figures: the share of Africa's exports that China receives has shot from 1% to 15% over the past decade. The European Union's share fell from 36% to 23%. China is now Africa's largest trading partner. Some Africans have become resentful; unhappy with unbalanced relationships in which China has taken proprietorship of African natural resources using Chinese labor and equipment without transferring skills and technology. Lamido Sanusi, governor of Central Bank of Nigeria, wrote in the *Financial Times* that "China takes our primary goods and sells us manufactured ones. This was also the essence of colonialism."

[3] የንግድ ሚዛን ወደምዕራባዊያን ጥቅም የማድላቱ ጉዳይ እና አፍሪካ የጥሬ ዕቃ አቀባይ ብቻ መሆኗ ሁሌም የሚቆጭ ጉዳይ እና ዛሬም መፍትኄ ያልተገኘለት የአህጉሪቱ ግዙፍ ተግዳሮት ነው።

[4] የምእራባዊያን ትኩረት የቻይናን እንቅስቃሴ በአፍሪካ ማጥላላት እና ማጠለሸት ላይ ያተኮረ ነው።

አስራር እንዲኖር መገፋፋት ነው። ይህ ቢሆን ይበጃል ከሚል እምነት ጭምርም ነው። ምድር ላይ ያለው ሀቅ ግን ሌላ ነው፤ እንዲሁ በመንግስት ባለስልጣናት ይሁንታ እና የፖለቲካ ግለት የሚገፋ ነው።

ቻይና ምድር ላይ ባለው እውነታ የኢንቨስትመንት ሜዳውን እየተቆጣጠረች ነው። በአሁኑ ወቅት ከአስር ሺ በላይ የቻይና ኩባንያዎች በአፍሪካ መዋዕለ ንዋይ እያፈሰሱ ሲሆን ከነዚህም ውስጥ አስሩ እጅ በመንግስት ባለቤትነት የተያዙ ግዙፍ ኩባንያዎች ናቸው።[5] ያ ማለት ዘጠና በመቶው የቻይናውያን የግል ኩባንያዎች ናቸው። የቻይና እና የአፍሪካ የንግድ መጠንም ወደሁለት መቶ ቢሊየን ዶላር እየተጠጋ ነው።[6]

በደምሳሳው ሲታይ ቻይና ዋነኛዋ በአፍሪካ መዋዕለ ንዋይ አፍሣሽ፤መሰረተ ልማት አስፋፊ እና የንግድ ሸሪክ ሆናለች። ምዕራባዊያን በተለይም የአውሮፖ ህብረት እና አሜሪካ የነበራቸውን የጎላ ስፍራ ለቻይና አስረክበዋል። ታድያ ቁም ነገሩ ይህ እንዴት ሊሆን ቻለ የምዕራባውያኑ ‹የዴምክራሲ ሰርዓት በአፍሪካ ይገንቡ ግፊት ምን ውጤት አስከተለ? የቻይና በውስጥ ጉዳይ ያለመግባት/በተለይ የፖለቲካ እና የሠብዓዊ መብት ጥያቄ አለማንሣት/ ጠቀማት ወይስ ጎዳት? አፍሪካ ከቻይና ተጠቃሚ ናትን? አሊያም የአፍሪካ እና የቻይና ግንኙነት በምን መልክ መያዝ አለበት? የወደፊት ግንኙነቱስ በምን ስርዓት መታሠር አለበት? ኢትዮጵያስ ምን ስፍራ ይኑራት? እንዴት ግነኙነቷን ትገምግም? ህጋዊ ተቋማትስ እንዴት እና በምን መርህ ይቋቋሙ፣ግንኙነቱንስ እንዴት ይምሩት ወይም እንዴት ያለ የውሣኔ ሀሣብ ያቅርቡ? ዝም ብሎ መንግስት ብቻ የሚያረገውን በፖሊተካ ሙቀት የሚገፋ ግንኙነት ማየት ይበጃል ወይ?

ለ. ቻይና በአፍሪካ፡- ከታሪክ ማህደር

የአፍሪካ እና ቻይና ግንኙነት[7] የጀመረው እና እያደገ የሄደው ባለፉት አምስትና ስድስት አስር ዓመታት ውስጥ ነው።[8] አፍሪካን ከቅኝ ግዛት ቀንበር የማላቀቅ እንቅስቃሴ ጋር ተያይዞ ቻይና በአፍሪካ ታሪካዊ ሰፍራ ያዘች። በተለይ የማኦ ሴቱንግ በቻይና በትረ ስልጣኑን መጨበጥ እንዲሁም የኮምዩኒዝም ስርዓት የቻይና ስርዓት መሆን፣ የአፍሪካዊያንን ቀልብ በእጅጉ ሳበ። የ1960ዎች ትውልድ የአፍሪካዊነትን በተለይም የኮምዩኒዝም ፍልስፍና አቀንቃኝነት አሌ አይባልም። ቻይናንም በትኩረት ያጠኗት ነበር።

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[5]አንድ በቅርቡ ኤም.ጂ.አይ ያወጣውን ጥናት ይመለከቱ፡ Lions on the Move II: Realizing the Potential of Africa's Economies፣ 2016፣ McKinsey Global Institute (MGI)፤ *ይህ ማለት ግን እኩል ተጽኖ ፈጣሪ ናቸው ማለት አይደለም፣ በተለይ ትላልቅ ስራዎች፣ የስራ ኮንትራቶች፣ ገንባታዎች የሚሸፍኑት በመንግስት በተያዙት ኩባንያዎች ናቸው።*

[6] ዳገም ኤም.ጂ.አይ ያወጣውን ጥናት ይመለከቱ፤ Lions on the Move II: Realizing the Potential of Africa's Economies፣ 2016፣ McKinsey Global Institute (MGI)፣

[7] The People's Republic of China's (PRC) contact with Africa dates back to the mid-1950s. To get wide international recognition, Beijing attached great importance to its relations with the developing world. In 1955, the Bandung Conference created an opportunity for the Chinese leadership to meet African leaders. Initiated by the diplomatic relationship established between China and Egypt in 1956, China's Africa policy was developed alongside Africa's anticolonial struggle in the 1950s and the 1960s, as well as the confrontation between the socialist and the capitalist camps. By emphasizing shared colonial experience and by cultivating a brotherly relationship with Africans nations, the PRC was successful in enlisting support from African countries to join the UN in 1971. In the space of six decades, Chinese foreign policy has witnessed a shift in stance from 'war and revolution' to 'peace and development'. China's Africa policy has been adjusted from focusing on political relations, backed by generous economic assistance to emphasizing both political and economic cooperation. Such changes are related to China's economic andreform policy, its de-emphasis of communist ideology, its revision of foreign policy towards pragmatism, its rapid economic growth and its increasing dependence on energy. See, Jing Men and BenJaMin Barton, ed., page.6 and 8

[8] JING MEN AND BEN JAMIN BARTON, *supra note* 2.

የአፍሪካ ወጣቶች ወደ ኮምዩኒዝም መሣብ እና የነጻነት ትግል ውስጥ መግባት፣ በተለይ የቻይና ዓለምአቀፍ እውቅና የመሻት እንቅስቃሴ ጋር ተዳምሮ በቻይና እና ባብዛኞቹ የአፍሪካ አገራት (በተለይም በ1950ዎቹ እና 1960ዎቹ) የጠነከረ ወዳጅነት መመስረት ተቻለ።[9] ይህ ግንኙነት ውሎ ባደረ ቁጥር እየጠነከረ በተለይ በአፍሪካ የለውጥ አዙሪት እና ጦርነቶች መበራከት ጋር ተዳምሮ፤ የአፍሪካ መሪዎች ከምእራብ አገራት ይልቅ ወደምስራቅ ኮምዩኒስት አገራት ማድላቱን ያዙት። ይህም የሆነበት ምክንያት ከጦር መሳሪያ ሽመታም ጋር ይገናኛል።

አብዛኞቹ የአፍሪካ አገራት 'ነጻነታቸውን' ካገኙ በኋላ የውስጥ ንትርክ እና ግጭቱ ማባሪያ አላገኘም።[10] ይህ ደግሞ ከምዕራባውያን ውግዘት (የእጅ አዙር ድጋፍ ባይጠፋም) አስከትሏል። በተቃራኒው ቻይና የምትመራበት የፖለቲካ ርእዮተ-ዓለም ኮምዩኒስት ነን ባይ ከሆኑ አዳዲስ የአፍሪካ ነጻ አገራት ጋር ተዳምሮ ምቹ ሁኔታ ፈጠረ። ብሎም አንዳዶች የአፍሪካ ኮምዩኒዝም የሚል ዘዬ ይዘው ብቅ አሉ።[11] ግን ደግሞ ለአፍሪካዊያኑ ቻይና ዋና መስብ የነበረችው/ከሩሲያ ቀጥሎ/ ለእርስ በረስ ግጭት ፍጆታ የሚውል የጦር መሣሪያ አቅራቢ ስለነበረች ነው።

የሆነው ሆኖ ከማኦ ሞት በኋላ[12] ቻይና የኢኮኖሚ መስመሯን፤የንግድ እና የኢንቨስትመንት አቅጣጫዋን ቀየረች። የቅይጥ ኢኮኖሚ በማወጅ የኢንዱስትሪ አብዮትን ጀመረች። ይኸው ዛሬ ሁለተኛው ግዙፍ የአለም ኢኮኖሚ ለመሆን ቻለች።[13] ተቀዛቅዞ የነበረው የቻይና እና የአፍሪካ ወዳጅነት ታድሶ ብቅ አለ። የጦር መሣሪያ እና የርእዮተ-ዓለም ወደጅነት ወደ ኢኮኖሚ ወዳጅነት በፍጥነት በመቀየር ላይ ነው ወይም የኢኮኖሚ ገጽታም ደርቧል።

ይሁን እንጂ፤ በታሪክም ሆነ አሁን ያለውን የአፍሪካና ቻይና ግንኙነት ጤነኝነትም ሆነ በሌላ መልኩ በቅጡ እየተፈተሸ አይደለም። ግንኙነቱ ዘላቂ እና የጋራ ተጠቃሚነት ላይ እንዲያተኩር የአፍሪካ እንዲሁም የኢትዮጵያ የቤት ስራ በቅጡ እየተሠራ አይመስልም። በእርግጥ ብዙ የግንኙነት ስምምነቶች እየተፈረሙ ነው። የቃል-ኪዳን ሠነዶችም ብቅ ብቅ እያሉ ነው።[14] የንግድ እና የኢንቨስትመንቶች

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[9] China-Africa relations got off to a slow start after the first Asia-Africa Conference, the Bandung Conference, in 1955 as Beijing attempted to assert its leadership over the Third World and the nonaligned movement. Egypt became the first African country to establish diplomatic relations with China in 1956. By the early 1960s, over 10 African countries, including Morocco, Algeria, and Sudan, had established diplomatic relations with China. By the end of the1970s, 44 of the 50 independent Africans had entered into diplomatic relations with China. China's early involvement in Africa was primarily centered on building ideological solidarity with other underdeveloped countries to advance Chinese-style com munism. See:https://sites.google.com/site/chinapolicyinfocus/china-s-return-to-africa/the-history-of-sino-africa-relations, (Accessed on August 3, 2017).

[10]Military cooperation goes back to the Cold War period when China was keen to help African liberation movements. Apart from some traditional allies such as Somalia and Uganda, China also had military ties with non-aligned countries such as Egypt. Military equipment worth $142 million was sold to African countries between 1955 and 1977. Two decades after the collapse of the Soviet Union, military relations are nowbased on business interests rather than ideology. See https://en.wikipedia.org/wiki/Africa%E2%80%93China_relations (Accessed on August 3, 2017).

[11]ጁሊየስ ኔሬሬ፣ኡጁማ ብሎ የሰየመውን የአፍሪካ-ሶሻሊዝም ፍለስፍና አመንጪ እንዲሁም ተመራማሪ እና ፖለቲከኛ የታንዜኒያ ዜጋ ነበር።

[12]ሊቀመንበር ማኦ ከ1893-1976 እ.ኤ.አ የኖሩታላቅ የቻይና መሪ ነበሩ።

[13] According to world babnk, with a population of 1.3 billion, China is the second largest economy and is increasingly playing an important and influential role in development and in the global econony. China has been the largest contributor to world growth since the global financial crisis of 2008.

[14] የቻይና- አፍሪካ ትብብር ፎረም ተጠቃሽ ነው።The China-Africa Cooperation Forum is a platform established by China and friendly African countries for collective consultation and dialogue and as a cooperation mechanism among developing countries. The characteristics of the Forum are twofold. First, it is to strengthen consultation and expand cooperation within a pragmatic framework. Second, it is to promote political dialogue and economic cooperation with a view to seeking mutual reinforcement and cooperation.

መጠን፣አይነት እና ጥልቀትም እየጨመረ ነው። አሁን ቀዳሚውን ስፍራ ቻይና ይዛለች። እነደ ፕሮፌሰር ዎን ገለጻ ከ2005 እ.ኤ.አ. ጀምሮ ከዓለም ባንክ ይልቅ ቻይና ትልቋ የመስረተ ልማት ገንዘብ አቅራቢ ሆናለች።[15] ይህ የቻይናን ትኩረት ያስረዳል። በንግዱ እና በኢንቨስትመንቱም ቻይና ቀዳሚ ሆናለች።

ቻይና ከአፍሪካ መሪዎች ጋር የምታደረገው ስምምነት ዝግ ስምምነት (closed window deal) ነው። የእዳ ክፍያውም በአመዛኙ በአይነት (paymnet in kind) ነው። ለአብነት ያህል፤ ከናይጀሪያ ጋር በነዳጅ ዘይት የሚከፈል የ23 ቢሊዮን ዶላር ስምምነት፣ ከጋና ጋር በተፈጥሮ ጋዝ የሚከፈል የ3 ቢሊየን ዶላር ስምምነት፣ ከኬኒያ ጋር የ4 ቢሊየን ዶላር ስምምነት (አከፋፈሉ ጠብ እየጫረ ነው) ፣ሌሎችም አገራት ኢትዮጵያን ጨምሮ በቻይና ብድር እና የብድር አከፋፈል ስምምነት ችግር ውስጥ ናቸው።[16]

ቻይና የአፍሪካን ንግድ፣ ኢንቨስትመንት እና መሰረተ ልማት ግንባታ እያፈጠነች መሆኑ እሙን ነው። ግን ደግሞ ስጋትም አለ። ስጋቱ አሁንም አፍሪካ የጥሬ እቃ አቅራቢ ነው መሆን ያለባት ወይስ የእኩያ ሸሪክ? አፍሪካ አህጉር ሆና ስታበቃ ከአንድ አገር ቻይና ጋር ምን ዓይነት ስልታዊ እና ህጋዊ ግንኙነት ማረግ አለባት? ይህስ ግንኙነት ከወቅቱ ተለዋዋጭ ሁኔታጋር እንዴት መጠናት አለበት፤የአፍሪካ ዝግጁነትስ ምን ይመስላል? ይህ ፅሁፍ እነዚህን ጉዳዮች በመነካካት እነዲመከርባቸው እና በስፋት እንዲጠኑ ያነሳሳል።

ሐ. የምዕራባዊያን በአፍሪካ መኮሰስ

የአፍሪካ መንግስታት በዴሞክራሲ ስረዓት ግንባታ እዚህ ግባ የሚባል እምርታ አላሳዩም። የምዕራብ አገራት 'ዴሞክራሲ በአፍሪካ' ፕሮጀክትም ከምእራብ አገራት እርዳት፣ብድር እንዲሁም የኢንቨስትመንት ፍስት ጋር ቀጥታ ግንኙነት እንዲኖረው ይፈለጋል/በተወሰነ መልኩ ተደርጓልም።[17] እንዲህ ያለው ቅድመ ሁኔታ ደግሞ በቻይና በኩል ትኩረት አይሰጠውም ብሎም የህግ እውቅና የለውም። በዚህ ምክንያት የአፍሪካ መንግስታት የውስጥ አስተዳደር ህመምን ከማከም (ከማዳን) ይልቅ ቀላሉን ምርጫ አርገው ወደ ቻይና አዘንብለዋል። የቻይና መንግስትም የአፍሪካን መሪዎች ቀልብ መግዛት ችሏል። የህብረቱ መቀመጫ ውድ ሀንጻ በቻይና መንግስት ወጪ ተገንብቶ በገጸ-በረከት ለህብረቱ ተበርክቷል።[18] ባጠቃላይ የምእራባዊያን ተጽኖ እየከሰመ እና የቻይና ሚና እየጎላ መምጣቱ አያከራክርም። የምዕራባዊያን በአፍሪካ መኮሰስ ምክንያቶቹም ከሞላ ጎደል የሚከተሉት ናቸው።

አንደኛ የዴሞክራሲ እና የሰብአዊ መብት ይከበር ውትውታ።[19] የዴሞክራሲ እንዲሁም የተጠያቂነት ስረዓት መኖር ለአንዲት ሀገር እጅግ ወሳኝ ቁም ነገር ነው። ይህንንም ጉዳይ የመከወን

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[15] Won Kidane, 'The China-Africa Factor in the Contemporary ICSID Legitimacy Debate' 35(3) UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW, *5 (201)*. Today Africa's largest Infrastructure financier is no longer the World Bank. It is China. Indeed, it was back in 2005 that the volume of China's investment in African infrastructure surpassed that of the World Bank's.

[16] አብዛኛው ክፍያ ተከፍሎ ሲያልቅ የብድሩን እጅግ ብዙ እጥፍ ነው።Accorindly to financial times report, in the $23 billion deal China signed with Nigeria, China was to build 3 refineries with a combined capacity of 750,000 barrels a day that would exceed the domestic demand of some 450,000 barrels a day. In exchange, China wanted to grab one-sixth of Nigeria's 36 billion barrels of oil reserves. A simple multiplication by the price of oil at $107 a barrel in 2010 yielded $642 billion which was what China was demanding for a $23 billion infrastructure project.

[17] See, JING MEN AND BENJAMIN BARTON, *supra note* 2. Due to the colonial legacies of many of these member states, relations between the two continents can be seen as a double-edged sword. On the one hand, certain EU Member States have been accused of habitually involving themselves in the domestic politics of their former colonies despite gaining their independence.'

[18] ለግንባታው የወጣውን 200 ሚሊዮን ዶላር የቻይና መንግስት ሸፍኖ እና ገፀ-በርከት አርጎ ለወቅቱ የህበረቱ መሪ ቁልፍን አስረክበዋል። ይህም አያሌ ትችትን አስከትሏል።

[19] With Western loans linked to an insistence on democratic reforms and the need for transparency in using the money (diplomatic language for rules to ensure dictators do not pocket millions), the Chinese have proved much

ሀላፊነት በመጀመሪያ ደረጃ መወጣት ያለባት ያቺው አገር ነች። ሆኖም በተለያዩ ምክንያቶች አባዛኞቹ የአፍሪካ አገራት ዴሞክራሲን የመገንባት ሂደት እና የተጠያቂነት ስረዓትን የማነበሩ ጉዳይ የማይወጣ ዳገት ሆኖባቸዋል። በዚሁ ምክንያት የምእራብ አገራት እርዳታ መለገስ ስራዬ ብለው ይዘውታል። ያመጣው ፋይዳ ግን እምብዛም የሚነገርለት አይደለም። ይባስ ብሎ ከአፍሪካ ገዥዎች ቂም አትርፎላቸዋል። ተስተካከሉ አንዳንዱም እንዲህ ብታደርጉት የሚለውን ምክር ብሎም የእርዳታ እና የብድር ቅድመ ሁኔታዎች አፍሪካዊያኑ ገዢዎች በበጎ አላዩትም። በዚህም አማራጭም ሲፈለጉ ቻይና ጥሩ አማራጭ ሆና ብቅ ብላለች።

ሁለተኛ ብድር እና ቅድመ ሁኔታዎቹን በተመለከት፤የአለም ባንክም ይሁን የተለያዩ የበለጸጉ አገራት ብድር ለመስጠት የተበዳሪዋን አገር ሁኔታ ቀድመው ይገመግማሉ። አንዱ ቁም ነገር የተበዳሪዋ አገር መልሶ የመክፈል አቅም (credit worthness) ነው። ይህ አቅም የሚገነባው በረጋ ስረዓት እና ልማት በተጠያቂነት ስረዓት ውስጥ እየተከወነ መሆኑ ሲረጋገጥ ነው። አገሪቱ እንደ አገረም ከብጥበጥ (በተለይ ለፖለቲካ ስልጣን ሽሚያ) እና ከነውጥ የጸዳች ስትሆን ነው።

ሶስተኛ እርዳት እና ቅድመ ሁኔታዎቹም የሚያተኩሩት በዚሁ የዴሞክራሲ ስረዓትን የመገንባት እና የተጠያቂነት መኖር ጋር የተቆራኘ ነው። እርዳታው ለታለመለት አላማ መዋሉን ማረጋገጥ ያሻል እና። አራተኛ የኢንቨስትመንት ቅድመ ሁኔታዎችንም ስንመለከት የተረጋጋች አገር ከመሰና እና አድሏዊ አሰራረ የጸዳች ተገማች የሆነች እንዲሁም የፖለቲካ እና የህግ ስረዓቷ አስተማማኝ መሆኑ መረጋገጥ አለበት።

አምስተኛ የቻይና አዲስ ዘዬ ደግሞ በውስጥ ጉዳይ ያለመግባት[20] የሚል ሲሆን ለብድርም ሆነ ለእርዳታ ምንም አይነት ቅድመ ሁኔታዎች የሏትም። በኢንቨስትመንት ጉዳይም የመንግስታቱ መስማማት ብቻ በቂ ነው።የቻይና መንግሰት የዴሞክራሲ በተለይም ደግሞ የሰብኣዊ መብት ማክበር ጉዳይ ላይ የተለየ ምልከታ ነው ያለው።[21]

መ. አፍሪካ እና ኢትዮጵያ፡- በህበረቱ መነፅር

ኢትዮጵያ በአፍሪካ ውስጥ ያለች አንድ አገር ስትሆን ከ አፍሪካ አህጉር ጋር ለየት ያለ ግንኙነት አላት። ኢትዮጵያ የቅኝ ግዛት ታሪክ የሌላት ቢሆንም ቅሉ በብዙ መልኩ የባህል ወረራን ያስተናገደች እና የጥገኝነት አባዜዋም ከሌሎች የአፍሪካ አገራት የተለየ አይደለም። በተለይም የድህነቱና ኋላቀርነቱ ጉዳይ አመሳሳይ ከመሆኑም ባለፈ ከሌሎች የአፍሪካ አገራት የተለየች ነች ማለት አያስችልም። እንዲያውም በአንዳንድ መስፈርቶች ኢትዮጵያ ኋላቀር የምትባል ነች። የሆነው ሆኖ ታሪካዊ ልዩነቷ በተለይም የምዕራባዊያንን ወረራ መገዳደር መቻሏ ልዩ ስፍራ በአፍሪካ ውስጥ እንድታስገኝ

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more relaxed about what their billions are used for. Certainly, little of it reaches the continent's impoverished 800 million people. Much of it goes straight into the pockets of dictators. In Africa, corruption is a multi-billion pound industry and many experts believe that China is fuelling the cancer.The Chinese are contemptuous of such criticism. To them, Africa is about pragmatism, not human rights. 'Business is business,' says Chinese Deputy Foreign Minister Zhou Wenzhong, adding that Beijing should not interfere in 'internal' affairs. 'We try to separate politics from business.' See http://www.dailymail.co.uk/news/article-1036105/How-Chinas-taking-Africa-West-VERY-worried.html (Accessed on August 10, 2017)

[20] By developing and consolidating political and economic cooperation with Africa, China has become an influential actor in Africa. In its external relations, China adheres to the principle of non-interference. China's respect for sovereignty and territorial integrity resonates with most African leaders. See, JING MEN AND BENJAMIN BARTON, *supra note 2, at 10.*

[21] Aljazeera Inside Story, 21 May 2012 09:29, 'With a lot of people still in poverty the stress on economic and social development would be the priority, an important part of China's human rights approach … when you are hungry, you don't have proper housing you are talking about things beyond the expectation of ordinary people."

አድርጓታል። በተለይ መሪዋ አጼ ሀ/ስላሴ 'የአፍሪካ አባት' የተባሉ ብሎም የአፍሪካ አንድነት ድርጅት መስራች ናቸው።[22] ይሄው እስከ ዛሬ የድርጅቱ (አሁን ህብረት ሆኖዋል) መቀመጫም አዲስ አበባ ነው።

ታድያ የአፍሪካ ህብረት መቀመጫ መሆኗ ከሌሎች የውስጥ መስህቦች ጋር ተዳምሮ ኢትዮጵያ የቻይና ትኩረት ሆናለች። ቻይናም በኢትዮጵያ በተለይም በአዲስ አበባ በመንቀሳቀስ የመላው አፍሪካ /ቢያንስ መሪዎቿን/ ቀልብ መሣብ እንደምትችል የገመገመች ይመስላል፣ውጤትም አስገኝቶላታል። ኢትዮጵያ ላይ የሚታዩ ውጤቶች በተለይ የመሠረተ ልማት ዕድገት፣ኘሮጀክቶች እና ኩባንያዎች በሌሎች የአፍሪካ አገር መሪዎች ተደጋግሞ ተጎብኝተዋል። ተመሣሣይ ውሎችም ሌሎች አገሮች ላይ ተፈርመው ወደተግባር ተግብቷል።[23] ቻይና በዚህ መልኩ የአፍሪካ ህብረት አገራትን ቀልብ መሣብ ችላለች። ኢትዮጵያም ከዚህ ተጠቃሚ ሆናለች። በአጠቃላይ ኢትዮጵያ የቻይና የመዋዕለ ንዋይ ፍሠት፣የንግድ እና የመሰረተ ልማት እድገት ማሣያ እየሆነች ነው። ይህ ደግሞ ክፋት የለውም በተለይም የኢትዮጵያ ተጠቃሚነት አሌ የሚባል አይደለም። ግን ደግሞ በኢትዮጵያ በኩል (ማሳሳቻነት) የተፈጥሮ ሀብት ክምችት ያለባቸው አገሮች ላይም የቻይና ተጽኖ እየጎላ ነው። የኢትዮጵያም የተፈጥሮ ሀብትም በልዩ ትኩረት እየታየ አንዳንዶችም ወደስራ ገብተዋል።[24]

ከቻይና ብድርና የመሠረተ ልማት እድገት ድጎማም በቀላሉ እየተገኘ ነው።[25] ቻይና አሁን የምታደርገው እንቅስቃሴ የአፍሪካን ብሎም የኢትዮጵያን ተጠቃሚነት ያረጋገጠ ነው። ግን ደግሞ ሌሎች የውጭ ተፎካካሪዎች እየደከሙ እንዲሁም የአገር ውስጥ ተፎካካሪዎች ሁኔታም አስጊ ደረጃ ላይ ነው። የቻይና ኢንቨስትመንት በተፈጥሮ ሀብት እንክብካቤ የዴሞክራሲ ስረዓት ግንባታ እና የሠብአዊ መብቶች አያያዝ ረገድ ያለው ተጽዕኖ ከቁብ ነገር የገባ አይመስልም። እነዚህ እና ተመሣሣይ ጉዳዩች በቅጡ መፈተሽ አለባቸው። በተለይ ትኩረት የሚሻው ጉዳይ የብድር ክምችት እና አከፋፈል ነው። አንዳንድ የአፍሪካ አገራት (ኢትዮጵያንም ይጨምራል) ብድርን በተፈጥሮ ሀብት ወይም በአይነት

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[22] See generally, J. AYO LANGLEY, IDEOLOGIES OF LIBERATION IN BLACK AFRICA, *1856-1970* (London: Rex Collings, 1979): On May 25, 1963 the Organization for African Unity (OAU) was established with a permanent headquarters in Addis Ababa, Ethiopia. Haile Selassie, Emperor of Ethiopia, was selected as the first President of the OAU. His acceptance speech appears below.

'This is indeed a momentous and historic day for Africa and for all Africans. We stand today on the stage of world affairs before the audience of world opinion. We have come together to assert our role in the direction of world affairs and to discharge our duty to the great continent whose 250 million people we lead. Africa is today at midcourse, in transition from the Africa of Yesterday to the Africa of Tomorrow. Even as we stand here, we move from the past into the future. The task on which we have embarked, the making of Africa, will not wait. We must act, to shape and mould the future and leave our imprint on events as they slip past into history.

[23] See in general, Chinese FDI in Ethiopia, A World Bank Survey, 2012.

[24] ለአብነት ያህል፤ ከአ/አ/ ከተማ የቀለበት መንገድ መጠናቀቅ በኋላ፤ በርካት ተመሳሳይ ስራዎች በሌሎች የአፍሪካ መዲናዎ ተገንበተዋል። One of the top destinations for Chinese investment in Africa is Ethiopia, a mostly resource-poor country of 100m people that is pursuing Chinese-style state-led development. Ethiopia has few resources of interest to China other than its strategic location and potentially large market, should its fast growth of the past 15 years prove sustainable. Since 2000, Ethiopia has been the second-biggest recipient of Chinese loans to Africa, with financing for dams, roads, rail and manufacturing plants worth more than $12.3bn, according to researchers at Johns Hopkins. That is more than twice the amount loaned to oil-soaked Sudan and mineral-rich Congo. In fact, a far larger portion of US direct investment, 66 % vs 28 % for China goes into mining. See David Pilling, Financial Times, June 13, 2017.

[25] Just like Western powers, China has used aid strategically to support its commercial and investment interventions in Africa. Aid has taken the form of financial investments in key infrastructural development projects, training programmes, debt relief, technical assistance and a programme of tariff exemptions for selected products from Africa, not dissimilar to the agreements that Africa has had with Europe, US and other Western economies. See DOROTHY-GRACE GUERRERO and FIROZE MANJI, *supra note 1, at 3.*

መክፈል ጀምረዋል። ይህ ሁኔታ ደግሞ ሙስናን የማበራከት ዐባይ አለው። በቀላሉም ሀብትን ማሸሽ እና መልኩን መቀየርም ይችላል።[26]

ሠ. የቻይና በኢትዮጵያ መጉላት

ቻይና ከአጼው መንግስት መውደቅ በኋላ በኢትዮጵያ ፖለቲካ እና ኢኮኖሚ ላይ የላቀ ተጽኖ አላት። እውነቱን ለመናገር የአብዛኞቹ 1950ዎቹ እና 60ዎች ተማሪዎች እንዲሁም ጥቂት የወቅቱ ምሁራን የፖለቲካ መስመር ከማኦ ሴቱንግ ፍልስፍና (ቀይ-መጽሀፍ)[27] የሚመዘዝ ነው። ከኮሚኒዝም ፍልስፍና አመንጪዎች አንዱ ማኦ ነበር እና በርካታ አድናቂዎችም ነበሩት። አሁን በትረመንግስት የጨበጡት (በደርግ ዘመን አማጺያን የነበሩት ጭምር) የማኦ አድናቂዎች እንዲሁም ተከታዮች ነበሩ። ከሶቭየት ሕብረት መንኮታኮት በኋላ ደግሞ የቻይናው ኮሚኒስት ፖርቲ አድናቂ እና ተከታዮች ጥቂቶች አይደሉም። ዛሬ ጎልቶ የሚታየው የፖለቲካ እንዲሁም የኢኮኖሚ አተያይና አስተሳሰብም በአብዛኛው ከቻይና የተቀዳ እና ቻይናን እንደጥሩ ማሣያ የሚወስድ ነው።

በዚህ እና በሌሎች ምክንያቶች ቻይና በኢትዮጵያ ያለከልካይ መናኘት ችላለች። መሪዎቿ ሲመጡ እና ሲሄዱ የመንግስትን ባህሪ ላጤነው ብዙ ማስተዋል ይችላል። ልዩ እንክብካቤ እና አክብሮት (አሰልቺ የዜና ሽፋንም ጭምር) የሚሠጠው ለቻይና መሪዎች ነው። የኢኮኖሚ ተቋሞቻቸውም ልዩ እንክብካቤ ይደረግላቸዋል። በተለይ በኢንቨስትመንት ረገድ እና የመንግስት ኮንትራቶችን በማሸነፍ ረገድ የቻይና ኩባንያዎች ተቀናቃኝ ያላቸውም አይመስልም።[28] የቻይና ኩባንያዎችም በተመሣሣይ (በተለይ መሠረተ ልማት ግንባታ ላይ) የኢትዮጵያ መንግስት የሚኩራራበትን ሥራ በአይነትና በፍጥነት በመስራት ይታወቃሉ። ቻይናም ብድርም ሆነ እርዳታ መለገሡ ላይ የሚታጠፍ እና ለነገ የምትለው ነገር ያለ አይመስልም። በአጠቃላይ የኢትዮጵያና ቻይና ግንኙነት ጠንካራ ብቻ ሣይሆን መተሣሠብ መደናነቅ እና መዋደድ ያለበት ይመስላል፤ ዘላቂ ነው ወይ የሚለው ሊያነጋግር የሚችል ጉዳይ ቢሆንም። በተለይም የብድር መከመር ብዙዎችን እያሳሰበ ሲሆን ወደየት ያደርሠናል የሚለው ጥያቄም እጅግ አሣሣቢ ነው።

የኢትዮጵያ መንግስት ለቻይና እድገት እና የእድገት ዘዬ ልዩ ትኩረት ይሠጣል። ግን ደግሞ በቅጡ ያልገቡት የቻይና ፖሊሲ አቅጣጫዎች እንዳሉም እሙን ነው። ቻይና አብዛኛውን የኢኮኖሚ መስመሯን ለገቢያ ስርዓት ተገዢ አድርጋለች። ህግ እና ስርዓትን በማስከበር ብሎም ሙስናን በመከላከል ረገድ ተወዳዳሪ የላትም። የመሬት ፖሊስዋንም ወደሊዝ ስርዓት (በተለይ ለገበያ እና ለንግድ የሚፈለጉትን) በመቀየር እና ዋስትና በመስጠት ላቅ ያለ ስራ ሠርታለች።[29] በአጠቃላይ አገሪቱን ለንግድ እና

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[26] See generally, CHINA'S LOANS FOR OIL: ASSET OR LIABILITY? (OXFORD INSTITUTE FOR ENERGY STUDIES, 2016). Beijing began viewing overseas investments as a strategic asset as the realisation that China would become more dependent on imported crude than it had previously anticipated began to sink in.

[27] For a short period in the late 1960s the "Little Red Book" containing the thoughts of Chinese Communist Party Chairman Mao Zedong (or as his name was spelled in English at the time "Mao Tse-Tung") was one of the most intensively-studied books in the world. Assembled by party editors from old speeches and writings of Mao, it was intended as a guide for those involved in the Cultural Revolution of 1966-1969.

[28] China-Africa trade was a mere $10 bilion till very recently. However, by 2014, that had risen more than 20-fold to $220 bilion according to the China Africa Research Initiative at Johns Hopkins School of Advanced International Studies in Washington, though it has fallen back because of lower commodity prices. Over that period, China's foreign direct investment stocks have risen from just 2 % of US levels to 55%, with billions of dollars of new investments being made each year. China contributes about one-sixth of all lending to Africa.

[29] Vince Wong, Land Policy Reform in China: Dealing with forced Expropriation and the Dual Land Tenure System, The University of Hong Kong, 1014, 'During the 1980s, to facilitate economic growth while keeping up the appearances of socialist public ownership, land use rights (LURs) were separated from underlying land ownership, as land in China continued to be owned by the State (in the case of urban land) and by rural collectives (in the case of rural land). Through this ingenious conceptual sleight of hand, a land use market was created in urban China upon which rapid economic growth and development could be facilitated. However, while urban residents were

ኢንቨስትመንት ምቹ በማድረግ እና የመንግስት ሠራተኞችን ብቃት በማረጋገጥ ልዩ እምርታ አስመዝግባለች። አሁን አሁን ደግሞ ለህዝቧ ደህንነት (የክፍያ የጤና እና የስራ ቦታ ምቹነት) በማሠብ አካባቢን የሚጉዱ ፋብሪካዎች እና መብት የሚረግጡ አሠሪዎች ላይ እርምጃ መውሰድ እየጀመረች ነው።[30] የቻይና መንግስትም እውነት በሆነ መልኩ ምሁራኑን ጨምሮ የአብዛኛው ማህበረሠብ ድጋፉ አለው።[31]

ረ. የኢትዮጵያ የኢንቨስትመንት ህግ አንደምታ ለቻይና ባለሐብቶች እና ሌሎችም

አሁን ባለንበት ወቅት የኢትዮጵያ መንግስት ልዩ ትኩረት የሚመስለው ኢንቨስትመንትን ወደ አገር ውስጥ መሣብ ነው። ይህ ፖሊሲ በመሰረቱ ሀሳቡ ችግር የለበትም። ግን ስንዴውን ከእንክርዳዱ መለየት ያስፈላጋል። የአገራት ግንኙነትም በመረህ እና በተቋማት ቢመራ መልካም ነው። በተለይ በኢትየጲያ ይህ ሲሆን ግን አይታይም። ከቻይና ጋር እስክ ቅርብ ግዜ ድረስ የሁለትዮሽ ስምምነት እንኳን አልነበረም። የሆነው ሆኖ ኢትዮጲያ ኢንቨስትመንት የመሳብን ጉዳይ አበክራ ስትስራበት ከርማለች። ከባለፈው ዓመት ጀምሮ ደግሞ በልዩ ሁኔት ህጉንም፤ ተቋማትንም መፈተሽ ጀምራለች።

ይህንንም ለማሣካት ልዩ ልዩ አርምጃዎችን ወስዷል። ከነዚህም ውስጥ ከሰላሳ በላይ አገሮች ጋር የሁለትዮሽ የኢንቨስትመንት ስምምነቶች ፈርሟል። የኢንቨስትመንት አዋጅ፤ (አዋጅ ቁጥር 769/2012) አዋጁን ተክተሎ ደንብም አውጥቶታል። የኢንቨስትመንት ኮሚሽን ተቋቁሟል። እንዲሁም ልዩ ልዩ የውትወታ ስራ ተሰርቷል። እነዚህ ሁሉ እርምጃዎች ያስመዘገቡት ድል ግን ከሌሎች አፍሪካ አገራት ጋር ሲነጻጸር የተሻለ ቢሆንም እምብዛም የሚወራለት አይደለም። በተለይ የአገሪቱን የህዝብ ቁጥር፤ ስትራቴጅካዊ አቀመመጥ እና የቆዳ ስፋት ሲያገናዝብ።[32] የኢትዮጵያ መንግስት ከቅርብ ጊዜ በኋላ ደግሞ የኢንዱስትሪ ፖርክ ገንብቶ እባካችሁ ኑ እያለ ነው።

ለውጭ ኢንቨስተሮች በህግ ከተሠጡት ልዩ ልዩ ጥቅማጥቅሞች መካከል ለተወሠነ ግዜ ከግብር ነጻ መሆን፣ቋሚ ንብረቶችን ከቀረጥ ነጻ ማስገባት፣መሬት በሊዝ ማግኘት፤ስራ ከጀመሩ በኋላ ከገቢ ግብር ለተወሰነ ጊዜ ነጻ መሆን፣የመኖሪያ ቤት ለመስራት ቦታ የማግኘት፣ትርፍ እና ሌሎች ገቢዎችን ከአገር በውጭ ምንዛሬ የማውጣት ወዘተ ናቸው።[33] ከዚህ በተጨማሪም በሁለትዮሽ ስምምነት ውስጥ ልዩ ልዩ

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eventually able to sell, lease and collateralize urban LURs, rural peasants have been heavily restricted from doing the same with their rural LURs. Another critical difference between rural and urban land rights is that urban LURs allow for essentially any type of development, while rural LURs can only be held for limited agricultural and household residential purposes.

[30] Three years ago, at the Communist Party's annual congress, Premier Li Keqiang declared war on air pollution in China. At the party congress this past March, he renewed his vow "to make our skies blue again."

[31] See servey by: Wenfang Tang, Michael S. Lewis-Beck, and Nicholas F. Martini: Government for the People in China? 2013. Based on responses from a national random sample of 3,763 Chinese, we found the average person's support for the government in Beijing was about 8.0 on a 10-point scale. Besides, this result is consistent with calculations from other recent surveys. For example, according to the 6th Wave World Values Survey, conducted at the end of 2012 and the beginning of 2013, the average level of support among Chinese respondents was 7.5 on a 0-10 scale. This level of support compares favorably with many democratically elected governments across the world. From these numbers, then, the Chinese government hardly appears on the verge of collapse, as some commentators would have it.

[32] As per African investnmnet report 2106; Africa regional trends፡ Egypt remained the leading destination for FDI into Africa in 2015 with $14.5 bilion of announced investments recorded. South Africa continues to dominate FDI by number of projects, recording 118 projects. Kenya recorded one of the biggest increases in FDI, with project numbers rising 49 percent to 85, totalling $2.4 bilion in investments. The top 10 destination countries for FDI into Africa account for 77 % and 75 % of FDI in the region as a whole, by both number of projects and capital investment respectively. Uganda increased its project numbers by 67% to 20, tying for 10th place with Tanzania. Mozambique and Ethiopia were the only two countries in the top 10 to witness a decline in FDI by number of projects in 2015.

[33] ኢንቨስትመንት አዋጅ ቁጥር 769/2012፣ አንቀፅ 26

ከለላዎች መንግስት ለውጭ ኢንቨስትሮች ሊሠጥ ተስማምቷል/ሰጥቷልም፡፡ ከነዚህ ከለላዎች መካከል፣ግጭት ቢነሣ በገለልተኛ አለም አቀፍ ገላጋይ መዳኘት፣ንብረትን አለመውረስ (የሚወረስ ከሆነ አግባብ ያለው ካሣ መክፈል)፣ልዩነት አለማድረግ (በተለይ ከአገር ውስጥ ባለሀብቶች ጋር በንጽጽር)፣ላንዱ የተሠጠን ልዩ ጥቅም ለሌላውም መስጠት እና በፍትህ እና በርትዕ ላይ የተመሠረተ ግንኙነት መመስረት፡፡[34] እነዚህ እና ሌሎችም ከለላዎች ለውጭ ኢንቨስተሮች ጥበቃ የሚያደርጉ ሲሆኑ የህግ አስገዳጅነትም አላቸው፡፡ አንዳንዶቹን ከለላዎች እና ጥበቃዎች በቅጡ ያለመረዳት ችግርም አለ፡፡ በኢትዮጵያ መንግስት በኩል ነቅቶ መደራደር እንዲሁም ተጠንቀቆ ግዴታዎችን ማክበር አስፈላጊ ነው፡፡ ጥፋት በተገኘ ጊዜ የካሣ መጠኑም ሆነ ሌሎች ኢንቨስተሮችን የማባረር (ከቶውኑ እንዳይመጡም የማድረግ) አቅሙ እጅግ ከፍተኛ ነው፡፡ የቻይና ጉዳይ ግን ይህንን የተለመደ መስመር የሚከተል አይደለም፡፡

በቅርቡ በተከሠተው ህዝባዊ እምቢተኝነት በአዲስ አበባ ዙሪያ ለወደመ ኢንቨስትመንት የኢትዮጵያ መንግስት ከአምስት መቶ ሚልየን ብር በላይ ካሣ ከፍሏል፡፡[35] ይህ የሚሆነው የኢትዮጵያ መንግስት ሙሉ ጥበቃ እና ደህንነት በአገሪቱ ውስጥ ላሉ ኢንቨስትመንቶች ሊሰጥ/ሊያረግ በመስማማቱ ነው፡፡ ይህ ሙሉ ጥበቃ የሚለው አስገዳጅ የህግ ትእዛዝ የአገርን ሠላም እና ደህንነት (በተለይም ዲሞክራሲያዊ ስርዓትን አስፍኖ) ማረጋገጥ ድረስ ሊሄድ/ሊዘረጋ ይችላል፡፡ ጉዳዩ ወታደር አቁሞ መጠበቅ ብቻ አይደለም፡፡ ስለዚህ የፖለቲካ የኢኮኖሚ እና የህግ መዘርጋት እና ተገማች መሆን ዋነኛው ቁልፍ ጉዳይ ነው፡፡ ኢንቨስተሮች ልዩ ልዩ ችሮታ ስለተሠጣቸው ብቻ አይገቡም፡፡ በዋነኛነት ማረጋገጥ የሚፈልጉት አገሪቱ ምን ያህል የተረጋጋች እና ተገማች (predictable) ነች የሚለው ነው፡፡ በተለይ እንደጦርነት አመጽ የህግ መቀያየር የኢኮኖሚ ለውጥ (ለአብነት-ግሽበት እና የመሣሰሉት) ዋነኞቹ አስጊ ጉዳዮች ናቸው፡፡

ታዲያ ጥያቄው ኢትዮጵያ ምን ያህል በዚህ ረገድ የቤት ስራዋን ሠርታለች ነው፡፡ ይህ የቤት ስራ በአግባቡ ከተሠራ ኢትዮጵያ ሁለተኛዋ ቻይና የማትሆንበት ምንም ምክንያት የለም፡፡ ኢትዮጵያ በገፍ ወጣቶች[36] ያላት አገር በተፈጥሮ ሀብትም ጥሩ የምትባል ስትሆን በተለይ ህዝቧ ለሠላም እና ህግ አክባሪነት ያለው ቦታ እጅግ ተመራጭ ያደርጋታል፡፡ ታድያ ሁሌም የሚቸግራት አስማሚ እና አቻቻይ ብሎም በብቃት የሚመራ የመንግስት ሀይል ነው፡፡ በዚህ ረገድ ገና ብዙ እርቀት መሄድ አለብን፤ አሁን የሚታየው የለውጥ መንፈስ የሚያበረታታ ነው፡፡ በትምህርት ደረጃም ጥራቱን በማሻሻል የሞያ እና የተለያዩ ክህሎቶች ያሉት ወጣት ማፍራት ያስፈልጋል፡፡ አብዛኛውን ወጣት ሊሸጥ የሚችል ክህሎት ማስያዝ ያስፈልጋል እና ለጥቂቶች በፈተና ለተመረጡት ደግሞ ጥሩ እውቀት የማሰጨበጡ ነገር እጅግ ሊታሠብበት ይገባል፡፡

በኢንቨስትመንት ህጉ ረገድ ልዩ ትኩረት የሚሻ ጉዳይ አለ፡፡ ህጉ (reservation)[37] በሚል ለውጭ ባለሀብት ለአገር ቤት እና ለመንግስት የሚለየው የኢንቨስትመንት መስክ አለ፡፡ በተለይ ለንግድ እና ኢንቨስትመንት እንደ አክሰጅን የሆነውን (finance and internet) በኢትዮጵያ መንግስት እና በቀላሉ በሚቆጣጠራቸው የአገር ቤት ኩባንያዎች እጅ ነው፡፡ በባንኪንግ በቴሌኮም እና ሀይል በማምረት (በተለይ ስርጭት ላይ) ረገድ የውጪ ባለሀብቶች መሣተፍ አይችሉም፤ የለውጥ ጅማሮ ግን እየታየ ነው፡፡ ይህ ትልቅ እቀባ ሲሆን በተለይ ቴሌኮም (ብሎም ኢንተርኔት) በሞኖፖል መያዙ እጅግ ከልካይ የኢንቨስትመንት ድባብ ነው፡፡ በባንክ መስክ ረገድም እንዲሁ በመንግስት እና በመንግስት መዳፍ ስር

[34] ዝርዝር የሁለትዮሽ ስምምነትን ለማግኘት ይህንን የድረ-ገፅ መስመር ይጎብኙ፡ http://investmentpolicyhub.unctad.org/IIA/CountryBits/67

[35] **Reporter** Biweekly Newsapaper, Amharic Version. (28 March 2018)

[36] 70 ከመቶው የኢትዮጲያ ህዝብ ከ30 ዓመት እድሜ በታች ነው ተብሎ ይገማታል፡፡

[37] አንቀፅ 6፣7፣8፣9፣ ፣ኢንቨስትመንትአዋጅ ቁጥር 769/2012

ባሉ የአገር ቤት ኩባንያዎች መያዙ አገራቱ የአለም አቀፍ የንግድ ስረዓት እንዲሁም ኢንቨስትመንት ውስጥ በሙሉ ልባ እንዳትገባ ገቷታል።

የኢንቨስትመንት ህጉ በልዩ ልዩ ድንግ ኢንቨስትመንት ለመሣብ እየሞከረ በውስጥ ግን ትላልቅ ደንቀራዎችንም ያስቀምጣል። በዚህም ምክንያት በኢትዮጵያ የኢንቨስትመንት ጉዳይ ገና ብዙ እርቀት የሚቀረው እና ከጉረቤት አገሮች አንጻር እንኳ ኋላቀር ነው። ይህም ሆኖ የቻይና ኢንቨስትመንት ግን እየጨመረ በመሄድ ላይ ነው። ለዚህም ይመስላል፤ በቢዝነስ ስነ-ምግባር ያልታነጹ ባለሀብቶች የተበራከቱት፤ ሌብነት እና ንቅዘት የተበራከተው።

በኢትዮጵያ የኢንቨስትመንት ህግጋቶች ከኢንቨስትመንት አዋጅ ጀምሮ ደንብ፣የሁለትዮሽ ስምምነት፣የንግድ ህግ የመሣሠሉትን ያካትታል። ግን ደግሞ ተቀዳሚው ህግ የኢንቨስትመንት አዋጅ እና እሱን ለማስፈፀም የወጣዉ ደንብ ነው። የዚህ ህግ ተቀዳሚ አላማ (ከመግቢያው እንደሚነበበው) የውጭ ካፒታል በማስገባት፤ቴክኖሎጅን በማምጣት እና ስራ በመፈጠር የአገር ሀብትን ተጠቅሞ እድገት ማስመዝገብ ነው። ከዓላማው አንጻር ብዙ ቀረ እሚባል ጉዳይ ያለ አይመስልም። ይህንን ዓላማ ለማስፈጸም አጅግ ብዙ ማበረታቻዎች (በተለይም ለውጭ ባለሀብቶች) በህጉ ውስጥ ተካተዋል።[38] እነዚህን ማበረታቻዎች እና ጥበቃዎች(በተለይ በሁለትዮሽ ስምምነት ውስጥ የተካተቱትን) በመንተራስ ወይም ተስፋ በማድረግ (እንደመተማመኛም በመውሰድ ጭምር) ኢንቨስተሮች ይመጣሉ ተብሎ ይገመታል/ ሊሆንም ይችላል። ይህም በቂ ሆኖ ስላልተገኘ አገራቱ የኢንዱስትሪ ፖርኮችን ገንብታ እባካችሁ ኑልኝ እያለች ነው። የኢትዮጵያ ተቀዳሚ ተግባራትም የኢንዱስትሪ አብዮት(በተለይም ብዙ ወጣት ቀጣሪ በሆኑ መስኮች ላይ) በማምጣት የኢኮኖሚ ሽግግር (ከግብርና መር ኢኮኖሚ ወደ ኢንዱስትሪ መር) ማድረግ ነው። የሆነው ሆኖ ይህንን ሠናይ ዓላማ ለማከናወን የወጣው ህግ በዝርዝር ይዘቱ ላይ ያካተታቸው ቅድመ-ሁኔታዎች እና ክልከላዎች ኢትዮጵያን ተመራጭ የኢንቨስትመንት አገር (ከሌሎች አቃቢ/ከልካይ ጉዳዮች ጋር ተዳምሮ) እንዳትሆን አድርጓታል። በተጨማሪም የረጋ እና ለትንበያ አመቺ የሆነ የፖለቲካ፤የኢኮኖሚ እንዲሁም የህግ ድባብ በሚታይ መልኩ ማረጋገጥ አልተቻለም። በቅርቡ የተከሠተውን አገራዊ ነውጥ እንደማስረጃ መጥቀስ ይቻላል። እንዲህ ያለው ነውጥ ሊወገድ የሚችለው በእውነተኛ የዲሞክራሲ ሰርዓት እና አሣታፊ ውሳኔ አሠጣጥ ብቻ ነው።

ወደ ዝርዝር የህጉ ይዘት ስንመጣ ከላይ በከፊል እንደተጠቀሰው፤ከላይ ከላይ ሲታይ አበረታች እና ጋባዥ መስሎ ቢታይም በጥንቃቄ ለፈተሸው ባለሞያ አሳሪ እና አቃቢ ይዘት እንዳለው እምብዛም የተሠወረ አይደለም። በተለይም የአዋጁ አንቀጽ 6 ጀምሮ ሲታይ የትኛው የኢንቨስትመንት መስክ ለውጭ ባለሀብቶች የትኛው ደግሞ በመንግስት እና በአገር ቤት ኢንቨስትመንት እንደሚሸፈን ይደነግጋል። በተለይ እጅግ ትርፋማ እና ቀልጣፋ የሚባሉትን የኢንቨስትመንት መስኮች በመንግስት ወይም በመንግስት ጥፍር ስር ላሉ የአገር ቤት ኢንቨስትመንት ክፍት ያደርጋል።

በተጻራሪ ለውጭ ባለሀብቶች አዳጋች እነደሆ የሚታወቀው መስክ (የአምራች ኢንዱስትሪዉ ዘርፍ) ላይ እንዲያተኩር አስገዳጅ ህግ ይደነግጋል። በኢትዮጵያ መንግስት አተያይ ደግሞ ብዙ ቀጣሪ ለሚባለው አምራች ኢንደስትሪ የገንዘብ አቅም እና ቴክኖሎጂ ላላቸው ቅድሚያ መስጠቱ ተገቢ ነው የሚል ነው። የሆነው ሆኖ የመስክ አከፋፈሉ/ድልደላው የቅን ልቦና መንደልን (የቁጥጥር አባዜን) ስለሚያሣይ በዉጭ ኢንቨስተሮች ዘንድ በመልካም ጎኑ የሚታይ አይመስልም። ሊታይም አይችልም። በተለይ የባንክ እና የኮሚኒኬሽን መስኮች እጅግ ተፈላጊ የኢንቨስትመንት መስኮች ናቸው። እነዚህ መስኮች ደግሞ ኢትዮጵያን ከሌላው አለም ጋር የማስተሣሠር እና የማቆራኘት ልዩ አቅም አላቸውም። የውጭ ምንዛሬ እጥረትንም በቀላሉ ሊያቃልሉ የሚችሉ የኢንቨስትመንት መስኮች ናቸው። በተጨማሪም ህጉ አነስተኛ

[38]አንቀፅ 23፣24፣25፣26፣ኢንቨስትመንትአዋጅቁጥር 769/2012።እንዲሁም ኢንቨስትመንት ደንቡን ድነጋጌዎች ማጤን ይጠቅማል።

የካፒታል መጠን (minmum capital) በቅድሚያ እንዲቀመጥ ያዛል። ይህ ቅድመ ሁኔታ አሣሪ እና ባለሀብት ወደ አገር ቤት መቶ አስፈላጊውን ፍተሻ ማድረግን የሚያግድ ነው።

እነዚህ አሣሪ ህጉች ከንግድ ምዝገባ ህጎች እና የተቋማት ዝርክርክ አሠራር ጋር ሲደማመር ኢትዮጵያ ተቀዳሚ ተመራጭ መሆን ቀርቶ ተወዳዳሪ ተመራጭ ለመሆን እንኳን ብዙ የቤት ስራ እንደሚቀራት አመልካች ነው። የሆነው ሆኖ ከዶ/ር አብይ አህመድ ወደ ስልጣን መምጣት በኋላ እነዚህ ሳንካዎች ለውጥ እነደሚያስፈልጋቸው ስምምነት ላይ ተደረሷል። በተለይ ግዙፍ የመንግስት ኢንተርፕራይዞች (በህጉ ልዩ ጥበቃ ሲደረግላቸው የነበረ) ለውድድር ክፍት እየሆኑ ነው። በኮሚንኬሽን ግልጋሎት ረገድ ተግባረዊ እረምጃም እየተወሰደ ነው። ህጉና የኢንቨስትመንት ኮሚሽንኑም ማሻሻያ እየተደረገባቸው ነው።

ሰ. የቢሆን ሀሳብ እና ተመራጭ መስመሮች

ኢትዮጵያ ኢንቨስትመንት ለመሣብ እንዲሁም አሁን የጀመረችው የኢንዱስሪ ፖርክ ግንባታ ፊር እንዲይዝ ውጤት እንዲኖረው እና የምንመኘውን የኢንዱስትሪ አብዮት እንዲለኩሠው የሚከተሉትን የቤት ሥራ በአግባቡ እና ደረጃ በደረጃ መስራት ተገቢ ነው።

አንደኛ ህጉቹን ከሌሎች አፍሪካ አገራት ጋር (ቢያንስ ቢያንስ) ተስማሚ ተወዳደሪ እና ቢቻል ተመራጭ ማድረግ። በተለይ ክልከላዎች እና እቀባዎችን በአግባቡ እና በባለሞያዎች በማስፈተሽ እርማት ማድረግ።

ሁለተኛ ተቋማትን /ቢቻል ሙሉውን ሲቨል ሰርቢስ/ በተለይም ሞያ እና እውቀት እሚጠይቅን ቦታ ለባለሞያው እና ለባለእውቀት መስጠት። እንዲሁም የኢንቨስትመንት የንግድ እና ተያያዥ የፍትህ ተቋማትን ጠንካራ እና ተአማኒ ማድረግ።

ሶስተኛ አግባብ ያላቸው ተቋማትን (በተለይ በንግድ፤ የገንዘብ ነክ፤ ኢንቨስትመንት፤ ፍትህና የገቢያ ስረዓት ወዘተ) ማደራጀት የተደራጁትን በአሰሪ ህግ እና በብቃት (ብቃቱን በፈተና ባረጋገጠ ባለሞያ) ማስያዝ፤ በተቻለ መጠን ባለጉልበት አዛገሮችን ከመስመር ማስወገድ እና እውቀት እንዲቀድም ማድረግ፣

አራተኛ የዲሞክራሲ እና የመልካም አስተዳደር ጉዳይ ለኢንቨስትመንት ብሎም ለዘላቂ የአገር እድገት ወሳኝ መሆኑን ተቀብሎ ለተግባራዊነቱ ከልብ መንቀሣቀስ። በዚህ ረገድ አስተማማኝ ውጤት ማምጣት/ማሳየት አገሪቱ እንድትታመን ያስችላል። ባለሀብቶች ይመጡ ዘንድ ዋስትና መስጠት ግድ ይላል። ዋስትና አደጋ ሲደርስ ካሣ መስጠት ብቻ ሳይሆን አደጋው እንደማይደርስ መተማመኛ መሰጠትን ይጨምራል። ይህ ደግሞ የሚሆነው በረጋ ዴሞክራሲ (በተለይ ጠንካራ ጠቋማት የሚመሩት) ውስጥ ነው።[39]

አምስተኛ የኢኮኖሚውን ስርዓት የረጋ እና ተገማች ማድረግ የማይታለፍ የቤት ስራ ነው። ይህንን ተከትሎ የሚወጡ ህጎችን የተመከረባቸው እና የታሰበባቸው በማድረገ በፍጥነት መቀያየርን ማስወገድ የግድ ይላል። ህጉም ተገማች መሆን መቻል አለበት። ኢኮኖሚውም ቢሆን መረጋጋት እና ተገማች ቢሆን እጅግ ይመረጣል፤ ማድረግም ይቻላል።

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[39]ዲሞክራሲ ጠቃሚ የሚሆነው በአንድ ግልፅና አጭር ምክንያት ነው። ይህም ዲሞክራሲ የብዙሀንን ተሳትፎ ስለሚያረጋግጥ እኛ እና እነሱ የሚለውን የመጠፋፋት መስመር ያጠፋዋል/ያደበዝዘዋል።የኢኮኖሚ ተጠቃሚነትም በየደረጃው በተጠያቂ መንግስት ስርዓት ውስጥ ስለሚረጋገጥ ኢንቨስትመንቶች በማህበረሠቡ ይጠበቃሉ። የእኔ ስለሚላቸው አመፅ እና ግርግር እነኳ ቢኖር ኢንቨስትመንቶችን ኢላማ የማድረጉ እድል ዝቅተኛ ነው የሚሆነው። በዲሞክራሲ ስርዓት አመፅ እና ግርግርም ብዙ አይዘወተርም። በምርጫ መውጣት እና መውረድ የህግ እና የፖለቲካ ስርዓት ስለሚሆን።

ስድስተኛ፤ ከልዩ ልዩ አገራት ጋር በተለይም ግዙፍ ኢንቨስትመንት በአገራችን ካላቸው አገራት ጋር (ቻይናን በተለይ) ያለን ግንኙነት በመርህ እና በጠንካራ ተቋማት እንዲገዛ ቢደረግ መልካም ይሆናል። አሁን ያለው የቻይና ሁኔታ ለድርድም እንዲሁም ለህግ እና ስርዓት ምቹ በመሆኑ (በኢትዮጵያም የለውጥ መንፈስ በመኖሩ ጭምር) ይህንን ልዩ አጋጣሚ መጠቀም ያስፈላጋል። ቻይና ለሰብአዊ መብቶች እና ለአከባቢ ጥበቃ ትኩረት መስጠት ጀምራለች። ሌሎች እርምጃዎችንም እየወሰደች ነው፤ ለአብነት ያህል፣ በአንዳንድ መስኮች የማምረቻ ፋብሪካዎችን ወደ ሌሌች አገራት ማስወጣት፤ ማዘመን እና መስፈርቶችን ማጥበቅ የደሞዝ ጭማሪ እና የአከባቢ ጥበቃ ህጎች መጠበቅ፤ ኢንቨስተሮች ወደ አፍሪካ እና ሌሎች የእስያ አገራት እንዲያተኩሩ እያረገች ነው። ታዲያ ጠንቀቅ ማለቱ አይከፋም፤ የቻይና የራሷን ስህተት ላለመድገም።

በመሆኑም ኢትዮጲያ ልትዘጋጅ ይገባል። ዓለምን መቃኘት እና መገናዘብ ያስፈላጋል። የሚመጣውን ሁል እንኳን ደህና መጣህ ሳይሆን ከውስጥ ሁኔታ እና የወደፊታ ውጤት ጋር መመዘን ያስፈለጋል። መርህዎች እና ተቋማት መፈትሽ አለባቸው። ያራሷን የውስጥ የቤት ስራም መስራት የግድ ይላል። የህግ፣ የፖለቲከ፣ እና የኢኮኖሚ ተገማችነት /predictability/ ለአንድ አገር እጅግ አስፈላጊው የኢንቨስትመንት መስብ ነው። በተጨማሪ አገሪቱ ያላት የተፈጥሮ ሀብት፤በሞያ የተካነ ስራ ፈላጊ ወጣት እና በልዩ ሁኔታ የምትሠጣቸው ማበረታቻዎች አስፈላጊ ሊሆኑ ይችላሉ። ስለዚህም ኢትዮጵያ ዋናውን የቤት ስራዋን በመዘንጋት ማበረታቻን ማንጋጋት የትም አያደርሳትም። በቅርብ ከተከሠተው ህዝባዊ አመጽ እጅግ ትልቅ ትምህርት ሊቀሰም ይገባል። ለውጡ ይህንን መንፈስ መያዝ አለበት።

ሸ. መቋጫ ሀሳብ

የቻይና በአፍሪካ ብሎም በኢትዮጵያ የኢኮኖሚ ዋና ተዋናይ መሆና እሙን እውነታ እየሆነ መጧል። አፍሪካ እንደ አህጉር የተለያዩ ስምምነቶች እና መግለጫዎች በቻይና ግንኙነት ረገድ እየሠጠችም እንዲሁም እያረገች ትገኛለች። የአፍሪካ ህብረት ከቻይና ጋር የሞቀ ግንኙነት አለው፤ኢትዮጵያም እንዲሁ። ታዲያ ይህ ግንኙነት በጠንካራ ህግ እና ተቋም የሚሞረድና የሚጎለብት አይደለም። ነገሩ የፖለቲካ ሙቀት እስከፈጠር ድረስ ይበል ይበል እየተባለ አሁን ይኸው ቻይና በአፍሪካና በኢትዮጵያ ዋና የኢኮኖሚ (ንግድ፣መሠረተ-ልማት፣ግንባታ እና ኢንቨስትመንት) ተዋናይ ሆናለች። በፖለቲካውም ረገድ እንደ ጥሩ ማሣያ ነች።

የሆነው ሆኖ አፍሪካ በህብረቱ ደረጃም ሆነ ኢትዮጵያ ይህንን የኢኮኖሚ ግዙፍ ግንኙነት በህግ እና በተቋም የመግዛት የማጥናት እና የመከታተል ሥራ በበቂ ሁኔታ እየሠሩ አይደለም። በተወሰነ መስክ ደግሞ ጭራሽ መፈናፈንም የለም። ውሎ አድሮ ግንኙነቱ የሠጪ እና የተቀባይ (እንደ ከምዕራብ አገራት ጋር ያለ ግንኙነት) እንዳይሆን ያሰጋል። አዝማሚያው የሚታየውም እውነታ አፍሪካ የጥሬ እቃ አቀባይ ቻይና ያለቀለት ምርት አቅራቢ እየሆነ ነው። ተመልሶ ከታሪክ እና ከውድቀት የመማር ችግር አዙሪት ውስጥ እየገባን ነው። በተለይ ዩንቨርስቲዎች እና የጥናት ተቋማት ጉዳዩን በአጽንኦት ቢገመገሙት እጅግ ተመራጭ ነው።

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Article 5

Scope of the Journal

The *Haramaya Law Review* (HLR) publishes original scholarly works on any topic relevant to the legal community, including analysis of domestic or international laws and cases, the African Union and other international organizations, challenges and lessons from domestic practice, and original field research.

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Article 18

Ethical Declaration by Manuscript Author(s)

1. All contributions in the Journal shall be original works of the author(s).
2. Author(s) are required to sign and submit a declaration to the effect that the contribution is not duplication or excerpt of previously published work (See ANNEX III: AUTHOR DECLARATION FORM).
3. The author(s) declare that the manuscript:
    a. Is submitted solely to HLR or that it is not under consideration for publication elsewhere;
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    c. Has been carefully read and explicitly approved by all authors;
    d. Does not contain any defamatory, abusive and deceitful elements; and
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4. In the event of breach of ethical declaration, all the authors' rights shall be revoked and they shall be barred from participating in future Journal affairs.
5. **Plagiarism and Similarity**
   The HLR uses the latest software to detect instances of overlapping and similar text in submitted manuscripts. Any instance of content overlap is further scrutinized for suspected plagiarism according to the Journal's Editorial Policies. The Journal allows an overall similarity of 15% for a manuscript to be considered for publication.

Article 19

Types of Manuscripts

1. **Feature Articles:** Article is original research work that focuses on specific thematic legal issues.
   a) In the research, a critical analysis of the legal issues and the relevant principles/doctrines are often made to criticize, illuminate or justify the application of legal rules, precedents, principles, etc.
   b) The research article, whether qualitative/doctrinal or quantitative/empirical, must be original and of high quality for publication.
   c) The article can range between 15 - 30 pages in length or 8,000 to 15,000 words.
   d) Full length article could include case comments based on decisions (including arbitral awards) of significant impact or importance with critical analysis of its rulings and theoretical foundations.
2. **Case Reviews:** In a case review, the formulation or application of legal rules or precedents can be elucidated to show the significance or implication of the decisions or the underlying principles. The length of a case review may range between 5 - 10 pages or 3,000 to 10,000 words.
3. **Notes or Reflections:** A note is a writing that covers a range of topics without a deeper critical analysis of the issues. In most cases, the note makes a brief summary of the relevant literature on the topic or subject matter. The length of a note may be between 5 - 10 pages or 3,000 to 10,000 words.
4. **Book review:** A book review is an original work of scholarship that involves review of the topics/issues covered in a book. In particular, the review may be made in the form of a succinct summary of the important issues under each chapter with a comment or an appraisal of the topics covered in the book. The review may be 5 - 8 pages long or 3,000 to 8,000 words.
5. **Legislation Reviews**: This is a short submission designed to review important part of a legislation to inform audiences about the salient features of it – usually new legislation. It is designed to inform audiences about state and federal legislation, how it can affect interests and what one can do about it. Its length usually ranges between 5 - 10 pages or 3,000 to 10,000 words.
6. The Editor-in-Chief may waive the page or word limits of a manuscript by a third if the content and style of the manuscript is exceptional and justifies it.

Article 20

Formats of Manuscripts

1. HLR accepts submissions ONLY in soft copies through its designated email address preferably in doc format (MS Word).
2. Manuscripts shall be written in Times New Roman style (Power Ge'ez Unicode for Amharic texts), 1.5 space, 12 Font size, 1" margins on both right and left sides, and with 0.5" header and footer, and Footnotes in single space, and 10 Font size.
3. Manuscript shall include, at least, Title, Author(s) Name with detailed profile, affiliation and full address for correspondence, Abstract (250 words), Keywords (five to seven), Introduction (including methodology section), body (further sub divided into sections), and Conclusion (Recommendations).
    a. **Title**: Must be less than a sentence that adequately reflects the subject and scope of the work.
    b. **Author(s)**: Full name(s) of authors, affiliation (institution names), full address for correspondence (especially email) and acknowledgements shall appear as footnote marked by an asterisk.
    c. **Abstract:** It should briefly introduce the subject, precisely summarize the aim, findings and purpose of the manuscript including notes and reviews. As a summary of the entire paper, not just the conclusions. An abstract must be able to stand alone, separate from the rest of the paper. The use of abbreviations must be minimized and citation of references must be avoided in the abstract.
    d. **Keywords** - Five to seven keywords representing the main content of the article appearing in alphabetical order following the abstract.
4. **Internal organization**: Headings and sub-headings (including the Introduction and Conclusion) should be clearly indicated and should be numbered. All **Headings** must be written in the same style and bolded. This shall appear in the following way:

I. THIS IS HEADING 1

A. This Is Heading 2

1. This is Heading 3

5. **Quotations:** In general, three consecutive words or more copied from a source should be treated as a direct quotation (given quotation marks and a citation).
    a. Quotations of less than 50 words should be presented in the text with double quotation marks.

b. Quotations longer than 50 words should be presented as independent, fully-indented paragraphs without quotation marks.

c. Quotations from foreign languages should normally appear in English translation.

6. **Spelling and Language:** American English spellings and expressions must be used endings such as "ize/ization." than "ise/isation".

7. **Citation (Footnotes)** – All factual assertions, direct quotations, statutes, and case references must be cited using footnotes (See ANNEX I: SAMPLE CITATION)

a. All citations should be in the style of *The Bluebook: A Uniform System of Citation*. For more information see sample citation annexed to this guideline (ANNEX I: SAMPLE CITATION) or a recommended guide to legal citation by Peter W. Martin's '*Introduction to Basic Legal Citation* (online ed. 2016) available at http://www.law.cornell.edu/citation.

b. In case of doubt as to how to cite a particular source, always provide enough information to allow an editor to easily locate the document.

c. '*Id'*, '*supra* note' and 'hereinafter' must be used for cross-references.

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Article 22

Submission

1. All manuscripts shall be submitted to the designated address before the lapse of time indicated on the call for submission.
2. All manuscripts submitted after the date indicated in the call may be considered for the next issue.
3. The Editorial Manger shall acknowledge the receipt of the contribution up on receipt of the same.
4. Manuscripts shall be free from any self-identifying information about the author except in the author information part.
5. Contributions shall be free from grammatical and spelling errors.

.....

Article 25

Acceptance and Rejection of manuscript for publication

1. Authors of manuscripts shall be notified of the decision made by the Editorial Committee without any delay.
2. Conditional acceptance will be communicated to authors when the Editorial Committee is satisfied with the reviewers comment and believe that the author can incorporate the comments provided.

3. Based on the evaluation of the external reviewers, if the Editorial Committee feels that the work is far below the required standard, the work will be rejected and the decision will be communicated to the author(s) with the reasons for the rejection.
4. The Editorial Manager shall communicate the author(s) of manuscripts accepted for publication to do the final proof reading before publication.
5. Depending on the responses from authors, HLR aspires to complete the processing of a manuscript (from submission to publication) within three months.

Article 26

Re-publication and Reproduction

1. Authors who wish to republish their manuscripts that have been published elsewhere shall ensure that they have appropriate permission(s), indicate clearly that the material has been published, and clearly state the original source of the material.
2. The Journal may consider for re-publication of manuscripts which were previously published only as abstracts or extended abstracts, as thesis or part of thesis, proceedings (published in a different form and process than that of the Journal), reports by institutions (in a different form than that of the Journal), or translation from a different language etc.
3. Published material shall not be considered for publication unless written permission is obtained by HLR from the copyright holder.
4. HLR may request copies of related publications if it is concerned about overlap and possible redundancy.
5. Manuscripts published in HLR may be reproduced (except for non-commercial uses) or republished elsewhere with prior written permission from the Journal and acknowledging its original publication (See also Art. 30: Copyright of this guidelines).

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Article 29

Opinions expressed in the Journal

Opinions expressed in the Journal, except the message from the Editorial Committee and College, reflect only the views of the respective authors and not that of the Journal or the Editorial Committee or the University or the College.

Article 30

Copyright

1. The Journal/College of Law/Haramaya University shall have copyright over the contributions published in the Journal. However, authors may republish their works with prior permission from the College. Details shall be regulated by the applicable laws of the country.

2. The Journal is protected by **Attribution-Non Commercial-No Derives [CC BY-NC-ND]** license.

Article 31

Complaints and Appeal Process

Anyone who is dissatisfied with any decisions of the Editorial Committee may appeal to College AC within 15 days from the date when the decision was communicated to him/her.

Article 32

Publication and Dissemination Policy

1. Haramaya Law Review is published both online and in print. The online publication is made through:
   a. Haramaya University website: http://www.haramaya.edu.et/academics/college-of-law/
   b. African Journals Online (AJOL): http://www.ajol.info/index.php/hlr/
   c. Hein Online: http://heinonline.org/HOL/Index?index=journals/haramlr&collection=jour/
   d. Cite factor: http://www.citefactor.org/
2. Editorial Committee shall continue its effort to get the Journal indexed by different institutions and platforms, and make it available in different digital data bases.
3. The Editorial Committee shall determine relevant legal and academic institutions, individuals and libraries for distributing the printed copies. In addition, the printed copies shall be available at Haramaya University Book Center, and other book shops for sale.
4. Authors and reviewers may get a complimentary copy of the Journal that their work features.

Article 33

Publication Fee

1. HLR does not charge any one for manuscript submission nor for processing.
2. Haramaya University, from its own fund or sponsors, covers all Journal processing and printing costs.

Article 34

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ANNEX I: SAMPLE CITATIONS FOR HARAMAYA LAW REVIEW

GENERAL

All contributions to the Haramaya Law Review should follow this rules of citation. All citations should be in the style of **'The Bluebook: A Uniform System of Citation'**. If you've doubts as to how to cite a particular source, provide enough information to allow an editor to easily locate the document.

1. Books

- Full Author Name, Title of the Book, Publisher, (edition number – if any, Year of Publication)
- European/foreign names should appear in their natural order (family names followed by given names) and Ethiopian names in their natural order too beginning with given name.
- Works by two authors are cited using both names separated by "&".
- If the book has more than two author or editor, the names of all should be provided.
- If the book contains contributions by several authors, the name of the editor(s) should appear in place of an author and the fact that she/he is the editor should be indicated in parentheses.
- If the book has more than one volumes, it should be given in Arabic numerals in the manner illustrated below.

Examples

DEBORAH L. RHODE, JUSTICE AND GENDER 56-59 (1989).

CHARLES DICKENS, BLEAK HOUSE 49-55 (Norman Page ed., Penguin Books 1971) (1853).

WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 5.4 (2d ed. 1986).

BAHRU ZEWDE & DIEGFRIED PAUSEWANG (EDS), ETHIOPIA: THE CHALLENGE OF DEMOCRACY FROM BELOW (United Printers, Addis Ababa, Ethiopia) (2006), at 17-18.

ABERRA JEMBERRE, LEGAL HISTORY OF ETHIOPIA – 1434 – 1974: SOME ASPECTS OF SUBSTANTIVE AND PROCEDURAL LAWS (Rotterdam: Erasmus Universiteit and Leiden: Afrika-Srudiecentrum) (1998).

PHILIP KYLE, PEOPLE AND PLACES, (Dante Press, Vol. 5, 2003).

Works in a Collection or Book Chapter:

- Book chapter or work in collection should indicate name of the author(s) and title of the chapter followed by the word '*in'* Vol # (if any), title of the book, page at with the chapter begins and referred pages, if any. Editors, translators, publisher and date appears at the end in parenthesis form.

John Adams, Argument and Report, *in* 2 LEGAL PAPERS OF JOHN ADAMS 285, 322-35 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

Institutional Authors

ENVIRONMENTAL PROTECTION AUTHORITY, ENVIRONMENTAL POLICY OF ETHIOPIA (1997).

2. Law Review Articles

- Should include author(s) full name, Title of the article, Volume (Issue) number, JOURNAL TITLE, page on which article begins, year of publication, specific page(s) cited
- If the article is co-authored by more than two authors, all co-authors should be listed.

Examples

Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 737-38 (1964).

Justice Richard J. Goldstone, *Women, Children, and Victims of Massive Crimes: Legal Developments in Africa,* 31 FORDHAM INT'L L.J. 285 (2007).

Fekadu Petros, *Underlying Distinctions between Alternative Dispute Resolutions (ADR), Shimglina and Arbitration*, 3(1) MIZAN LAW REVIEW 105-133 (2009).

Mulugeta Getu, *The Ethiopian Environmental Regime Versus International Standards: Policy, Legal, and Institutional Frameworks,* 1(1) HARAMAYA LAW REVIEW 43, (2012).

3. Magazines or Newspapers:

- Should contain Name of the author(s), Title of the Article or piece referred, Name of the Newspaper (Magazine), Date when the newspaper (magazine) was published, Page where the specific reference could be found.

Examples

Robert J. Samuelson, *A Slow Fix for the Banks*, NEWSWEEK, Feb. 18, 1991, at 55.

Damages for a Deadly Cloud: The Bhopal Tragedy, TIME, Feb. 27, 1989, at 53.

Habtamu Bazeze, *The Necessary Evils*, THE REPORTER, Dec. 28, 2014, at 10.

4. Treaties

- Include name of the document, date of signing and document number

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

African Charter on Human and Peoples' Rights, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982) (hereinafter African Charter), Art. 27(2).

5. Cases and Decisions:

- This at least should contain Case name (in most cases this would be the name of the parties to the case), Country and Court Name, Case number or file number, Date of the

decision (in parenthesis), Name of the case report or journal, Page where specific reference might be found.

Examples

W/t Tsedale Demissie Vs Ato Kifle Demisse, Federal Supreme Court, Cassation Bench, File No. 23632 (6 Nov 2007) Vol. 5, at 188.

Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres, Fed. First Instance Ct., Lideta Div., File No. 54024 (Decision of 3 June 2005) (26 *Ginbot* 1997 E.C.)

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

Kampanis v. Greece, 318 Eur. Ct. H. R. 29, 35 (1995).

6. Ethiopian Laws:

- Should include name of the legislation, legislation number, gazette name, number and year of publication.

Examples

CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 9(1) [when it appears for the first time], and then FDRE Constitution, Art. 40(3) subsequently.

The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings, Proclamation No. 3/1991, FED. NEGARIT GAZETA 50th Year No. 4, Addis Ababa, 12 August 1991.

CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No 165/1960, NEGARIT GAZETA, 19th Year No. 2, 5th May 1960, Addis Ababa [here after CIVIL CODE].

Electoral Law of Ethiopia (as Amended) Proclamation No. 532/2007, FED. NEGARIT GAZETA, 13th Year No. 54, 2007.

7. Online Publications and Internet Sources:

- It should at least indicate Author(s) Name, Title of the Manuscript, url address and last date it was retrieved.

Example

Heidi Goldberg, Center on Budget & Policy Priorities, State Supported Health Care 15 (2007), *available at* http://www.cbpp.org/11-8-01wel.pdf/ (Accessed on 23rd of January, 2013)

8. Unpublished Reports and Manuscripts

- References to unpublished manuscript of any type shall contain Author's name, Title of the manuscript, Date when the work was completed, The word "unpublished" (in parenthesis), Place of the work may be found (in parenthesis), Page referred to

Example

Tarekegn Tafesse, Effects of Traditional Family Arbitration and Legal Divorce on Divorcees and Their Children: The Case of Boloso Sore Wereda, Wolaita Zone, Southern Ethiopia, (Unpublished, MA Thesis in Social Works, Addis Ababa University, June 2015).

9. Interviews

- Reference to materials obtained in an interview should contain the phrase "interview with", Full name of the person interviewed, Position of the person interviewed, Date of the interview.

Example

(Telephone) Interview with Ato Regassa Dedefo, Director of Foreign Trade Alignment, Ministry of Trade, on 20th of July 2014.

10. Short citations:

- Use '*id.*' when referring to the immediately preceding citation/authority. Note also that "*id.*" is always *italicized* and followed by a period.
- Use '*supra'* when an authority has been fully cited previously but not the immediate preceding one. Note that '*supra'* is also italicized.
- Use 'hereinafter' for authorities/citations that would be cumbersome to cite with '*supra'* or *'id.'*, or shortened form may be established.
- Use 'et al' when referring to the previously cited material with more than two authors.

Examples:

(same as immediately previous citation) → *Id.*

(same as immediately previous source, but different page) → *Id.* at 53.

(same as citation earlier in article) → (Author's given/last name), *supra* note 12 [the footnote # where the authority appeared for the first time]; e.g. Tarekegn, *supra* note 13.

(same as citation earlier in article, but different page) → (Author's given/last name), *supra* note 12, at 23-26; e.g. Reich et al, *supra* note 54, at 78.

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ANNEX III: AUTHOR DECLARATION FORM

AUTHOR DECLARATION FORM

I, _____, the author (co-author) of the paper entitled _____ _____ submit my (our) manuscript to be published at Haramaya Law Review (HLR) and

(1) Confirm that I have read, understood and agreed to the submission guidelines, policies and submission declaration of the Journal, and transfer the copyright of the manuscript to HLR;

(2) Declare that it is my (our) original work, free from data manipulation and isn't plagiarized;

(3) Declare that it has neither been published (even its excerpts) anywhere else electronically or in print nor has been submitted elsewhere for publication in a Journal, book chapter or any similar form;

(4) Guarantee that the authorship of this article will not be contested by anyone whose names are not listed by me as co-authors;

(5) Declare that the manuscript contains no defamatory, abusive, deceitful elements or other unlawful statement, and does not contain any personal or property rights of any other person or institution;

(6) Shall bear full responsibility for the submission on behalf of all co-authors; and

(7) Agree not to withdraw the manuscript without prior consent of the Journal.

We also agree to the authorship of the paper in the following sequence:

Authors Name in Sequence	Institutional Affiliation	Email	Cell phone	Signature

Sincerely,

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