Federalism as an Instrument for Unity and the Protection of Minorities:
A Comparative Overview: Ethiopia, India and the US

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Abstract

Accommodation of differences is used by federal systems to hold their units together. Lack of accommodation of diversity could lead to conflicts and pose danger for a union, particularly, in multicultural federal systems like Ethiopia. This article explores the protection of diverse groups and preservation of a union in federal systems. It involves a comparative overview of three jurisdictions: Ethiopia, India and the US. Although comprehensive discussion on the relevant principles of federalism across these federal systems cannot be done in a single article, an investigation into the three jurisdictions gives insight as these jurisdictions demonstrate substantially different federal features while they share some of the hallmarks of federalism. The US represents a territorial federal system. Indian federation is multicultural with unique centripetal tendencies and this would make it a quasi-federal system. The Ethiopian federal system, on the other hand, appears to empower ethnic groups by making them its building blocks. This article examines the accommodation of diversity and protection of minorities in such differently designed federal systems and aims at drawing relevant lessons.

Key terms

Federalism, unity, representation of minorities, ethnic federalism

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Introduction

Unity, regional autonomy, protection of minorities, conflict management and establishment of a civilized and democratic community are among the most important issues in many countries. Federalism is a form of government structure which can address such concerns. While a unitary form of government may erode regional autonomy, confederations may encounter problems in building a lasting union.

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Various comparative studies on different aspects of federalism have mostly focused on territorial federal systems. This is, partly, because most of the developed federal systems, which are considered as models, are territorial. Thomas Hueglin and Alan Fenna have, for example, contributed a comparative work on federalism from the perspective of democratic governance involving, primarily, territorial federal systems including the US, Canada, Germany, Australia and Switzerland.[1] Michael Burgess uses such federal systems to make a distinction between federalism and other forms of governance.[2]

In his comprehensive work on comparative federalism, 'Comparing Federal Systems', Ronald Watts compares 25 federal systems.[3] His work involves territorial and non-territorial federal systems. However, this work gives emphasis to territorial federal systems, and does not provide detailed analysis on non-territorial federal systems like Ethiopia. We cannot expect such details as his work involves almost all federations.

Assefa Fiseha compares differently designed –territorial and non-territorial– federal systems from the perspective of accommodation of 'ethno-linguistic groups' and division of legislative, executive and judicial powers.[4] The Forum of Federations, an international organization based in Canada, has also initiated comparative studies on federalism involving both territorial and non-territorial federal systems. Most of these studies emphasize on fiscal federalism, policy making in federations, conflict management and decentralization of power.

This article builds on these works with a particular focus on the preservation of unity and the protection of minorities by comparing differently designed federal systems and incorporating new developments particularly in Ethiopia. The focus of the article is on the role of federalism in preserving unity and protecting the interests of minorities. These federations are designed differently and their federal features can be used as inputs to draw lessons for federal systems. The brief investigation into the ethnic based federal system in Ethiopia, the formally centralized quasi-federal system in India and the territorial federal system in the US is meant to give an overview on the role of different forms of federalism in preserving unity and accommodating diverse interests.

The first two sections of the article present theoretical aspects of federalism, unity, diversity and the protection of minorities. The third section explores representativeness of shared federal institutions. The fourth section highlights

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[1] Thomas Hueglin and Alan Fenna (2006), *Comparative Federalism: A Systematic Inquiry*, University of Toronto Press, p. 1.

[2] Michael Burgess (2006), *Comparative Federalism: Theory and Practice*, Routledge, pp. 82-99.

[3] Ronald Watts (2008), *Comparing Federal Systems*, Queens University Press, p. 1.

[4] Assefa Fiseha (2006), *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Wolf Legal, pp. 2-14.

the main factors which may lead to disintegration of a federal system. Section 5 explores constitutional adjudication and the protection of the rights of minorities and preservation of unity.

1. Federalism as the Synthesis of Unity and Diversity

1.1 Federalism

As federalism[5] is basically a political arrangement, each federal system has its own unique nature which is shaped by long historical, political, social and economic factors. Malcolm M. Feeley states that "a political entity that is governed by a single central government making all significant decisions cannot be described as federal entity without abandoning the ordinary meaning of the term."[6] He added that "the same is true for a group of separate political entities that have entered into an alliance that precludes conflict among them but leaves all other decisions under the control of the separate political entities." [7]

If all basic decisions are made by the central political entity, the existence of constituent units does not make the system federal; rather it is simply a decentralized form of government. Under such settings, the units are subjects of the central political entity. This would mean that their power, if any, is given and can be taken away by the central government at any time as they are formed by and subjects of the central entity.[8]

A federal system is also different from other forms of association like confederation. Such forms of arrangement give total sovereignty for the units and they subordinate the central political entity to the constituent units. The federal system is somewhere in between. Both the central and constituent units under a federal system have constitutionally guaranteed autonomous power and thus one is not the subject of the other.[9] Both are established by a constitution which is neither under the monopoly of the central nor constituent political entities and both have independent legitimate power which enables them to act on people directly.[10]

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[5] Malcolm M. Feeley and Edward Rubin (2008), *Federalism, political identity and tragic compromise*, the University of Michigan Press, p.7. In this book, Malcolm M. Feeley and Edward Rubin have explained federalism and related concepts like political identity under chapter one. They have also gone through related but different concepts like decentralized forms of government, consociation and democracy which need to be distinguished from federalism.

[6] Ibid.

[7] Ibid.

[8] Ronald Watts (1999), *Comparing Federal Systems,* 2nd ed, Queen's University Press, pp.943-945.

[9] Daniel Elazar (1987), *Exploring Federalism*, University of Alabama Press, 2-7.

[10] Ibid.

1.2 Federalism, unity and diversity

In countries where multi-ethnic, multi-linguistic and multi-cultural societies have survived upon the failure of attempted assimilation processes, territorial federalism and individual liberalism may not function well. On the one hand, an attempt of high scale assimilation in the contemporary world may not be realized without violating fundamental rights. Instead, there may be gradual and voluntary assimilation through economic integration. But this cannot be attained easily as it is indeed a challenge to bring about substantial and inclusive economic changes and integration to the benefit of the general public.

Integration usually takes a long time because individuals in pre-assimilated societies are shaped by their ethnic, linguistic or cultural groups and give value for these elements in their identity. While individual liberalism opts to leave the individual free to choose among values, communalism gives emphasis to ethnic/linguistic/cultural group identities. We can indeed recognize and promote all identities and at the same time respect individual rights.

One may argue that ethnic federalism –the Ethiopian model– is not a feasible way to preserve unity in diversity as this would exaggerate the differences and lead to conflicts. Such views may give preference to other ways through which identity issues can be addressed as will be explained in the subsequent sections. Specifics in any federal system will differ based on previous political, historical, social and economic factors. But, the basic goal in all federal systems is to keep unity while addressing diverse interests.

In the course of striking the balance between the forces of unity and diversity, rendering the center too strong can lead to conflict and threaten unity. The other extreme of unduly strong centrifugal forces may allow the regional sates to leave the federation easily and thus impede unity. Therefore, a wisely framed federation has to provide the right balance between these tensions. The shift from confederation to a federal form of government in the US was, for instance, to avoid problems associated with a weak central political entity.

While some federal systems have constitutional mechanisms to make federal laws and decisions supreme over regional ones, such supremacy is reflected through practice in Ethiopia. If the Ethiopian regional states become strong and conflict arises in blurred areas of power in the future, there is no constitutional provision which can help us determine the decision that has to prevail. Even though the FDRE Constitution prevails over all federal and state laws and decisions (Art 9), the Constitution has not made other federal laws and decisions supreme over the regional ones. Considering the basic goals and principles of federalism, the FDRE Constitution may be interpreted as giving slight supremacy for the federal government.

The Indian federation on the other hand is designed with a strong central government in mind and this is because of high economic and industrial

disparities between regions which lead to continuous conflicts threatening the union.[11] In the US, the supremacy clause under Art VI has proclaimed the supremacy of the federal government if there is conflict between the federal and state laws.[12] Conflict of laws does not refer to cases where one level of government encroaches into the power of the other to make a law. If this happens, the law is void and there is no conflict. The supremacy clause rather comes to play to solve conflict of laws that arise where the two levels of government in a federation are acting within their legitimate power.

2. Federalism and the Protection of Minorities

Art 27 of the ICCPR recognizes three types of minorities: ethnic, linguistic and religious minorities.[13] A federal system is more suitable to accommodate such minorities and to ensure respect for identities. It should, however, be noted that protection of minorities is not only about equal political participation as will be elaborated later. It should also be noted that though we are preserving group identity, the rights of minorities are individual rights granted for those who belong to the minority group.[14] Every person belonging to a minority group has, thus, the right, in community with others, "to enjoy culture, profess religion and use language."[15] Although such rights are recognized as individual rights, a group of individuals belonging to the minority group or the minority group as a whole may be affected similarly and may bring action together through a representative.[16] Protection of minority groups cannot be realized without providing such groups with participatory rights. Thus accommodation of such minority group through participatory rights (in addition to the granting of minority oriented rights) is an important aspect of protection of minorities.[17]

2.1 Who are minorities?

There is no a universally accepted definition of minorities in spite of many attempts by scholars. Although the protection of minorities was one of the

[11] http://www.legalservicesindia.com/articles/c1onst.htm
[12] Art VI, clause 2 of US Constitution.
[13] Art 27 of the ICCPR. This provision provides that in countries where ethnic, linguistic and religious minorities exist, every one belonging to such minority group should not be deprived of his right together with the group to manifest and use their culture, religion and language.
[14] Human Rights Committee, General Comment 23, Art 27, 1994, U.N. HRI/GEN/1/Rev.1, pa. 3.1 p. 1.
[15] Id. pa, 1 p. 1.
[16] Lubicon Lake Band Vs Canada, Communication No. 167/1984, (March 1990), pa.32.1 p. 23.
[17] Robert F. Williams, Josef Marko and Allan Tarr (2004), *Federalism, sub national constitutions, and minority rights*, Westport, CT, p. 42.

agenda of the League of Nations,[18] there was no attempt at that time to define the term 'minority'. The UN Charter does not make reference to minority rights or minorities.[19] The UDHR too emphasizes on the general non-discrimination principle without giving special account for the rights of minorities.

The General Assembly took the view that it was "difficult to adopt a uniform solution" to this intricate problem as the question regarding minorities is different across countries.[20] The International Covenant on Civil and Political Rights (ICCPR) provides protection for minorities without defining who minorities are. It states that "in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion or to use their own language."[21] This is the only provision about minority rights protection under the ICCPR which provides some factors that are helpful in determining minorities i.e. ethnicity, language, and religion. However, it fails to provide a definition and does not therefore, answer the question: which ethnic, linguistic, and religious groups within the states are minorities?

Even though the Human Rights Committee, in its General Comment 23 on Article 27 of the ICCPR, tried to make clarification on the rights of minorities, it does not attempt to approach the question directly. Its clarification was, however, helpful to understand the scope of the notion of minority.[22] The General Comment makes it clear that the ICCPR does not only apply to national minorities but also covers migrant minorities as it does not make distinction between nationals and foreigners.[23] However, the General Comment of the Human Rights Committee is not binding on the international community, and the Framework Convention of Europe employs the term "national minorities".[24] This Framework Convention does not provide any definition regarding minorities.[25]

The definition given by Francesco Capotorti is widely used. This definition does not, however, answer all questions about minorities. His definition reads:

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[18] Steven Wheatley (2005), *Democracy, minorities and international law*, Cambridge University Press, p. 10.
[19] Ibid.
[20] *Supra* note 17.
[21] Art 27 of ICCPR.
[22] Human Rights Committee, General Comment 23, Art 27, 1994, U.N. HRI/GEN/1/Rev.1, pa 5.2 p 2.
[23] Ibid.
[24] The Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995.
[25] Ibid.

> A group numerically smaller to the rest of the population of the state, in a non-dominant position, whose members –being nationals of the state– possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.[26]

If there is one majority group over the rest of the population (50%+1 of the whole), then that group cannot be a minority.[27] However, there may be a situation where there is no any ethnic, linguistic or religious group which is a majority out of the whole population.[28] Even though the above definition is very important in determining minorities, it cannot be free from criticism. The definition is narrow in scope as it employs the phrase 'nationals of state'.[29] International law has extended its scope to protect the rights of individuals irrespective of nationality. According to the above definition, it is difficult for migrants to claim linguistic, cultural and religious rights unless they get nationality. It is up to the states to grant nationality and thus migrants will be systematically left behind if we follow the above definition.[30]

Most federal systems have no clear rights of minorities regime under their constitutions. Under the US Constitution, there is no reference to minorities. There is a modicum of affirmative action (promoting disadvantaged groups) to bring real equality but not to preserve diverse identity. In India some religious groups are recognized as minorities.[31] The case in Ethiopia is relatively complex. Even though Ethiopia has more than 80 ethnic groups, most of which are minorities, the Constitution does not directly address the issue of protection of minorities. It has also used the terminology 'minority nationalities and peoples' instead of 'minorities'.

According to the FDRE Constitution, only the "nations, nationalities and peoples"[32] of Ethiopia may be determined as minorities. Such nations, nationalities and peoples of Ethiopia are those groups of people who satisfy two requirements under the Constitution; those having common culture, language or religion and constituting identifiable territory under Art. 39 of the FDRE

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[26] Francesco Capotorti (1977), *Study on the rights of persons belonging to the ethnic, linguistic and religious minorities*, United Nations, para. 568.
[27] Steven Wheatley (2005), *Democracy, minorities and international law*, Cambridge University Press, p. 19.
[28] Ibid.
[29] *Supra* note 26.
[30] Perry Keller (1998), "Re-thinking Ethnic and Cultural rights in Europe", *Oxford Journal of Legal Studies*, Vol. 18, 31-33.
[31] http://www.countercurrents.org/commpuniyani101005.htm
[32] Art 39 (5) of the FDRE Constitution.

Constitution.[33] It means that those minorities who have no identifiable territory because they are dispersed over the country have not been envisaged as minorities under the Constitution.

Thus, there is the need for a legally binding definition to the term minority at domestic and international levels in order to prevent abuse from states against minorities. The difficulty then is the issue of diversity because it has distinct features in different countries. It was because of this problem that the ICCPR, while recognizing rights of minorities, failed to define who minorities are. Giving recognition for the rights of minorities under international human rights conventions or within federal constitutions without defining the term would undermine the rights of minorities as it would give states discretionary power in determining minorities and that may lead to systematic exclusion of minorities.

Some modification on the definition given by Francesco Capotorti[34] could avoid the confusion over the subject. The basic problem with Francesco Capotorti's definition is that it fails to protect non- nationals as it employs the term 'nationals'. It means that by using the term '*persons*' (like Art 27 of the ICCPR) instead of 'nationals', we can protect all individuals who belong to a minority group. Such modification is crucial, particularly, for migrant workers who could be denied citizenship systematically. Once we determine minority groups, then we can provide them with defined rights.

2.2 Recognition of rights of minorities and participatory rights

The general non-discrimination principle is a human rights notion which is applicable for all human beings irrespective of the fact that an individual belongs to a minority or majority group.[35] Human rights are implemented based on the principle of equality and they uniformly apply to everyone. The protection of minorities is an additional mechanism for specific group of persons who are determined as ethnic, linguistic or religious minority.[36] While non-discrimination principles in international and national legal documents are there to avoid discrimination, i.e. different treatment which is committed most of the time against minorities, the rights of minorities are introduced to preserve differences (identities) by providing special rights.[37]

Such treatment of the minorities should not be confused with positive discrimination/affirmative action which has the aim of achieving equality. Affirmative action is temporary, while the rights of minorities are permanent.

[33] Ibid.
[34] *Supra* note 26, para. 568.
[35] *Supra* note 22, para 1, p.1.
[36] Ibid.
[37] http://www.ohchr.org/Documents/Publications/FactSheet18rev.1en.pdf

Such rights should not also be taken as special benefits for a minority group.[38] They are rather inherent in a minority group and are recognized to allow members of such group enjoy what their language, culture and religion offers.[39] There is the need for such rights as long as we have ethnic, linguistic or religious minority even in settings where affirmative action is not necessary.

Recognition of the rights of minorities would also mean increasing the scope of social values. Such rights preserve ways of life including cultural, religious and linguistic values thereby increasing the opportunity to choose among the ways of life[40] on our planet. Any one from the majority or minority group should have the freedom to choose the way of life which is most important to him/her. Indeed, recognition of and respect for the rights of minorities would advance equality although the basic rationale behind such rights is preservation of identity.[41] Full realization of these rights is possible only through the accommodation of minority groups in a political process. The question of who shall be granted participatory rights in this regard is directly related to another important question as to why we need to grant such participatory rights for a group.[42]

2.3 Participatory rights that should be claimed by minorities

As Williams and Marko noted, "participation rights should promote integration without ethnification of politics".[43] The Ethiopian ethnic federal system does not seem be in conformity with this view. The organization of regional political entities in Ethiopia is based on ethnicity. Thus, mere citizenship does not enable citizens to actively participate in politics if they are not members of the ethnic group of a region even if they are living there for life. The secession clause in the Constitution adds fuel to the ethnically organized society. On the contrary, modern societies need integration and harmony in various pursuits.

In India, although there are some regions which are organized based on religion or ethnicity, the central government has strong constitutional powers to hold the units together. In the US too, the constitutionally proclaimed supremacy of federal laws and decisions over the laws of states is a reflection of supremacy of the federal government to the required degree. In Ethiopia, the federal government is influential because of the party system. If the dominant party system fails in the future, there is no guarantee to ensure unity unless some constitutional amendments are made.

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[38] *Supra* note 22.
[39] Ibid.
[40] *Supra* note 30.
[41] *Supra* note 22.
[42] *Supra* note 17.
[43] *Supra* note 17, p. 45.

In any federal system where diversity exists, two basic interests must be balanced regarding *participation rights*, because neglecting these interests can lead to conflict and disintegration. On the one hand, the groups must "have an effective say" in the political process.[44] On the other hand, the "influence given to the groups must not be so strong that they can completely paralyze the system".[45] Williams and Marko made it clear that "participation rights ought not to lead to a situation in which political mobilization is based exclusively or primarily on ethnic arguments".[46]

3. Representativeness of Shared Federal Institutions

3.1 The need for and representativeness of shared federal institutions

Mere existence of principles of federalism on paper does not solve problems of plural societies. The practical accommodation of diversity is necessary to build lasting unity. Federalism is a means to reconcile clashing groups and thus political accommodation and mutual understanding among the diverse society is an essential element in every federation.[47] As Watts clearly explains, every federal system has two basic purposes: namely ensuring self-rule through constitutional division of political power and (at the same time) achieving unity through shared federal institutions by working together on areas of conjoint interest.[48] Here, legitimacy and efficiency of shared federal institutions are essential. Watts has made it clear that "representativeness within the institutions of the federal government of the internal diversity within the federation and effectiveness in the federal government decision making" are necessary if shared federal institutions are to be acceptable by citizens of constituent units.[49]

Representativeness of the federal legislature, executive and other federal institutions needs special consideration in this regard. While India and the US have bicameral federal legislatures, Ethiopia has a two-house parliament but a one-house (unicameral) legislature and this raises questions as to the legitimacy and representativeness of the federal legislature of Ethiopia. The head of government in the US is the president who is directly elected by the people. Ethiopia and India, on the other hand, have the prime minister as the head of government. Such differences in the arrangement of federal institutions have practical implications in the functioning of federations. For example, though the Ethiopian and Indian parliamentary form of government, with the prime

[44] *Supra* note 17, p. 46.
[45] Ibid.
[46] Ibid.
[47] http://www.queensu.ca/iigr/conf/Watts/papers/majeed.pdf
[48] *Supra* note 8, p.83.
[49] Ibid.

minister being the head of government, may be helpful to establish effective executive decision making, there is a problem of executive dominance through party discipline. In this case, the representativeness of the federal government will be questionable. On the other hand, even though there are good checks and balances in the US presidential form of government, there is a risk of standoff while making decisions especially when the president and the Congress are from different parties.

Whatever form of government a federation may have, there are shared federal institutions to hold the units together. Such institutions exercise power on areas of common interest like foreign affairs, defense and commerce. The role of shared federal institutions especially in India and Ethiopia where diversity is so enormous is very important to hold the units together as there is high potential for conflicts and disintegration. One way of accommodating regional interests in the federal shared institutions is through the upper house. While the US federal system provides two seats uniformly for each state, whether it is large or small, in the Senate,[50] the House of Federation[51] in Ethiopia and the Indian Rajya Sabha[52] do not follow such uniform seat allocation. Indeed, such uniform allocation does not work for the two federations as they are composed of societies with high diversity. An inequitable distribution of power among the ethnic and linguistic groups at the federal level is a prominent problem and source of conflicts in Ethiopia and India.

In Ethiopia, the question raised by nationalities to get an equitable share of power at the center is still left unsettled. Diverse groups strive to control power at the center which leads to continuous conflicts and instability. Thus, it is obvious that fairly distributed power among the nationalities is necessary if the tension among plural societies is to be addressed. Government systems in Ethiopia, including the present one, have failed to address the questions raised by nationalities and this is the reason for successive conflicts and removal of government systems by war.[53]

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[50] Art I section 3 of US Constitution.

[51] Art 61 of the FDRE Constitution. The House of Federation in Ethiopia is the second chamber or the upper house, a federal shared institution, which is established to represent the interest of nations, nationalities and people as defined under Art 39 of the constitution.

[52] Art 80 of the Constitution of India. Rajya Sabha is the upper house in India. It is composed of 250 members. Twelve of them are appointed by the president and they are experts in specific fields.

[53] http://www.google.hu/search?q=www.oromopeoplescongress.org%2Fdocs%2FMerera-OSA-paper. Merera Gudina, "The Ethiopian State and the Future of the Oromos: The Struggle for 'Self-Rule and Shared-Rule", paper presented in OSA Annual Conference, Minneapolis, USA, 2006, pp. 2-12.

Power sharing that was promised in 1991 during the establishment of the transitional government is incorporated in the current Constitution. The Ethiopian government has also repeatedly claimed that it is progressively realizing what has been promised under the Constitution. However, *de facto* single party system has continued to be a serious challenge to the realization genuine federalism in Ethiopia.[54] It was the failure to address the question of nationalities which resulted in the removal of the Derg regime.[55] Yet, the current ruling party which came to power by war relies on its military power by setting aside the promises for equitable distribution of power at the federal level among nationalities and thus the tension among ethnic groups remains unsettled.

The popular discontent in 2016 has signaled some structural and operational problems with the Ethiopian ethnic federal system. The Constitution, for example, lacks clarity on intergovernmental relations within the federation in general and between the Oromia region and the capital, Addis Ababa, in particular. Such lack of clarity coupled with over 25 years of ethnification has resulted in popular discontent which forced the government to cancel the Addis Ababa and Oromia Special Zone Integrated Master Plan.[56] The issue of Welkait, which has been initiated by the leaders of the community peacefully, did not also receive the government's willingness to handle it according to the constitutionally proclaimed procedures and this had fermented anti-government resentment in the Amhara region.[57] This author does not suggest ethnic federalism. However, given the fact that the Constitution grants unconditional right to the nations, nationalities and peoples to decide their own fate (including secession) and because the government has stated this right as the pillar of the existing federal system, negating identity related issues would stand against the fundamental principles of the Ethiopian ethnic federal system. That in turn would erode trust on the government.

Needless to say, a federal system that merely gives territorial autonomy to a country's ethnic, linguistic or religious groups could not be sufficient, in multicultural federations like India and Ethiopia, to ensure respect for rights of minorities. In both countries, there are minority groups scattered over different areas, and, in effect, they do not occupy a defined territory. In Ethiopia, for example, there are about 80 ethnic groups, but only 9 states and two city administrations. This would mean that there are many ethnic groups (minorities in the various regional states) that could be excluded.

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[54] Ibid.

[55] The socialist Dergue regime was removed after a bloody war caused by the then policy which suppressed opposition groups.

[56] http://addisstandard.com/why-resist-the-addis-abeba-master-plan-a-constitutional-legal-exploration/

[57] http://www.bbc.com/news/world-africa-36940906

In a nutshell, unless the interests of ethnic, linguistic or religious groups are accommodated through federal shared institutions equitably, there will always be a high potential for conflicts. Mere enactment of laws that adhere to federal principles cannot create harmony and unity within diversity unless there is genuine share of political power which enables these groups to secure their interests under the federal setup. Failure to establish inclusive shared federal institutions thus poses a threat to a union in a federal system.

3.2 Representativeness of the federal legislatures and minorities' protection

It is through laws made by the federal legislature that a federal system achieves its goals regarding areas of common interest. As long as the federal legislature lacks legitimacy, or if it is not a genuine representative of different groups within a federation, the federal system cannot effectively function in a stable manner. For a federal legislature to be a legitimate representative, it has to satisfy two things. *First*, as federalism is about unity in diversity, the federal legislature has to constitute both elements of unity and diversity. It should thus include both the lower and upper houses. *Second*, chambers represent diverse interests and lower houses represent the interests of all citizens in the federation. If one house is excluded, it means that one element of federalism is missing.

The Ethiopian unicameral legislature fails to include one of these elements as the House of Federation (the upper house) does not participate in the lawmaking process. It is only the lower house (House of Peoples Representatives) which can make laws.[58] This means that it fails to satisfy the yardstick for legitimacy of a federal legislature. Both the US[59] and India[60] have bicameral legislatures in which both the lower and upper houses participate in lawmaking. The second element for a federal legislature to be legitimate is that the upper house must genuinely represent diversity and the lower house must represent unity.

In the US, the upper house (the Senate) has two members from each state (Art I section 3) and its members are elected directly by the people (Amendment XVII). Thus, the US upper house represents both small and larger states equally and this can avoid domination of large and populous states over small ones. Yet, such a system can ensure equality only between states but not among diverse groups. Minority groups within a regional state could be dominated by the majority group in that state although the state is represented equally with other states at the federal level. The emphasis on the well-established egalitarian principles including individual liberalism, equality and non-discrimination in the

[58] Art 55(1) of the FDRE Constitution.
[59] Id., Art I section 1.
[60] Art 107 of the Constitution of India.

US has made preservation of diversity and minorities' protection less important issues in the country.

The upper house in India (the Council of States or the House of Representatives of States, Art 80), like the US senate, represents states and not diversities *per se*. In addition to its failure to represent diversity, the Indian upper house can also be dominated by the largest states as the seats are allocated based on proportional representation principle (i.e. seats are allocated based on population size of constituent units).

The House of Federation (the upper house in Ethiopia) represents diversity although the allocation system enables the largest regional states to dominate smaller ones as each nationality, in addition to its one seat right, can have extra seats for each one million population.[61] The House of Federation represents diversity as members are representatives of nations, nationalities and peoples of Ethiopia. But the House of Federation has no lawmaking role. There are two prominent problems with the Ethiopian upper house. *First*, it is dominated by few larger nationalities as they can have more seats for every one million extra population in addition to their rights for one seat. Secondly, it has no power to vote on laws. The basic reason behind the past conflicts and removal of government systems by war was the absence of a genuine share of power at the center. This has continued because, as Shola Omotola states, "real power is exercised in centralized fashion" by the ruling party and its ethno-national satellites under … tight control …".[62]

The Constitution recognizes equality among the nationalities and their right to self-determination up to secession. The right to secessions is not incorporated in other modern federations. Thus, if one takes a look at the Constitution without considering what the reality on the ground is, he/she may say that the nationalities (which are ethnic groups in Ethiopia) are given unlimited rights and are more autonomous than other nationalities anywhere in the world. But the way the federation operates is far from what the Constitution has declared. As Merera, an opposition party leader, stated in his speech on a political debate, there is no genuine sharing of power and democracy in Ethiopia.[63] He has mentioned and underlined this again during the 2015 Ethiopian general election debate aired by the Ethiopian Broadcasting Corporation (EBC).[64] Merera, in his

[61] Art 61 sub article 2 of the FDRE Constitution.

[62] J. Shola Omotola (2006), Review of *Ethnic Federalism: The Ethiopian experience in comparative perspective*, edited by David Turton, Oxford: James Currey, p.305.

[63] Ethiopian Television, Feb, 12, 2010, speech by, Dr Merera on the first-round debate ahead of the May 2010 election.

[64] Ethiopian Broadcasting Corporation (EBC), March 13, 2015.

speech, stated that "the EPRDF/ruling party governance system in Ethiopia falls under the category of pseudo democracy."[65]

The legitimacy deficit in the federal legislature, single party dominance and party discipline have resulted in a centralized political system while the Constitution has established a federal system. As I have explained before, the federal legislature of Ethiopia does not reflect diversity as the upper house which represents nations, nationalities and peoples of Ethiopia has no power to vote on laws. This means that the system cannot adequately resolve the problem of diversity unless a bicameral legislature is established. The Ethiopian federal system should thus draw lessons from the US, India and other federal systems to set a legitimate legislature suitable to address problems in a federal system. When we see the role played by second chambers, in almost all federations except a few like Ethiopia, they have significant say in law making process.

3.3 Electoral systems and their impact on minorities' protection

The type of electoral system followed by federal countries has an impact on representation of diverse interests.[66] Members of the lower house in Ethiopia,[67] India[68] and the US are elected based on a "single member constituency plurality electoral system."[69] Other federal systems including Switzerland employ proportional representation with a view to accommodate minority political parties to represent the interests of minority groups.[70]

There are problems with both types of electoral systems. While the electoral system adopted in the US, India and Ethiopia may enable these federations to establish effective and stable legislative bodies, this happens at the expense of underrepresentation of minority parties[71] and ultimately this has adverse impact on the representation of diversity within these federal systems. To avoid problems of underrepresentation produced by "plurality-majority voting systems", the *proportional representation system* is introduced in most (21 out of 28) of the countries in Western Europe.[72] But, it is difficult to establish a stable legislature and, most of the time, there will be coalitions of political parties to form the executive as there is a low chance for one party to form a

[65] Ibid.
[66] *Supra* note 8, p. 90.
[67] http://www.electionsethiopia.org/Electoral%20System%20print.html
[68] http://www.cfr.org/publication/19105/indias_electoral_politics.html
[69] *Supra* note 8.
[70] Ibid.
[71] Ibid.
[72] http://www.mtholyoke.edu/acad/polit/damy/BeginnningReading/PRsystems.htm

majority. That in turn leads to frequent disagreements on how to govern a country.[73]

It is obvious that the proportional electoral system is fair and more inclusive than the single member plurality electoral system. Especially, in federations like Ethiopia where the second house which represents diversity has no lawmaking power, it is necessary to introduce a more accommodative electoral system to enable different groups to have a say in the lower house. As explained in the previous sections, the upper houses of the US, India and Ethiopia lack one or more elements to be genuine representatives of diverse interests. The Ethiopian and Indian upper houses are more problematic because they fail to avoid control of the upper house by larger states.

Election of members of the second chamber of India and Ethiopia is by the legislatures of regional states. This creates an additional problem in the functioning of the federal system as there will be an opportunity for a ruling party to control this house through a party discipline system. In such a case, members cannot serve as real representatives of either the interests of regional states or diverse groups of people in a region. To ensure that those neglected groups in the past are well represented in the federal lower house, the Constitution of India has obliged states to reserve seats for scheduled Tribes and Castes. This is a relevant step to represent a particular group in the lower house as candidates belonging to that particular Caste or Tribe are elected only to represent that group. But, the total number of reserved seats is lower than half of the number of members of the lower house and it is difficult to influence the majority in this house unless such scheme is supported by wisely designed upper house. Proportional electoral system or reservation of a significant number of seats for marginalized groups and a representative upper house with a lawmaking role are necessary for a federal system in general and particularly where it is multicultural.

4. Potential Threats to Unity in a Federal System

In every federation, there are potential factors which lead to conflict and, in serious cases, total collapse of a federation. A federation needs formal institutions and principles of intergovernmental relationship (IGR) to handle such problems amicably. The Ethiopian IGR system is mainly informal dominated by the ruling party.[74]As Burgess explains, "the coexistence of self-

[73] Pippa Norris (1997),"Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems", *International Political Science Review,* Vol. 18, No.3, 297-312.

[74] The Ethiopian House of Federation (2015), *The concept of Intergovernmental Relations, countries' experience and the context in Ethiopia,* a report presented on Intergovernmental Relations Conference, March 2015, Addis Ababa, Ethiopia.

rule and shared rule means that conflict, competition and cooperation are institutionalized in a peculiar way that perpetuates problems of great complexity".[75] There will be more dangers to unity in a federal system if constitutional and political mechanisms are not employed to handle potential sources of conflict.

As the units of a federal system form a federation to maintain a balance between unity and diversity, strengthening unity or diversity alone may result in the collapse of the federation. Too much emphasis on unity may gradually take away the powers of constituent units. That may force member states to leave the federation. Excessive emphasis on diversity is also equally dangerous to a union in a federation. It, in the long run, may make states stronger than the federal government and that may enable them to ignore the federal government and secede from the federation unilaterally.

Most of the time, excessive asymmetry of power, absence of supremacy clause to settle conflicts between federal and state jurisdictions, arranging boundaries of a federation based on ethnicity (ethnic federalism), constitutional secession clause and failure to represent diversity in federal institutions are among the potential sources of conflict which endanger union in a federation. This section will focus on these potential dangers to unity in a federal system.

4.1 Excessive asymmetry of power

As explained in the previous section, there is asymmetry of power in every federation. Political asymmetry, in particular, is unavoidable as it is caused by differences in terms of population size, skilled manpower, resources and other factors. There is also constitutional asymmetry in some federations. Asymmetry of power becomes a source of conflict and instability when it is undesired or excessive. As Govinda Rao and Nirvikar Singh stated:

> Asymmetry in administrative, political and economic spheres in federal systems is unavoidable and in fact, may be necessary not only to 'come together' but also to 'hold together'. However, while transparent asymmetric arrangements that can be justified on grounds of overall gains to the federation contribute to nation building, the discriminatory policies followed purely on short term political gains can be inimical to the long term interests and stability of federalism.[76]

Asymmetry of power will be excessive in more centralized federations and the worst scenario will be in case there is/are state/s which is/are stronger than the centralized federal government.[77] In a centralized federation, the central

[75] httpwww.queensu.caiigrconfWattspapersBurgess.pdf
[76] M.Govinda Rao and Nirvikar Singh, "Asymmetric Federalism in India: Unequal arrangements", p. 31. httpwww.nipfp.org.inworking_paperwp04_nipfp_006.pdf
[77] Ibid.

government has more discretionary power than a non-centralized one and that may lead to asymmetrical treatment of constituent units. If such centralized federal system is controlled by only a few states or where there is/are state/s which is/are stronger than the central government, there will be much more room for discrimination against the remaining states and that worsens the asymmetry of power as the stronger states will tend to stand for their own interest. Based on the Indian scenario regarding this problem, Govinda Rao and Nirvikar observed that "the states ruled by regional parties with significant strength in the parliament (federal parliament) have become pivotal and have been able to secure substantially higher resources relative to other states."[78] That would result in excessive or undesired asymmetry of power.

In India, there is a growing trend of asymmetry of power. While some constitutional and political asymmetries that have developed in India are appropriate for the smooth functioning of the federation, there is excessive asymmetry of power which is caused by "changing configuration of political power structure, vagaries of coalition and regional party politics"[79] and that could be a danger to the union in the long run.[80]

As explained earlier, political asymmetry of power is unavoidable. It can only be minimized by using constitutional asymmetry which may be helpful to address challenges from influential constituent units. But, in the long run it may have a divisive impact. As the experience in India indicates, granting special rights for one or more states in a federation can induce others to claim similar special rights, and such competition may lead to conflicts.

Both the US and Ethiopian federations are constitutionally symmetric. The states in these federations have equal rights and powers. But, there is political asymmetry in both federations like all other federations. In the US, there are also non-state units which are treated asymmetrically. Such asymmetric treatment of non-state units is meant to address substantial differences. As G. Alan Tarr clarifies, "geographical position mattered in the case of island territories; differences in style of life and traditional forms of governance influenced the treatment of Indian tribes; and differences in ethnicity affected the status of Puerto Rico and other islands."[81] What has to be noted here is that, unlike in India and Canada[82], asymmetrical treatments in the US are not designed for component units (states). Rather, they apply to non-state units including non-state islands, the District of Colombia (where the nation's capital exists) and Indian tribes. Alan Tarr has explained this point:

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[78] Id., p. 30.
[79] Id., p. 32.
[80] Ibid.
[81] Ibid.
[82] *Supra* note 8, p.66.

> Typically –particularly in multi-ethnic federations– it is the component units that seek distinctive (asymmetrical) arrangements as a means of recognizing and accommodating diversities. In the United States, in contrast, the asymmetrical arrangements were devised by and imposed by the federal government, and these steps were taken to serve national objectives, not the distinctive needs of the component units.[83]

Alan Tarr added that such arrangements in the US helped to avoid control of the nation's capital by a state[84] and it provides "an orderly procedure whereby sparsely inhabited territories could be governed until population growth qualified them for statehood".[85] Therefore, asymmetric treatment of non-state units in US is for the healthy functioning of the federation and it does not lead to conflict between states.

Even though there is constitutional symmetry of power in Ethiopia like in the US, the political party structure has resulted in undesired asymmetry of power. In reality, the ruling party controls the military and executive apparatus in Ethiopia. In this regard Lovise Aalen stated that "The TPLF was the creator of the coalition (EPRDF) and the architect of the ethnic federal model" and he further noted that "The TPLF, through the EPRDF coalition, has not been able to demonstrate a genuine will to share power with other political forces in a democratic manner".[86]

4.2 Constitutionally proclaimed right to secede

While the US and Indian federations have indestructible union,[87] the FDRE Constitution has established a destructible union. The US federation is "indestructible union of indestructible states"[88] and the Indian federation is "indestructible union of destructible states."[89] In Ethiopia, both the union and the states are destructible, i.e. in principle, nations, nationalities and peoples of Ethiopia can secede from the federation or form their own state, zone or district within the federation.[90]

Article 39(1) of the Constitution of Ethiopia proclaims that "every Nation, Nationality and People in Ethiopia has an unconditional right to self-

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[83] httpwww.queensu.caiigrconfWattspaperstarr.pdf
[84] Ibid.
[85] Ibid.
[86] Lovise Aalen (2006), "Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: The Case of Ethiopia", *International Journal on Minority & Group Rights*, Vol. 244, p. 250.
[87] *Supra* note 76.
[88] Ibid.
[89] Ibid.
[90] *See* Art 39 (1) of the FDRE Constitution.

determination, including the right to secession".[91] "Right to self-determination short of secession"[92] is recognized in every federation to give autonomy to regional units or to protect rights of minorities.[93] But, what is unique in Ethiopia is that there is a constitutional right to self-determination including secession.

International law is unclear as to whether right to self-determination includes the right to secede. The widely accepted approach is that the right to external self-determination (secession) is an exclusive right of nations "under colonial rule"[94] and its application beyond this is only in case of failure to include a nation in a democratic political process or when massive human rights violations occur.[95] As Abate Nikodimos states, "if a government is democratic and inclusive, then the right has less international legitimacy."[96] While the FDRE Constriction is inclusive, the government has undermined the constitutional principles and there is no genuine share of power as I explained elsewhere. Failure to ensure equitable share of power on one hand and the constitutionally proclaimed unconditional and unilateral right to secede on the other have inspired some opposition groups to form military fronts to fight the present government to effect secession.

The secession clause under the FDRE Constitution, assuming that there is democratic environment to exercise it, is a time bomb for the union. Firstly, its incorporation under the Constitution may create a sense of leaving the federation and that may lead to bloody conflicts. Abate Nikodimos underlines that the "inclusion of the secession clause itself might encourage groups to try the option, and this might consequently create distrust and destabilizes the unity of the country".[97] Nor can we be optimistic about post-session scenarios. One can recall the bloody war between Eritrea and Ethiopia just some years after the secession of Eritrea.

Secondly, when we see the right under the Constitution, it is unconditional and unilateral which would mean that, assuming that there is a democratic government, it is so easy for any nation, nationality or people to secede as long as the majority of the people concerned opt for it. The federal government or other states within the federation have no say at all regarding the secession

[91] Ibid.
[92] Allen Buchanan (1995), "Federalism, Secession and the Morality of inclusion", *Arizona Law review*, Vol. 53, 53-63.
[93] Ibid.
[94] Abate Nikodimos (2004), "Ethnic Federalism in Ethiopia: Challenges and Opportunities", Lund University (Student Paper), p. 57.
[95] Ibid.
[96] Id., p. 58.
[97] Id., p. 62.

process and the nation which requests for secession does not have to provide the reason why it wants to secede.

As clearly stated under Art 39(1) of the Constitution, the right of nations, nationalities and people to secede is unconditional.[98] The federal government is obliged by the Constitution to provide referendum for secession within three years after it received the request for secession which is approved by the "Legislative Council of the Nation, Nationality or People concerned."[99] Then, it is up to the people of such Nation, Nationality or People concerned to decide on whether to secede or not through the referendum. Therefore, secession under the FDRE Constitution is both unconditional and unilateral. Nor can state of emergency be decreed to '*suspend or limit*' the right to secession because this becomes unconstitutional under Article 93(4)(c) of the FDRE Constitution.

No other federation in the world has a secession clause. This is because it can lead to unlimited fragmentation which goes against international law and global order. Unity, common defense, greater market and economic development and social cooperation are given emphasis in every federation. Thus, the secession clause under the FDRE constitution is among the unique features of the Ethiopian federation.

Of course, there are instances of secession questions even although other federations have no secession clause in their constitutions. The question of secession raised by Quebec can be cited as an example. But, what is constitutionally incorporated in Ethiopia and what is decided by the Supreme Court of Canada regarding secession are substantially different. While the Ethiopia's Constitution grants unconditional and unilateral right to secede, the Supreme Court of Canada rejected such unilateral and unconditional right to secede. It stated that, "while unilateral secession would be unconstitutional, a clear expression by the people of Quebec of their will to secede from Canada would impose a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire".[100] At this juncture, it should be noted that "self-determination short of secession"[101], if implemented in a democratic way, can bring the desired autonomy.

4.3 Arranging federal boundaries primarily based on ethnicity (Ethnic federalism)

A federation may adopt a form of distributive or ethnic federalism in organizing its constituent units. While the purpose of distributive federalism is to divide power between the federal and regional states to ensure liberty and democracy

[98] Art. 39 (1) of the FDRE Constitution.
[99] Id., Art. 39(4).
[100] Reference, Secession of Quebec, 1998, 2S.C.R.217, para.53.
[101] *Supra* note 92, p. 54.

and thus is organized based on administrative convenience, ethnic federalism is moulded based on identity and its aim is to give power (autonomy) for each ethnic group. India has reorganized the states along ethnic and religious lines in 1966.[102] Given the constitutional powers of the union in India, the federal arrangement which is organized based on linguistic and religious identities is not a threat to the union though the tension it creates between ethnic groups may lead to continuous conflicts among the tribes, castes, provinces or territories. The union has the right to reorganize the states, it can merge two or more states into one, it can establish new states from one or more existing states and it can direct states to execute the laws in a manner it deems necessary.

What is more, the centralized court system, the federal legislature's power to enact laws in the national interest on any area which belongs to states and the union's power to change the federation into a unitary form of government in case of emergency are all meant to maintain unity.

> In view of historical experiences of disruptive and disintegrative sectarian forces and the political context of partition prevailing at the time of independence, the founding fathers of the Indian Constitution wanted to strengthen the Union against possible disintegrative pressures.[103]

Ambedkar, one of the drafters of the Indian Constitution, had stated during the discussion on the draft constitution:

> Though India was to be a federation, the federation was not the result of an agreement by the states to join in a federation. Not being a result of an agreement, no state has the right to secede from it. Though the country and the people may be divided into different states for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source. ... The Drafting Committee thought it was better to make [this] clear at the outset rather than leave it to speculation...[104]

The form of ethnic federalism introduced in Ethiopia is different from what is adopted in India. As Minasse explains, "although the Indian Constitution of 1950 has been thought to have served as a model emulated by the drafters of the Ethiopian Constitution, the similarity between the two constitutions is superficial".[105] According to Minasse, there are conditions in India which can ensure the integrity of the federation and those conditions are lacking in

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[102] https://www.stratfor.com/analysis/telangana-decision-microcosm-indias-geopolitical-challenge

[103] http://www.unu.edu/unupress/unupbooks/uu12ee/uu12ee0j.htm

[104] Ibid.

[105] Minasse Haile, "The new Ethiopian constitution and its impact up on unity, human rights and development", *Suffolk Transnational L. Rev*. Vol. 1, 1996-1997, p. 17.

Ethiopia.[106] The FDRE Constitution has used language and ethnicity in organizing the states and every group which is identified as a "nation, nationality or people"[107] has the right to self-determination including secession. Though the undemocratic nature of the ruling government has left the constitutional provisions untested, full implementation of the ethnic arrangement introduced in the Constitution will be so hazardous for stability of the federation.

According to Minasse, the ethnic federal arrangement established by the Constitution has introduced perplexing and damaging structures which inspire tribal groups to fight each other and that may lead to disintegration.[108] He further noted:

> "the dangerous nature of the Ethiopian federation is found mainly in the near total transfer of sovereignty from the center to tribal regions, in the disproportionate powers allocated to the tribal sub-units collectively and individually and in the creation of a government of unlimited powers."[109]

Careful reading of Arts 8 and 39(5) of the FDRE Constitution reveals that there is no sovereignty vested in the people of Ethiopia as a whole. Art 8 declares that sovereignty is vested in the "nations, nationalities and people of Ethiopia".[110] And when we see the definition of "nations, nationalities and people of Ethiopia" under Art 39(1), it does not refer to the people of Ethiopia as a whole; rather it refers to ethnic groups.[111]

Those individuals who have mixed identity or are advocates of Ethiopianism have to ascribe themselves to one of the ethnic groups in Ethiopia. They can be participants in the political process only if they attribute themselves to one of the ethnic groups. This has eroded the common destiny Ethiopians have for "millennia".[112] It undermines the common historical, religious and social ties of all nationalities in Ethiopia including the victory of all nations, nationalities and people against foreign invasions at Adwa and other battlefields. The Northward movement and political domination of the Oromo over areas including Wello and Gondar in the 16 century and the Southward movement of the Amhara in

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[106] Ibid

[107] *See* Art 39 (1) FDRE Constitution. Art 8 of the constitution also declared that the sovereignty is vested in the nations, nationalities and people of Ethiopia. Thus every nation, nationality and people can claim such sovereignty at any time and secede from the federation.

[108] *Supra* note 105, p. 19.

[109] *Supra* note 105, p. 20.

[110] Art 8 of the FDRE Constitution.

[111] *Supra* note 105.

[112] Id., p. 23.

the 19 century[113] are also among the significant historical events which link the Ethiopian people by blood and culture. It is to be noted that Imam Ibrahim (usually referred to as Ahmed Gragn) who had expanded his control to most parts of Ethiopia in the 16th Century had established his capital in Dembia and not Harar. Thus, Ethiopian people have shared memories, assimilation, various moves of expansion, and blended values contrary to the misperceptions that are in the course of being nurtured as a result of the present ethnic federal system which is steadily eroding the elements of Ethiopianess in the identity of citizens and, in effect, creating the climate of fear, suspicion and hostility among ethnic groups.

Economically, it will be impossible to establish states for all ethnic groups.[114] Thus, some groups cannot be influential enough to exercise their right to self-determination. Therefore, the ethnic federal arrangement may benefit only dominant ethnic groups. Even people who belong to such groups may be minorities in other regions and thus may not have the same autonomy their ethnic group enjoys on the territory it dominates.

As many opposition politicians argue, federalism is indispensable for Ethiopia but not ethnic federalism.[115] The International Crisis Group has also warned against the danger the Ethiopian ethnic federal system. Its 2009 report states:

> While the concept has failed to accommodate grievances, it has powerfully promoted ethnic self-awareness among all groups. The international community has ignored or downplayed all these problems. Some donors appear to consider food security more important than democracy in Ethiopia, but they neglect the increased ethnic awareness and tensions created by the regionalization policy and their potentially explosive consequences.[116]

Hence, the ethnic federal system in Ethiopia is a threat to integrity and nation building. Ethiopia's pre-1991 provinces were not organized based on language. The provinces facilitated interactions between Ethiopian people from different ethnic groups. Thus, solely using language as a means of political organization ignores other important factors. As Assefa Fiseha states, "restoration of Ethiopia's historic provinces and organizing them on a federal basis"[117]can

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[113] *Supra* note 53, p.3.

[114] Lovise Aalen, (2002), "Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000", Report R. 2002: 2, Chr. Michelsen Institute Development Studies and Human Rights, p. 44.

[115] Ibid.

[116] International Crisis Group report on Ethiopia: "Ethnic federalism and its discontents", Africa Report N°153 – 4 September 2009, p. ii.

[117] Assefa Fiseha (2007), *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Artistic Printing Enterprise, p.248.

bring administrative convenience and it will be more accommodative as "provincialism is one element of diversity that defines Ethiopian society."[118] This can also minimize the asymmetry of power and tension among the ethnic groups.

4.4 Lack of genuine representation of diversity

As explained earlier, accommodation of diversity is one of the purposes of federalism in multicultural federal systems like India and Ethiopia. Accommodation or representation of diversity does not, however, necessarily need ethnic federalism. Accommodation of diversity and the establishment of a democratic environment that enhances the participation of diverse groups are crucial to avoid marginalization of some groups within a multi-cultural federation. If these conditions are lacking in practice, those groups left behind or groups which do not get appropriate share of power will opt to leave a union. Thus, failure to equitably represent diversity through shared federal institutions will create real threats to the integrity of a federation.

The core principle in the US federal system is 'liberal democracy.'[119] 'Individual liberty'[120] is thus the bedrock of the federation. Ethnic identity is not used as a basis in determining boundaries of the states and in sharing powers within the federation. This would mean that there will not be a question by a particular ethnic group to share power as one identified group within the federation. The fact that US federalism is based on liberal democracy does not, however, mean that diverse groups have no rights at all. Because of the wide exclusions of and discriminations against the minorities by the majorities in different states, the states have developed their own minority rights protection systems. As Alan Tarr explains, "state courts have responded with rulings granting protections for rights beyond those afforded by the federal constitution".[121] He states that, the state courts and constitutions play important roles in protecting minority rights.[122]

Unlike the US, the Ethiopian and Indian federal constitutions are committed to accommodation of diverse groups. The problem in both federations (Ethiopia and India) relates to the absence of accommodation in practice. The various issues discussed above including poor democratic culture in Ethiopia and disproportionate power given for the union of India are among the factors that have caused gaps in the accommodative environment. This has resulted in many

[118] Ibid.
[119] http://www.wisegeek.com/what-is-a-liberal-democracy.htm
[120] Ibid.
[121] *Supra* note 17, p. 90.
[122] Id., pp. 89-99.

communal conflicts in India[123] and has created ethnic tensions in Ethiopia including ethnic based military groups that are fighting against the Ethiopian government.

5. Constitutional Review, Unity and Minorities' Protection

Federal or quasi federal forms of government are more complex than unitary forms of government. The competition for power and resources among the constitutional actors within federations exposes them to disputes. This would mean that federal governments need to have strong and well organized constitutional umpire to handle horizontal and vertical disputes among constitutional actors. As federal constitutions divide power between the two levels of government and because such division of power has to be guaranteed for a system to remain federal, neither level of government should have unilateral power to interpret a constitution.

5.1 Constitutional review: Who can request for it?

While most countries have a system of constitutional review to evaluate the laws and decisions made by a legislative or executive body for their constitutionality, there is divergence in terms of the type of adjudicating body they adopt, the type of claim which can be made before this body, the sort of organizations or persons who can bring constitutional complaints and the composition of the adjudicating body.[124] Such differences have an impact on the protection of minorities and maintenance of a union in a federal system. This would mean that federal systems need to have umpiring institutions which can keep the spirit of federalism in addition to the protection of individual rights and supervision of horizontal separation of powers which are also essential in the constitutional review schemes of unitary governments.

The issue as to who can request for constitutional review depends on the particular spirit or purpose that is pursued in a federal system. For example, as the US federal system is based on the principle of liberal democracy, the vertical and horizontal divisions of power are meant to achieve individual liberty and democracy.[125] Group identity is not relevant under the US Constitution. This means, a group of people or a person belonging to this group has no standing to request for constitutional review before the US Supreme Court or other federal courts in order to claim a special right based on identity. As indicated earlier,

[123] Id. pp. 203-211.
[124] Tom Ginsburg (2008), *Comparative Constitutional Review*, University of Chicago, July 30, 2008, p. 1.
[125] *See* New York Vs United States, 505 U.S. 144, 112 S.Ct. 2408, 120. L.Ed.2d. 120, 1992, para. 16.

there are state constitutions and courts which have developed minorities' protection systems and thus there may be such claims in these states.

In India and Ethiopia, ethnic, religious and linguistic groups are the central elements in the respective federations. Hence, an ethnic, linguistic or religious group or an individual belonging to this group may request for constitutional review to secure a right based on such identity. Thus the issue who has standing in a given federation depends on the particular purpose that federation wishes to achieve. These days, there is an increasing trend of allowing individual complaints for constitutional review with a view to protecting fundamental individual rights.[126]

A federation which can be an example for providing wider access for constitutional review is Germany. "State bodies of all levels, ordinary courts, the Lander, constitutional courts of the Lander and any individual (alleging violation of his/her fundamental rights) can bring constitutional complaint before the Constitutional Court and the Constitutional Court has the power of both abstract and concrete review.[127] In the US, though there is no abstract review, anyone who satisfies general 'standing' requirements for litigation can raise a constitutional issue in court.

In India, Articles 12-31 in Part III of the Constitution provide fundamental individual rights and minority rights.[128] Art 32 provides that the Supreme Court has the power of constitutional review to enforce these rights.[129] Therefore, individuals, minority groups or an individual belonging to a minority group may bring constitutional compliant to the Supreme Court of India. But, the Supreme Court itself has very limited power of constitutional review. For example, the Supreme Court's decision on constitutionality can be reversed by the parliament through constitutional amendment in case the parliament is not satisfied with the Court's decision.[130] In 1967, the Supreme Court confronted the influence exerted by the parliament by passing a landmark decision in the Golaknath case stating that fundamental rights cannot be amended. In Ethiopia, any interested party has the right to institute a constitutional complaint by virtue of Article 37 of the Constitution.[131]

[126] http://www.concourts.net/lecture/lecture4.html
[127] Ibid.
[128] See Part III of the Constitution of India.
[129] See Art 32 of the Constitution of India.
[130] http://nos.org/317courseE/L-15%20judicial%20review%20and%20protection.pdf
[131] The House of Federation has also entertained a case submitted by Ethiopian Women Lawyers Association on behalf of Kedija Beshir and this shows that an individual, organization or association which is an interested party can institute a constitutional complaint to the Council of Constitutional inquiry. The final decision is passed by the

5.2 The adjudicating body that best serves protection of minorities and unity

Historical, political, cultural and social differences among federations have led to the establishment of different institutions entrusted with the power of constitutional review. Supreme courts in federal systems including the US, Canada, Australia and India have the final say on constitutional matters.[132] We also find specialized courts that can exercise this power such as the German Constitutional Court. This is currently pursued in many federal and unitary states including Belgium, Comoros, Spain, Bosnia and Herzegovina, South Africa and Hungary.[133] Ethiopia has followed a unique model. The power of constitutional review in Ethiopia is vested in a non-judicial political organization, the House of Federation.[134]

Four major arguments are forwarded in support of the House of Federation's power to adjudicate constitutional disputes. The *first* argument is that sovereignty under the Ethiopian constitution is vested in the nations, nationalities and peoples under Art 8 and as the Constitution, and since, the House of Federation represents these groups it is the proper organ to interpret the Constitution. But, this is not valid because it assumes that the federation is a *coming together federation*, i.e., one formed based on the free consent of nations, nationalities and peoples, which would mean that the nations, nationalities or peoples had had the capacity not to join the federation at the time. The constitution making process was under the control of the ruling party dominated by Tigray Peoples' Liberation Front (TPLF) and thus the Constitution cannot be seen as a genuine reflection of the will of nations, nationalities and peoples. To use the words of Lovise Aalen, "the process of drafting and ratifying the Constitution was totally dominated by the ruling party, and hence, the federal project lost legitimacy".[135] One cannot, therefore, assume the Ethiopian federation as a *coming together federation*. Thus, the first reason which justifies constitutional review by the House of Federation is not tenable.

The *second* justification for vesting this power in the House of Federation is absence of confidence in ordinary courts because of the history of the Ethiopian courts. This argument is also weak as reform can make courts much better and impartial than a single party dominated political institution.

House of Federation as the Council of Constitutional Inquiry can only send an advisory opinion of the HoF.

[132] *Supra* note 8, p. 100. See also http://www.concourts.net/lecture/lecture4.html

[133] Ibid.

[134] *See* Article 62 of the FDRE Constitution.

[135] *Supra* note 114.

The *third* argument is that vesting this power in the judiciary is inappropriate as judges will give priority to legal values and disregard political elements in constitutional disputes.[136] This argument may be persuasive but it does not lead to the inference that a political institution is the best alternative to adjudicate constitutional cases. Given the diversity in Ethiopia, ordinary courts may not be the right institutions to adjudicate all types of constitutional matters. Judges in the ordinary courts may give preference to mere literal readings of the law and fail to consider cultural, ethnic, religious, linguistic and other identities in exercising their power of constitutional review. But this does not justify the power of constitutional review by a non-judicial political institution (i.e. House of Federation) especially, when such political institution is controlled by a dominant party thereby lacking independence. It is indeed possible to establish a specialized court with specialized judges who can consider both legal and other legal factors. Thus, the German Constitutional Court can be adopted in Ethiopia with some modification.

It is, however, to be noted that a specialized court will be overburdened with cases and can be ineffective if all cases, including the ones that involve fundamental individual rights are directly brought to it. Ordinary courts can be proper judicial institutions to determine constitutional cases regarding such cases because they involve more legal than non-legal issues. Fundamental individual rights cases are frequent as they are everyday questions of citizens. Thus, ordinary courts need to have involvement in determining constitutional disputes concerning fundamental individual rights. But, there are other constitutional disputes which require the consideration of non-legal factors thereby necessitating specialized courts and judges to address such constitutional cases. Therefore, both ordinary courts and a specialized constitutional court need to have the power to determine constitutional disputes.

The *fourth* reason mentioned as a justification for constitutional review by the House of Federation is the argument that issues regarding horizontal separation of powers often involve both legal and political elements and thus courts may lack competence to adjudicate such cases.[137] The US judiciary is mentioned as one example facing a problem in adjudicating such cases.[138] It should, however, be noted that although the US Supreme Court had refused to

[136] Assefa Fiseha (2007), "Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)", Draft paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi, April 2007 p.9-11.

[137] *Supra* note 117, pp. 416-418.

[138] Ibid.

issue mandamus[139] against the political departments in *Marbury v. Madison* indicating that the case involves a political issue, the Court underlined that it has power to declare a law or executive action void.[140] The *Marbury v. Madison* case thus establishes the power of the judiciary to invalidate the laws and executive actions for their unconstitutionality.

While the power to invalidate laws and executive actions for their unconstitutionality is upheld consistently, the approach which limits the power of courts when a constitutional case involves a political issue is not. The well-established precedent which is applicable now reveals that what matters is not whether a case involves a political issue or not, but whether the case can be decided by applying the constitution or laws in the country. The Administrative Procedure Act of 1946 and the judicial precedent have removed the constraint which existed earlier.

Conclusion

This article has explored the territorial or nation-state federal system of the US, the formally centralized quasi-federal system of India and the Ethiopian ethnic federal system from the perspectives of unity and protection of minority groups. It has highlighted that neither the US territorial federal system nor the purely ethnic federal arrangement followed by Ethiopia can be a solution for multi-cultural states like India and Ethiopia. A purely ethnic federal arrangement which ignores historical, economic and social factors in organizing political entities magnifies differences and leads to instability.

While the forces of unity should not impose undesired restrictions on diversity, the other extreme of establishing a purely ethnic federal system and giving excessive emphasis for ethnic diversity (as in the Ethiopian federal system) is also problematic as this would lead to conflicts. In a nutshell, neither individual liberalism nor communalism is a solution for most countries if the rights of all sections of the society are to be addressed. Once minority groups are identified, the rights given to them should accord them protection against despotism by the dominant group. However, minority rights should not be misconstrued to the extreme in such a manner that a minority group can destabilize a political system.[141]

Based on various literature and analysis, this article has also indicated the problems associated with the electoral systems and the manner of selection of members of the upper houses of the US, Ethiopia and India. Shared federal

[139] http://www.lectlaw.com/def2/m079.htm
[140] Marbury Vs Madison, 5 U.S. 137, 1803.
[141] *Supra* note 17, p. 46.

institutions are indispensable to work together on areas of common interest and that maintains a union in a federation. For shared federal institutions to be legitimate and effective, they have to accommodate diverse groups. One of the schemes that can accommodate regional or diverse interests through shared federal institutions is the establishment of a representative upper house. Each state in the US has two representatives in the Senate (upper house), and such equal representation of both small and larger states can be a safeguard against domination by the large ones. But, equal representation of states does not mean equal protection of diverse groups within each state as majority groups in each state can dominate minorities. This necessitates protection systems for regional minorities.

While both the US and Indian federal legislatures are bicameral composed of both lower and upper houses, the Ethiopian legal regime does not enable the upper house which represents diversity, i.e., House of Federation, to have any involvement in the law making process. Thus, the constitutional protection of diverse groups in Ethiopia can easily be paralyzed through the lawmaking role of the lower house which is dominated by a few ethnic groups. To be legitimate, a federal legislature has to incorporate both unity (through the lower house) and diversity through the upper house. Thus, the Ethiopian legislature needs reform. India's practice of setting a limit on the maximum number of seats for states or ethnic groups in the second chambers can be a feasible solution in Ethiopia to enable the minorities to collectively counterbalance the majorities in these federations.

This article has also identified some potential threats to unity in federal systems. Excessive asymmetry of power, failure to accommodate diversity, constitutionally proclaimed right to secession, ethnic federalism and absence of federal supremacy clause are among the major potential threats to a union in a federation. While asymmetrical treatment of non-state units in the US has ensured healthy functioning of the federation, asymmetrical treatment among the states in India has led to some conflicts. In Ethiopia too, an excessive asymmetry of power caused by the *de facto* single party system has posed serious challenges to the integrity of the country.

Finally, this article has briefly explored the constitutional umpiring institutions in the three jurisdictions. The discussion has shown that neither reliance solely on ordinary courts nor political institutions (such as the House of Federation) are feasible to determine constitutional disputes especially when a federal system is multicultural. Thus, constitutional disputes that involve fundamental individual rights can be adjudicated by ordinary courts and the establishment of a specialized court for the remaining disputes would be feasible to effectively address constitutional disputes. ■

Protection of the Right to Freedom of Assembly under Ethiopian Law: Gaps and the Way Forward

Tsega Andualem Gelaye ♣

Abstract

The right to Freedom of assembly is among the political rights enshrined under the Constitution of the Federal Democratic Republic of Ethiopia (FDRE). Despite the frequent reporting of its rampant violation by human right monitoring bodies and the media, one cannot find a research that assesses the adequacy of protection offered to the right by the Ethiopian Constitution and other laws of the country. This article seeks to fill this gap by indicating some of the key problems with the existing legal regime governing the right and the prevailing practice. As such, it argues that the present Constitution of Ethiopia gives an incomplete protection to the right, by failing to go beyond listing grounds of limiting it without incorporating additional guarantees of preventing arbitrary restrictions such as necessity and proportionality in explicit manner. Moreover, it contends that this problem was exacerbated by the presence of too many loopholes in the Peaceful Demonstration and Public Political Meetings Proclamation that ranges from inadequate rules governing notification procedure to the absence of fair hearing and judicial or administrative review procedures in the law. Suggestions to improve the legal guarantees for freedom of assembly in Ethiopia are also made in the article in light of lessons from the experience of other national and international jurisdictions with better standards of protection. Furthermore, it asserts that reforming the legal regime applicable to freedom of assembly and ensuring its appropriate implementation requires a strong political will of the ruling party in promoting good governance, respecting rule of law and strengthening democratic institutions.

Key terms

Demonstration, Ethiopia, freedom of assembly, notification, proportionality, limitation

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Introduction

Freedom of assembly is a right that is rarely defined in major human rights treaties including the International Covenant on Civil and Political Rights (ICCPR). No General Comment that defines what the right protects is issued to date. To fill this gap in the existing treaties, several authorities have attempted to define what is meant by protected assembly. For instance, the experts of the Venice Commission (an advisory body of the Council of Europe) have defined an assembly as 'Intentional and temporary presence of a number of individuals in a public place for a common expressive purpose'.[1] The right safeguards the purposeful gathering of people in public places such as streets, parks, squares or other spaces that are freely accessible to the public. The ultimate aim of such gathering is the public expression of positions on various issues of public concern, be it in a declarative form like the case of public demonstration or an inward deliberation and discussion on issues among the assembled as the case in public meetings.[2]

The right to freedom of assembly only safeguards gatherings which are nonviolent.[3] This requirement is implied in every definition of a protected assembly and unanimously recognized in international human rights instruments as well as the domestic constitutions of states. Here it must be noted that, the right to freedom of assembly is not an absolute right. Thus, limitations could be placed upon it to safeguard other legitimate interests such as national security, public safety, public order or respect for the rights of others.[4] This however does not mean that the right could be restricted arbitrarily by invoking every ground. Instead, 'in each instance of potential limitation the state must clearly define the precise purpose served, as well as showing that the measure in question is necessary and proportionate'.[5] In other words, the state must meet the proportionality scrutiny.

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[1] OSCE/ODHIR (2010), *Venice Commission Guideline on Freedom of Assembly* (2nd ed) (June 2010).

[2] O. Salat (2015), *The Right to Freedom of Assembly a Comparative Study*, Hart , Oxford, pp. 5-6.

[3] OSCE/ODHIR (n1), pp. 25-26.

[4] International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49) art. 21; African (Banjul) 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, art. 11.

[5] African Commission on Human and Peoples Right (ACHPR), *Report of the Study Group on Freedom of Association & Assembly in Africa*, (2014), p.21.

Like many national constitutions, the present constitution of Ethiopia (FDRE Constitution) adopted in 1995 has recognized the right to freedom of assembly.[6] Ethiopia has also ratified all international and regional treaties acknowledging this right which further reinforces its obligation to respect and enforce it. Moreover, other subsidiary laws were enacted prior to the adoption of the Constitution with the objective of facilitating the implementation of the right.[7] Yet, the right remains one of the most repressed political rights in the country as witnessed in practice. Severe suppression of the right has led some including the author, to regard the right as illusory and devoid of any practical significance.

To corroborate this assertion, it might be relevant to see the situation in the pre and post 2005 Ethiopian general election. This period is imperative for anyone who is interested in studying the history of freedom of assembly in Ethiopia since the adoption of the Constitution in 1995. It marks the period where, the right enjoyed a relative respect for a short duration before it entered its several years of hibernation. Unlike the preceding elections which were largely boycotted, the 2005 election was competitive to a large extent.[8] This is mainly attributed to the pledge of the ruling party to open democratic space and undertake a free and fair election.[9] Accordingly, 'live televised debates on matters of public policy, opposition party access to state-owned media, and huge, peaceful rallies' were seen for the first time.[10] Further, in a manner which is unprecedented before, nearly one million people in the capital displayed their support for opposition parties through an entirely peaceful demonstration.[11] Other massive rallies were also held by opposition supporters in many parts of the country without much difficulty.

However, these developments were short-lived. On the evening of the election date, the late prime minster issued a decree that outlaws the conducting of demonstration in the capital for a period of one month which was extended

[6] The Federal Democratic Republic of Ethiopia Constitution (1995), art. 30(1).

[7] The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings, Proclamation No. 3/1991, Federal Negarit Gazzeta 50th Year No. 4, Addis Ababa, 12 August 1991 (hereinafter Demonstration and Political Meeting Proclamation).

[8] Terrence Lyons, 'Ethiopia in 2005: The Beginning of a Transition?' African Notes No.25 Center for Strategic and International Studies January 2006 <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/anotes_0601.pdf > accessed on 23 October 2016.

[9] Ibid.

[10] Ibid.

[11] Stefan Brüne (2010), 'The European Union and its Africa strategy Case study Ethiopia' in Valeria Bello and Behailu Geberewold (eds)*A Global Security Triangle European, African and Asian Interaction* , Routledge Taylor Francis Group, London and New York, p.142.

until July 2005.[12] Those who defied the order of the prime minster paid dearly with their lives and bodies. Even after the expiry of the ban on demonstration, in September and subsequent months, municipalities and other administrative units consistently refused to allow gatherings organized by opposition parties in different parts of the country.[13] This marked the beginning for the long period of dormancy for the right. Thus, for eight years subsequent to the 2005 controversial election, no demonstration was held in the capital Addis Ababa.[14]

Even after 2013, a number of notifications for undertaking public demonstrations or political meetings were either denied by the authorities regulating assemblies from the very outset or dispersed by force subsequently.[15] Many people also died and sustained bodily injury in the course of exercising this right in Oromia and Amhara regional states of Ethiopia.[16] The violence and destruction of property that ensued following the crackdown of the protests by security personnel ultimately led to the declaration of state of emergency[17] by the government which entailed the complete suspension of the right to freedom of assembly and severe restrictions to other fundamental freedoms throughout

[12] Carter Center, *Observing The 2005 Ethiopia National Elections Carter Center Final Report* (December 2009) p.4.

[13] U.S Department of State, 'Ethiopia' (8 March 2006). <http://www.state.gov/j/drl/rls/hrrpt/2005/61569.htm> accessed on 21 October 2016.

[14] Solomon Goshu, 'Peaceful Political Rallies: The Right Besieged by Hurdles', *The Reporter*, 31 January 2015 <http://allafrica.com/stories/201502020437.html> accessed 31 March 2016; Human Right Watch, World Report 2015: Ethiopia, <https://www.hrw.org/world-report/2015/country-chapters/ethiopia> accessed on 27 May 2016.

[15] Neamin Ashenafi, 'Cancellation of Planned Demonstration Annoys Medrek' <http://www.thereporterethiopia.com/content/cancellation-planned-demonstration-annoys-medrek> accessed 1April 2016; 'Ethiopia Arrests 43 Anti-Graziani Statute Protesters in Addis Ababa' <http://www.awrambatimes.com/?p=13407> accessed 31 March 2016, Ethiopian Police Crackdown On Anti-Saudi Protest'. <http://bigstory.ap.org/article/ethiopian-police-crackdown-anti-saudi-protest> accessed 31 March 2016.

[16] 'UN Experts Urge Ethiopia To Halt Violent Crackdown On Oromia Protesters, Ensure Accountability For Abuses' <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16977&LangID=#sthash.veMqExX4.dpuf > accessed 1 April 2016; 'Ethiopia: Dozens killed as Police Use excessive force against peaceful Protesters' <https://www.amnesty.org/en/latest/news/2016/08/ethiopia-dozens-killed-as-police-use-excessive-force-against-peaceful-protesters/? > accessed on 18 November 2016;'Dozens killed in Ethiopia protest crackdown' <http://www.aljazeera.com/news/2016/08/30-killed-ethiopia-protests-opposition-160808105428331.html> accessed on 18 November 2016.

[17] 'Ethiopia declares state of emergency as deadly protests continue' The Guardian (10 October 2016) <https://www.theguardian.com/world/2016/oct/10/ethiopia-declares-state-of-emergency-as-deadly-protests-continue> accessed: 18 November 2016.

the country. Further, more than 11,000 people were arrested by the Ethiopian government 'command post' subsequently for their alleged involvement in violence and destruction of property.[18] According to the Ethiopian Broadcasting Corporation, 9,980 detainees were expected to be released until the end of December 2016 (EBC; December 17, 2016).

This article seeks to critically assess the contribution of the existing Ethiopian legal regime governing freedom of assembly for this state and its adequacy from a comparative perspective. Accordingly, the first section explores the rationale for protecting freedom of assembly by pointing certain features and functions that distinguishes it from other rights. The second section examines the protection of the right under the FDRE Constitution by focusing on limitations. Sections 3 to 7 analyze the provisions of the Ethiopian Peaceful Demonstration and Public Political Meeting proclamations by giving emphasis to issues of notifications, spontaneous assemblies, restrictions on time, place and conduct, public order and public safety limitations, hearing procedure and judicial review. These aspects would be critically examined in the light of selected practices and cases in a comparative manner. The last section assesses the importance of political will of those in power towards promoting good governance, rule of law and strengthening democratic institutions to address the problems identified in the legal regime and its implementation.

1. The Utility of Freedom of Assembly

Given the strong interlink between the right to freedom of expression and the right to freedom of assembly, some question whether the latter adds any unique value. Concerning the relation between the two sets of rights, one must underscore the undisputed fact that any form of assembly ultimately has a communicative or expressive purpose. As such, the expression aspect of freedom of assembly is within the purview of protection of the right to freedom of expression[19] because demonstration and meeting constitute one of the mechanisms available for disseminating one's view. This has led some to contend that if the ultimate objective of freedom of assembly is 'expression', individuals should utilize other options of communicating their concerns through the mass media including news papers, radio, TV or internet.[20] The justification they offer in support of their contention is that, since ordinary

[18] 'Ethiopia state of emergency arrests top 11,000' <http://www.aljazeera.com/news/2016/11/ethiopia-state-emergency-arrests-top-11000-161112191919319.html > accessed 18 November 2016.

[19] Manfred Nowak *et al* (eds) (2012), *All Human Rights for All: Vienna Manual on Human Rights,* Antwerp: Intersentia; Vienna : NW Verlag Recht, p.382.

[20] Eric Barendt (2000), 'Freedom of Assembly', Chapter 9 in Jack Beatson and Yvonne Cripps(eds.), *Freedom of Expression and Freedom of Information*, OUP, p.161.

assemblies create inconvenience for the public by disrupting the flow of traffic and operation of businesses, individuals should resort to less disruptive channels of communication.[21]

What such critics ignore is that, expression through mass media is qualitatively different from physical assemblies. By virtue of their physical presence together in public places, the latter indicate how committed and united they are for the cause they stand for which has the capacity to exert influence on the government.[22] Further, the dramatic nature of expression also enables participants to express their position in a vivid and influential manner. Moreover, all sections of the society do not have equal access to various means of communication because of poverty or marginalization. Hence, 'freedom of assembly provides opportunities for public expression of those with less power, wealth or status.'[23] In particular, freedom of assembly guards the rights of the minorities from the tyranny of the majority. Any democratic system aspires to rule/implement the wishes of the majority of the people while protecting the rights of the minorities. Freedom of assembly pursues this aspiration of democracy by allowing minorities to assemble together and voice their concerns and interests.[24] At times, freedom of assembly could be the only way to make their voice heard since they do not have the power to influence the political process using the normal system of election since they would be outnumbered. It would also enhance their right to self determination enabling them to promote their culture, way of living and identity.[25]

An assembly is primarily '*characterized by physical presence of multitude of individuals who are aligned by a common purpose to collectively communicate a cause to the general public* [emphasis added]'.[26] What made the collective expression of concern possible in the first place is physical gathering of many individuals with a shared interest. Hence, what an assembly distinctly safeguards is the 'bodily togetherness of a group of people'.[27] In the absence of the right to freedom of assembly, individuals could not gather in the first place for voicing matters affecting public interest. And this attribute is not addressed by freedom of expression.

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[21] Id., 164.
[22] Id., 166.
[23] N. Jarman and M. Hamilton (2009), "Protecting peaceful protest: The OSCE/ODHIR and Freedom of Peaceful Assembly" *Journal of Human Rights Practice* Vol.1 No.2 (2009), p. 208.
[24] Solyom Peter (tras) (2008), 'The Constitutional Principles of Freedom of Assembly in Hungary', *Fundamentum* Vol.12, p.37.
[25] OSCE/ODHIR *supra* note 1, p.13.
[26] Michel Rosenfeld and András Sajó (ed) (2012), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, p.951.
[27] Ibid.

The underlying goal of the two rights is different. Freedom of expression is characterized by some scholars as *civil right* primarily because its prime focus is to allow the individual fulfill himself by speaking his mind.[28] The 'discovery of truth' through the exchange of different ideas is also mentioned as an additional aim of the right.[29] In contrast, the right to freedom of assembly is characterized as *political right* since its principal target is the governing of the polity and democratic process.[30] Hence, assemblies primarily promote collective interests rather than individual ones. Besides, the contribution of assemblies for discovery of truth is also minimal since the prime concern of the participants in a demonstration is not discovering the truth but making their voice heard and taking a position.[31]

Freedom of assembly is also regarded as an 'early warning' instrument for democracies that something is going wrong with the system.[32] Protests against the government expressed in the form of demonstration would indicate that some sections of the society are seriously dissatisfied with the way the government is handling certain matters. In a democratic system, governments are expected to be responsive to the demands of the people.[33] As such, when the people express their displeasure, the government must seriously consider those issues and address them properly before they are exacerbated. Ignoring the early warning might make it difficult for the government to handle issues after they go out of control.

2. Freedom of Assembly under the Ethiopian Constitution

The FDRE Constitution provides that all persons have the 'right to assemble' 'to demonstrate' and 'to petition'.[34] The fact that the Constitution does not define each of these terms might not be surprising given the nature of constitutions that merely enshrine general principles. It is to be noted that the prevailing literature characterizes them as different forms of assembly. The 'right to assemble' in the Constitution primarily refers to public meetings conducted with the purpose of deliberating on certain important matters.[35] This could be contrasted with the 'right to demonstrate' that has the principal objective of proclaiming the position of the assembled on an essential matter to the external audience

[28] Nowak, *supra* note 19, p. 371.
[29] Barendt, *supra* note 20, p.166.
[30] Nowak, *supra* note 19, p.371.
[31] Barendt *supra* note 20, p.166.
[32] Salat , *supra* note 2, pp.49-50.
[33] Ibid.
[34] FDRE Constitution, *supra* note 6, art 30(1).
[35] Salat, *supra* note 2, p.6.

concerned.[36] Hence, the target of demonstration is getting attention of an outsider rather than discussing the issue among the assembled.

This line of interpretation also conforms to the stipulations of the Proclamation on Peaceful Demonstration and Public Political Meeting[37] which serves as the implementing legislation in Ethiopia for the constitutional provision that enshrines the right to freedom of assembly. Accordingly, the Proclamation makes a distinction between 'peaceful demonstration' and 'public political meeting' and defines them separately. By peaceful demonstration the Proclamation refers to 'any public and orderly procession in which a group of people *express their ideas* through speech, songs, mottos, placards etc... [emphasis added]'.[38] This definition fits to the declaratory nature of demonstrations. The usage of symbols, songs and placards is also a distinguishing feature of such gatherings. With respect to 'public political meetings' the Proclamation explicates its meaning in the following manner 'any meeting in which a group of people *discuss* political and politics oriented issues [emphasis added]'.[39] From this, one can observe that the focus of political meetings is more on deliberation and discussion than expression of stance.

The tricky part in the Ethiopian constitutional provision recognizing freedom of assembly is the 'right to petition'. Does it provide something which is not covered either by right to assembly or demonstration? Or is it a needless duplication? To address these questions, we can examine the interpretation given to such formulations in early constitutions that included the right to assemble and the right to petition in the same provision. A good example in this regard is the First Amendment of the US Constitution adopted in 1791. It provides: 'Congress shall make no law … abridging … the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'[40].

According to El-Haj, the framers of the US Constitution saw a strong intersection between the two sets of right, and that explains why they paired them.[41] He states that some of the founders of the Constitution argued that in the normal course of things, submission of grievances by the public to the government are preceded by the assembly of the people to seriously deliberate on the issue and it is only logical to place the two rights together. However, it is important to note that not all assemblies have the ultimate purpose of

[36] Id., p.5.
[37] Demonstration and Political meeting Proclamation, *supra* note 7 .
[38] Id., art.2(1).
[39] Id., art.2(2).
[40] U.S. Const. amend. I
[41] El-Haj Tabatha Abu, 'The Neglected Right to Freedom of Assembly', (2009) 56 UCLA Law Review 560-566.

communicating discontent or petition. They might be convened for deliberation or celebratory purpose. Likewise, the right to petition is not necessarily tied to the right to freedom of assembly since protest could be expressed by using various channels of communication without the need to assemble.

The same logic can explain the pairing of the right to freedom of assembly with the right to petition under the Ethiopian Constitution. Hence, it could be argued that the Constitution made reference to the right to petition in this provision in order to underscore that the right to freedom of assembly or demonstration is not only confined to mere deliberation on an issue or demonstration. Rather, it could go to the extent of demanding the government to address their grievances deliberated and expressed through demonstration. As such, the presence of the right to petition in the provision (that recognizes freedom of assembly) further enhances the exercise of the right to assembly by explicitly informing the people about their entitlement to express their dissatisfactions with the measures or actions of the government and demand redress by using demonstration as a channel.

The Constitution also lists the grounds for limiting freedom of assembly which includes '*public convenience*', 'protection of *democratic rights*', 'public morality' and 'peace'.[42] The terms 'public convenience' and 'democratic rights' are somewhat unique. This is because it is uncommon to find such kind of formulations in other jurisdictions. For instance, 'national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others' are mentioned as the only possible reasons for restricting the right under the ICCPR.[43] These grounds are often addressed in human rights literature and jurisprudence of courts as 'legitimate aims' for restricting a right. With respect to public safety, it refers to safeguard 'against danger to the safety of the persons, their life or physical integrity, or serious damage to their property.'[44]

The ground 'public order' is more tricky because of its relative broadness. According to the Siracusa Principles, 'public order' refers to 'sum of rules which ensure the functioning of the society or set of fundamental principles on which the society is founded.'[45] The FDRE Constitution seems to allow the consideration of 'public convenience' as a ground for restricting the venue and

[42] FDRE Constitution, *supra* note 6, art 30(1).
[43] International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49) art. 21.
[44] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (hereinafter Siracusa Principles) Annex, UN Doc E/CN.4/1984/4 (1984) art vii para.33.
[45] Id., para.22.

route for conducting an assembly or a demonstration. In its essence, the ground resembles 'public order' stipulated under the ICCPR since its ultimate objective is to ensure the smooth functioning of society. Interpreting *public convenience* as such might also be logical since the FDRE Constitution looks up to international treaties like ICCPR for interpreting fundamental rights recognized by it.[46]

The other ground for limiting freedom of assembly in the Constitution i.e. 'protection of *democratic rights*', does not sound sensible considering the unusual classification of human rights enshrined in it as 'fundamental rights and freedoms' on the one hand and 'democratic rights' on the other hand, without providing the criteria for classifying them as such. Under the first group, rights like right to life, liberty, freedom of religion and the right to fair trial are included *inter alia*.[47] The second category (i.e. *democratic rights*') includes freedom of speech, association, assembly, right of women, right to vote, right of children etc...[48] A textual reading of the FDRE Constitution leads to the conclusion that, freedom of assembly is susceptible to limitation only where democratic rights listed above are threatened which does not make any sense. Hence, the broad stipulation of 'rights of others' envisaged in the ICCPR sounds more logical and inclusive.

However, the listing of legitimate grounds for restricting freedom of assembly by the Constitution is only the first step that prevents an arbitrary limitation of the right. A full-fledged protection requires suitability of the chosen means, necessity and proportionality. Yet, the FDRE Constitution does not go beyond qualifying limitations on freedom of assembly with a phrase 'appropriate regulations'.[49] No implementing legislation or decision of an Ethiopian court has elaborated what makes a regulation appropriate and the parameters for saying so. It is only through an extended constructive interpretation and reference to international human rights instruments ratified by Ethiopia that one may arguably contend that appropriateness refers to suitability, necessity and proportionality tests of acceptable limitation.

This author uses the word suitability in reference to the need to ensure that the means chosen by the legislature for regulating freedom of assembly must in one way or another contribute for attaining the legitimate aims.[50] If the means has no connection with the objective intended to be achieved, it would be unacceptable. The necessity requirement envisages the need to examine the

[46] FDRE Constitution, *supra* note 6, art. 13(1).
[47] Id., art. 15, 17, 20& 27.
[48] Id., art. 29-44.
[49] Id., art. 30.
[50] Dieter Grimm (2007), "Proportionality in Canadian and German Constitutional Jurisprudence", *University of Toronto Law Journal*, Vol.7 (2007) p. 390.

various alternatives available for addressing the concerns, based on which the legislature must select the one which entails the smallest impairment to persons exercising their right to freedom of assembly.[51] Assuming that, the legislature meets the *necessity* requirement, the final step is determining *proportionality* by weighing the respective gain or loss for the rights concerned.

This requires putting two things on the scale: the social importance of the purpose served by the limitation of the right in question i.e. freedom of assembly *vis-à-vis* the damage the right sustains because of the restriction.[52] If the balance between the two is right, then the government measure would be a sound limitation of the right. In contrast, if the cost to the right caused by the limitations significantly exceeds the social importance gained because of its limitation, then the government measure would be held unconstitutional because it fails to pass the key test of *proportionality* which is a criterion used in the balance.

3. Notification Requirement of Assemblies

The Peaceful Demonstration and Public Political Meetings, Proclamation predates Ethiopia's current Constitution. The Proclamation was initially designed to facilitate the exercise of political rights after their total demise during the *Derg* military regime. The preamble of the Proclamation provides that the objective of the law is to enable people 'start enjoying their democratic rights forthwith, until detailed laws are worked out and promulgated'.[53] Yet, the promise of the Proclamation is still unfulfilled (even long after the adoption of the Constitution), and there are several problems and controversies with regard to its contents and application.

Unlike most fundamental freedoms, the exercise of the right to freedom of assembly needs compliance with certain procedural requirements set by the legislature. [54] This is almost a universal reality and it is difficult to find a jurisdiction which does not attach a procedural pre-condition for its realization. The main procedural requirement that organizers have to comply with in many systems is that of 'giving notice' to or 'seeking authorization' from the authorities.[55] It is sometimes difficult to point out the real difference between 'notice' and 'permission', since the authorities regulating freedom of assembly could prohibit the undertaking of the assembly on the basis of facts stated in the notice. For instance, the African Commission on Human and Peoples Rights

[51] Id., p.389.
[52] Id., p. 340.
[53] Demonstration and Political Meeting Proclamation, *supra* note 7 Preamble.
[54] Salat , *supra* note 2, p.55.
[55] Id., pp. 58 & 72.

Working Group reports that despite the absence of a legal requirement of seeking permission for organizing an assembly in some systems, 'in practice the state often refuses to grant permits to assemblies critical of the government.'[56] Yet, the requirement of giving notice of 'intent' to conduct an assembly is regarded as sufficient and ideal measure, rather than imposing the duty of asking permission from the authorities to exercise the right. The prerequisite of permission will relegate the right to freedom of assembly to a privilege dependent on the goodwill of those regulating it.[57] Further, it is imperative to note that the prime purpose of notification must be facilitating the smooth undertaking of an assembly by making necessary arrangements in advance.[58]

As a matter of theory, Ethiopia follows the notification system for controlling assemblies, by virtue of the Demonstration and Public Political Meeting Proclamation.[59] The key provision in this regard is article 4 of the Proclamation which stipulates the procedure for submitting notice. Accordingly, it provides that 'any individual, group or organization that organizes a peaceful demonstration or public political meeting has the obligation to give written notice 48 hours before the intended peaceful demonstration or public political meeting is to take place'.[60] The timeframe for submitting notification provided by the Ethiopian law is reasonable considering the time authorities, organizers and police need to properly facilitate the undertaking of the assembly. In other jurisdictions, the duration of notification for assemblies ranges from 6 hours to 28 days.[61]

The Proclamation requires the notice to be presented to the administration of the municipality (or to local administrations in rural areas). Here, it is important to note various points related with the procedures of notification. *First*, both indoor and outdoor assemblies are subjected to the requirement of notice in Ethiopia. This is not the case in jurisdictions like Germany which do not require notification for indoor assemblies,[62] the justification being the non-occurrence of traffic and other inconveniences as a result of such gatherings. *Second*, Ethiopia's law demands notification regardless of the size of assembly or the number of participants. This deviates from the practice in many jurisdictions.

[56] African Commission on Human and Peoples Right (ACHPR), *Report of the Study Group on Freedom of Association & Assembly in Africa*, (2014), p. 61.
[57] 'Factsheet: Recommendations on Managing Assemblies Joint Report of Special Rapporteurs Maina Kiai and Christof Heyns to the Human Rights Council', March 2016 (A/HRC/31/66).
[58] OSCE/ODHIR *supra* note 1, s.1 para.4.1.
[59] Demonstration and Political meeting Proclamation, *supra* note 7.
[60] Id., art. 4(1).
[61] Jarman and Hamilton, *supra* note 23.
[62] Basic Law of the Federal Republic of Germany 2010, art 8.

For instance, the Armenian assembly law exempts small gatherings up to 100 participants from the requirement of notification.[63]

Likewise, the UN Special Rapporteur on Freedom of Assembly and experts of OSCE/ODIHR argue for the exemption of assemblies with insignificant number of participants from observing notification pre-condition.[64] Their argument centers on the very purpose of notification which is 'facilitate' the undertaking of an assembly by addressing possible concerns such as traffic and security issues in advance.[65] If the number of the assembled individuals is very few, it is unlikely for them to cause disruption to traffic or societal order. Hence, to require notice for such assemblies might defeat the underlying rationale of notification and it will be a disproportionate restriction of the right. Yet, what constitutes a small assembly is still controversial.

Aside from the features of notification highlighted in the preceding paragraphs, the Ethiopian law regulating assemblies also provides what a letter of notification should contain. Accordingly, notice submitted by organizers is required to state: the objective of the assembly, place of conducting it, routes it goes through, date, time, estimation of possible attendees and finally the kind of assistance they expect from the city administration in the course of undertaking the assembly.[66] The law does not specify the purpose of requiring these details even if one can presume that it is to make the necessary arrangements in advance. On this issue, the UN Special Rapporteur underscores the need to go beyond presuming the government's duty of cooperation in facilitating assemblies. Rather, a clear statement of this duty in a legislation (that regulates assembly) is necessary for the effective protection of the right.[67]

Hence, the explicit obligation imposed on the security personnel by the Ethiopian assembly law to ensure peace and security[68] might be considered as a step in the right direction, if it is implemented properly. Yet, the Ethiopian law is silent about the possibility of making modification to a notification of assembly that is submitted and the consequences that follow. On this matter, the stipulation of the Armenian assembly law can offer insights. If the organizers make changes that affect the essence or the notified assembly, Armenia's law

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[63] Republic of Armenia Law on Freedom of Assemblies 2011, art. 9(1) & 24.

[64] 'Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association' *, Maina Kiai,* A/HRC/20/27 (2012) par.28, & OSCE/ODIHR , *Venice Commission Guidelines on Freedom of Assembly*, (2nd ed Venice, 2010) para.115.

[65] Ibid.

[66] Demonstration and Political meeting Proclamation, *supra* note 7, art. 5(1).

[67] *Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association , Maina Kiai,* (hereinafter report of the Special Rapporteur) A/HRC/20/27 (2012) para.27.

[68] Demonstration and Political meeting Proclamation, *supra* note 7, art 6(1).

requires them to submit a new notice.[69] We can infer that the change made is major or substantial. In contrast, if the change is very minor and insubstantial, the authorities must tolerate the deviation and facilitate the assembly without demanding the re-submission of notice.

Once the notification is received, the Ethiopian assembly law gives 12 hours for the authorities to make a decision on it.[70] The inclusion of time limit for decision making is a positive thing since it helps to ensure timeliness of decision and accountability of authorities. The verdict of the administrative officials could either be to give the green light for the assembly to proceed as planned or to make a suggestion for the undertaking of 'the public demonstration or public political meeting to be held at some other time or place.'[71] The grounds for postponing the assembly to another venue or time must relate to concerns of safeguarding peace, security or preventing the disruption of the day to day activities of the public.[72]

These grounds seem to give authorities broader power and discretion for postponing assemblies compared to other jurisdictions like Kenya. Under Kenyan assembly law, the only ground that justifies the postponement or relocation of a planned assembly is the prior reservation of the place selected for the gathering by another assembly to be conducted at the same time.[73] Thus, Kenya's law does not allow the undertaking of two assemblies having different objectives at the same place and time. This seems true for Ethiopia as well, even if the law is silent on that issue. However, such practice of banning counter demonstrations is regarded by the UN Special Rapporteur as unjustified restriction on freedom of assembly.[74] The ideal solution is to find a means of conducting both assemblies without prejudicing each other.

4. Gaps and Practical Challenges in the Notification Regime for Assemblies

In the preceding paragraphs, an attempt has been made to provide a general outline of the Ethiopian notification regime through a comparative lens. The focus of this section is more on the gaps in the law and challenges of implementation as observed in different practical cases. The discretionary interpretation of the notification provision of the Ethiopian assembly law gives a

[69] Republic of Armenia Law on Freedom of Assemblies, *supra* note 63, art. 14(5).
[70] Demonstration and Political meeting Proclamation, *supra* note 7, art.6 (2).
[71] Ibid.
[72] Ibid.
[73] Public Order Act Chapter 56 of the Laws of Kenya. Rev. 2009, s. 5(12).
[74] 'Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association' , *Maina Kiai,* A/HRC/20/27 (2012) para. 30.

partial explanation for the absence of a single demonstration in the Ethiopian capital between 2005-2013.[75] It is also cited as an explanation for the failure of the majority of assemblies subsequent to 2013. One could only find a handful of assemblies conducted successfully since then.

4.1 Issues Related to Receipt of Notification, Decline and Silence

The problem begins with the refusal on the part of the administrative officials to receive the letter of intent to conduct assembly by the organizers. This happens often when the place, time or purpose of the assembly is not agreeable to the authorities for various reasons. A good example of such a case could be the demonstration organized by Semayawi Party (Blue party) in Addis Ababa, on September 7, 2013.[76] The press release of the party indicated that it approached the Addis Ababa City Administration Peaceful Demonstration and Meetings Notification Department on September 5, 2013 with a letter of notification to conduct a demonstration on the said date but the latter declined to receive the notification. The party also sent the same letter via Ethiopian Postal Service but, according to the statement made the party, the notification department of the municipality was still defiant to receive the letter.[77] This was later resolved after leaders of the party discussed the matter with the Office of the Mayor and got the explanation that it is impossible to conduct the assembly on the planned date since various public places in the city will be occupied by sale exhibition of small micro enterprises operating in the city; this forced the party to postpone the demonstration for another time.[78]

Evidently, the refusal of the authorities to receive the letter of notification is an arbitrary exercise of their power. If they have a problem with the undertaking of the assembly on the planned date and time, what they should do is accept the notification and give whatever decision they think is appropriate by taking into account the principle of proportionality. This problem is partly due to the gap in the implementing legislation as it fails to clearly order authorities to accept any notification that meets the formality requirement set by the law. Further, there is no mechanism of verifying whether the authorities have received notification of an assembly. This is often a cause for evidentiary controversy between the organizers of an assembly and the authorities in Ethiopia. To address this

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[75] Solomon Goshu, 'Peaceful Political Rallies: The Right Besieged by Hurdles', *The Reporter*, 31 January 2015 <http://allafrica.com/stories/201502020437.html> accessed on 31 March 31, 2016.

[76] 'Blue Party Demonstration Postponed to 22 September 2013' (Amharic), <http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/> accessed 31 March 2016.

[77] Ibid.

[78] Ibid.

problem, the experience of Kenya, Armenia and the recommendations of UN human rights bodies are relevant.

The Kenyan Public Order Act provides that 'the regulating officer shall keep a public register of all notices received.'[79] It also gives the public the right to examine or inspect the register of notifications in the opening hour of office.[80] Likewise, the Armenian assembly law besides demanding recording of the notice in a special register, also requires the authorities to immediately post a copy of the submitted notice in the 'administrative building' of the authority as well as on its website.[81] This practice is also regarded by the UN Special Rapporteur as a measure on the right track that ensures transparency and accountability. He further endorses the suggestion of the Venice Commission of Experts requiring the inclusion of a provision that forces authorities to immediately issue receipt of acceptance of notification.[82] Incorporation of such a provision in the Ethiopian legal regime that regulates assemblies would have helped in resolving some of the issues.

Another problem relates to the failure on the part of the Ethiopian authorities to communicate (to the organizers) their decision on the status of received notification within the prescribed period set by the law. In some cases, the organizers considered the silence of the municipality administration office as acceptance or recognition and have suffered from the consequences such as imprisonment and violent dispersal of the assembly. An example to this problem is the demonstration that was organized (for March 17, 2013) by the Blue party, Baleraey Wetatoch Mahiber (Visionary Youth Association) and Private Initiative Committee for the Defense of Ethiopian People's Dignity and Heritage.[83] The notice dated March 4, 2013 was addressed to the Addis Ababa City Administration Peaceful Demonstration and Meeting Notification Department. It states that the purpose of the demonstration is to oppose the construction of a museum and memorial park in Italy for Rodolfo Graziani who is regarded as a fascist war criminal by the organizers as he massacred thousands of Ethiopians during the 5 years of Italian occupation.[84]

The form of the assembly planned was a procession that starts at Yekatit 12 square where the statute of martyrs massacred by Graziani is located, and the

[79] Public Order Act, *supra* note 73, s 5(14).
[80] Ibid.
[81] Republic of Armenia Law on Freedom of Assemblies, *supra* note 63, art. 15.
[82] OSCE/ODIHR, 'Joint Opinion on the Draft Law on Peaceful Assemblies of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR', Opinion no. 525/2009 (22 June 2009) s37.
[83] Ethiopia arrests 43 anti-Graziani statue protesters in Addis Ababa' <http://www.awrambatimes.com/?p=13407> accessed 31 March 2016
[84] Ibid.

final destination was planned to be the Embassy of Italy in Addis Ababa. According to the organizers, the Municipality accepted the notification and kept silent. They took its silence as a tacit approval and went on to conduct the demonstration as planned. However, the Police dispersed the assembly as illegal for failing to get recognition from the Administration and it arrested 43 individuals who participated in the demonstration.[85] Such problems could have easily been resolved had the Ethiopian assembly law clearly provided the consequences of inability or unwillingness of the administrative officials to render and communicate their decisions within the timeframe set by the law like the one provided in the Armenian assembly law. In this regard, the Armenian law on assemblies states that failure to make a timely decision on notifications is 'considered as that the notification is acknowledged'.[86] Similarly, the UN Special Rapporteur and Venice Committee of Experts note that the principle that silence amounts to acceptance shall govern such situations and the law should allow demonstrators 'to proceed with the planned assembly in accordance with the terms notified and without restriction.'[87]

4.2. Treatment of Spontaneous Assemblies in Ethiopia

The other problematic issue in the Ethiopian legal regime governing notification of gatherings is that of 'spontaneous assemblies'. According to the Venice Committee of Experts, such assemblies refer to those 'organized in response to some occurrence, incident, other assembly, or speech, where the organizer (if there is one) is unable to meet the legal deadline for prior notification, or where there is no organizer at all.'[88] As their name suggests, these assemblies are accidental and not planned in advance. What usually induces their occurrence is a certain unforeseen event which is of interest to the public. Such incidents might induce the public to react immediately by going out to the streets without observing the notification requirement for normal assemblies. Various authorities including the UN Special Rapporteur on freedom of assembly recognize such kind of assemblies as exceptional in nature deserving a special treatment.[89] Thus, states are expected to devise (in their laws) a mechanism of allowing such assemblies without requiring the ordinary process of notifying assemblies which might take some time. Further, demanding spontaneous assemblies to go through similar notification procedure deprives their immediate nature and undermines their value.[90]

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[85] Ibid.
[86] Republic of Armenia Law on Freedom of Assemblies, *supra* note 65, art.20(3).
[87] Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, Opinion no. 596/2010 (22 December 2010) s.40
[88] OSCE/ODHIR , *supra* note 1, para. 126.
[89] Report of the Special Rapporteur, *supra* note 67, para. 29.
[90] Ibid.

Ethiopia's law (indicated in footnote 7 above) that regulates freedom of assembly does not leave a room for making any exception for spontaneous assemblies regarding notification requirement. The law treats spontaneous assemblies as any other form of assembly and does not provide a special treatment. This lacuna in the law has created a serious problem for exercising the right to freedom of assembly in Ethiopia as it deprives spontaneous assemblies from any protection.

Two cases of spontaneous assemblies which were dispersed by security personnel –for failing to give advance notice– illustrate this problem. The first spontaneous demonstration took place in Addis Ababa on November 15, 2013 in front of the Saudi Arabia Embassy. What triggered the demonstration was the killing of three Ethiopians by the Saudi police and the decision of the Saudi government to deport around 23,000 illegal workers of Ethiopian origin.[91] The release of a video showing 'a crowed dragging an Ethiopian from his house and beating him' created grievance in the public. Banners carried during the demonstration show the disappointment of the people on the Ethiopian government's careless handing of the problem and its failure to safeguard the interest of Ethiopian citizens working abroad.[92] The reaction of the police was to disperse the demonstrators and arrest some of the participants on the allegation that they conducted a demonstration without getting the approval of the city administration. In his response to the AFP broadcasting agency, the then spokesperson of the government Shimeles Kemal noted that the demonstration was terminated because 'it was an illegal demonstration, they had not [obtained] a permit from the appropriate office'.[93]

The second example of spontaneous assembly is the one that was dispersed by the Police. It was triggered by a video released by the ISIS which showed the beheading of 28 Ethiopian Christians in Libya.[94] In his statement, the then government spokesperson Redwan Hussein said that 'it was not clear if the victims were Ethiopians and the Ethiopian Embassy in Cairo was investigating

[91] 'Police crackdown on demonstrations against targeted attacks on Ethiopian migrant workers in Saudi Arabia' <http://www.aljazeera.com/news/africa/2013/11/arrests-at-anti-saudi-protest-ethiopia-201311151464025832.html> accessed: 31 March 2016.

[92] 'Ethiopian Police Crackdown on Anti-Saudi Protest'. <http://bigstory.ap.org/article/ethiopian-police-crackdown-anti-saudi-protest> accessed on 31March 2016.

[93] 'Police Crackdown on Demonstrations against Targeted Attacks on Ethiopian Migrant Workers in Saudi Arabia' <http://www.aljazeera.com/news/africa/2013/11/arrests-at-anti-saudi-protest-ethiopia-201311151464025832.html> accessed 31March 2016.

[94] 'Police Forcefully Disperse Protests Held by Ethiopians Against ISIS Killings' <http://addisstandard.com/police-forcefully-disperse-protests-held-by-ethiopians-against-isis-killings/> accessed 31 March 2016.

the matter', and this statement further added fuel to the fire.[95] Aggrieved with the reaction of the government on the incident, thousands went out to the streets on April 21, 2015 (without any organizer) by carrying banners with statements saying 'where is our government', 'justice for the dead', 'sovereignty is the safety of citizens everywhere in the world' and 'don't tell us they are not ours'.[96]

The city administration reacted by deploying members of Addis Ababa police and federal police forces, and stopped the protestors from heading to the headquarters of the African Union and National Palace.[97] Like the Saudi protest discussed above, no violence on the part of the protesters was reported. Such practice of dispersing spontaneous assemblies by administrative officials and police forces stands in direct contrast with the position of the UN Human Rights Committee.[98] This prompts another crucial issue regarding the fate of assemblies conducted without giving notice.

4.3. Fate of Assemblies without Notice

Ethiopian assembly does not clearly provide the measures taken against gatherings that are conducted without prior notification. The practice in Ethiopia shows that, any public demonstration or public political meeting which fails to comply with the requirement of notification is by definition illegal and forbidden. It usually ends up with dispersal and with filing of criminal charges against participants of such assembly.[99] The Criminal Code of Ethiopia also contains a provision that penalizes persons who take part in an assembly prohibited by law which includes gatherings undertaken in the absence of notification.[100] It also extends criminal liability to those who avail their land, property or hall to such assemblies.[101]

On the contrary, the UN Human Rights Committee has (in several cases before it) decided that mere failure of organizers to notify authorities does not give the latter an automatic power to disperse the assembly and arrest participants so long as the assembly is peaceful. For example, the case of *Igor Bazarov v Belarus*[102] involves the dispersal of a street procession conducted by the applicant and his subsequent liability for administrative offences. Igor, a citizen of Belarus, conducted a street procession on March 25, 2009 with two

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[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] *Igor Bazarov v Belarus*, Human Rights Committee(Communication No. 1934/2010) 29 august 2014.
[99] 'Ethiopia arrests 43 anti-Graziani statue protesters in Addis Ababa'<http://www.awrambatimes.com/?p=13407> accessed 31 march 2016
[100] The Criminal Code of Ethiopia 2004, art 482(1) a.
[101] Id., art 482(1) b.
[102] *Igor Bazarov v Belarus, supra* note 98.

other participants without getting permission from the appropriate organ of the city. Their march began at independence square and they were waving a 'white, red, white' flag which they think is 'symbol of revival for Belarus.'[103] After conducting the procession for 10 minutes, police stopped their march and took custody of Igor on the ground that he conducted the procession without getting authorization which is required by law. He was later found guilty of committing an administrative offence of undertaking a procession lacking permission and was fined 70, 000 Belarusian Rubles.[104] Aggrieved with the decision of Belarusian courts, the applicant approached the UN Human Rights Committee alleging the infringement of the right to freedom of assembly recognized by the ICCPR and Belarusian Constitution.

In its decision of 2014, the Committee found that Belarusian authorities have violated the right to freedom of assembly. The reasoning of the Committee underlined that the right to freedom of assembly is enshrined in the Constitution of Belarus and the state is also a party to the ICCPR which recognizes the right under article 21. The Committee noted that in restricting the right to freedom of assembly, Belarus must comply with the safeguards of necessity and proportionality incorporated in the Covenant. It particularly rejected the contention of Belarus that the measure has a legal backing since the law requires permission before conducting any procession.

The argument of the Committee was that Belarus 'has not attempted to explain why it was necessary –under domestic law and for one of the legitimate purposes set out in … the second sentence of article 21 of the Covenant– to obtain authorization prior to holding a peaceful street march in which only three persons intended to participate.'[105] For such restriction to be justified, the Committee found that the state must go beyond citing a law that demands authorization by showing how 'the movement of the author and his two acquaintances' holding a flag along the pavement down a pedestrian street during daytime would have violated the rights and freedoms of others or would have posed a practical 'threat to public safety or public order (ordre public)'.[106] This decision shows that the Committee demands states to strictly observe the requirement of *proportionality* whenever they restrict the right to freedom of assembly by law or its application. Hence, they must discharge their burden of establishing a link between the legitimate aims and the restrictions as well as the non-availability of other less prejudicial means for the right that s state seeks to limit.

[103] Id., para.2.8.
[104] Id., para 2.1.
[105] Id., para.7.5.
[106] Ibid.

A similar pronouncement was made by the Committee in the case, *Sergey Kovalenko v Belarus*.[107] On October 30, 2007 the applicant was joined by thirty other people who also lost their families during the Stalin era which they characterized as repressive. Their plan was to move around the various places in the town of Vitebesk where their relatives were killed or buried and pay tribute to them particularly 'to lay wreaths and flowers and to erect a cross.'[108] By these gestures, they also wanted to show their disapproval of any form of political suppression or the silencing of dissent.[109] This event was organized without seeking authorization from the city administration. Accordingly, after they finished their first commemoration in one of the places and boarding a bus to move to other places, the police arrested every participant on the allegation that they took part in a picket or stationary assembly which is not permitted by city officials. Subsequently, the organizer of the event Sergey was ordered by court to pay 620,000 Belarusian Rubles for his violation of the administrative law that requires seeking permission from authorities before conducting any form of assembly.[110] Being upset with the finding of the court, the applicant submitted a case to the UN Human Rights Committee claiming violation of the right to freedom of assembly enshrined in the ICCPR.

After a careful consideration of arguments of both parties, the Committee held in favour of the applicant and found Belarus responsible, *inter alia,* for violation of the right to freedom of assembly.[111] The Committee reiterated its reasoning in the *Igor Bazarov case* (discussed above) by indicating that no evidence is adduced by the state which shows how the commemoration event actually endangers 'national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.[112] The two decisions of the Committee (in the *Igor Bazarov* and *Sergey Kovalenko* cases) conform to the position held by the UN Special Rapporteur on the right to freedom of assembly as well as by the Venice Commission of Experts. The decisions in both cases require states to refrain from dispersing spontaneous assemblies or gatherings with negligible number of participants by merely invoking failure to comply with a notification requirement as it violates the principle of proportionality.[113] A similar ruling

[107] *Sergey Kovalenko v Belarus,* Human Rights Committee (Communication No. 1808/2008) 26 September 2013.
[108] Id, para.2.1.
[109] Ibid.
[110] Id., para.2.1
[111] Id., para.8.7.
[112] Ibid.
[113] 'Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association' , Maina Kiai, A/HRC/20/27 (2012) par.28, & OSCE/ODIHR , *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) para. 115.

was given by the African Commission in *Malawi African Association and Others v. Mauritania***.**[114]

The above decisions of the Committee have serious implications for Ethiopia as a state party to the ICCPR. This is because, the country has a bad reputation of dispersing gatherings conducted without compliance with the notification procedure and subjecting participants to criminal liability as noted in several parts of this article. The recent protest of a few Addis Ababa University students in front of the US Embassy[115] shows the level of intolerance of Ethiopian authorities towards assemblies conducted without notice irrespective of whether they pose security risk or not. This protest was held on March 8, 2016 by disregarding the notification requirement set by the Demonstration and Public Political Meeting Proclamation and the number of participants was 20 (twenty). As the video footage of the demonstration shows, the students were expressing their disapproval of the government's handling of the recent crisis in Oromia regional state in entirely peaceful manner.[116] They were even carrying a white flag to demonstrate their peaceful intention. Since their number was few, they did not block the road nor prevent the free flow of cars and people. Yet, the authorities immediately arrested the students and criminal charges were pressed against them.

The *firs*t count accused the students of violating Article 486(1) (a) of the FDRE Criminal Code which forbids assemblies conducted in violation of the law. Here, the contention of the prosecutor is that the students violated this article by failing to notify the city administration and for carrying out a demonstration in front of an Embassy in violation of the Demonstration and Public Political Meeting Proclamation.[117]

In the *second* count, the prosecutor alleged that the students are responsible for spreading false rumours against the government and inciting the public by carrying placards[118] such as "Schools are Knowledge Camps, not Military Camps", "Stop the Genocide Against the Oromo People", "The Government should take Responsibility for those Killed", "Stop the Killings and Evictions", "The Government should Withdraw its Military from Oromia Region", "The Ethiopian Defense Force is terrorizing the Oromo People", ''Stop giving Lands to Investors while Citizens are Starved", "The Government of America Should

[114] Malawi African Association and others v Mauritania, Comm. Nos 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), paras 108-11.
[115] *Public Prosecutor v Sorresa Demme et al,* Federal First Instance Court Menagesha Bench Reference no. GJBPPFNO 01716/08, 16 march 2016 (criminal charge).
[116] Ibid.
[117] Ibid.
[118] Ibid.

be aware of Ethiopia's Pseudo Democracy"[119] in violation of Article 486(1) (a) of the FDRE Criminal Code. The *third* charge incriminated the students of infringing article 487(b) of the FDRE Criminal Code which prohibits inciting 'others to disobey orders issued by a lawful authority or to disobey laws or regulations duly promulgated'.[120] The allegation of the prosecutor here is that with the intent of disobeying the law, students carried a placard which says "the Government of Ethiopia Should Amend the Anti Terrorism Law" and "Dissent is not Terrorism"[121].

The criminal proceeding against the students is undergoing during the writing up of this article. Yet, few remarks could be made on the rationality of the charges brought against them in light of their right to freedom of assembly and other related constitutional rights. From the perspective of the right to freedom of assembly recognized by the Constitution, none of the allegations made by the prosecution would hold water. With regard to the *first* charge of demonstrations without giving notice in a prohibited place, the issue that arises is whether the restriction provided by the Public Demonstration Proclamation is appropriate. Specifically, the issue would be whether the law is reasonable in requiring notification for assemblies of a few participants (i.e., 20 in the case at hand) where such events do not pose danger to public peace, order or free flow of traffic. The purpose of notification is to facilitate assemblies, and such requirement would be cumbersome to uphold considering their right to freedom of assembly. Blanket ban on demonstrations before embassies without further qualification is unduly burdensome to demonstrators especially where their messages target at the officials in the premises of the Embassy.

Regarding the *second* accusation against them which is inciting the public and spreading false rumours against the government, it also does not make much sense. Content based limitation on participants exercising their right to freedom of assembly is only allowed if it is proved that they have made an unequivocal call for war or hatred.[122] Apart from such cases, the right of demonstrators to criticize the actions or policies of the government is fully protected by their right to freedom of assembly and freedom of expression. The prime objective of these rights is to protect such views from unnecessary attack as long as they are expressed in a democratic and peaceful manner which seems to be the case. None of the messages included in the placards they carried even remotely call for violence or hatred. The sole claim of the prosecutor's charge is that what they are stating is false. For instance, the placard that regards Ethiopia's pledges

[119] Ibid.
[120] Federal Democratic Republic of Ethiopia, Criminal Code 2004.
[121] *Public Prosecutor v Sorresa Demme* , *supra* note 115.
[122] OSCE/ODHIR , *supra* note 1, para. 94.

to democracy as "Pseudo Democracy" is the expression of what the demonstrators genuinely believe to be the case based on their observations.

The government may believe that it is exercising a genuine democracy and it might consider the statements of the students as false. But is it fair to criminalize expression on a contestable issue such as the prevalence of democracy in Ethiopia solely because the statement is considered as false from the government's point of view? Is it not too cumbersome to demand citizens to keep quiet unless they are hundred percent sure that what they are saying is true from the government's standpoint? Would this ever be possible in constitutional democracy that upholds fundamental rights? I argue that this should not be the case because citizens must be allowed to say what they genuinely believe in without being required to prove its absolute veracity. A government may not agree with what every citizen says, but it should not criminalize citizens for saying so. Otherwise, recognizing freedom of assembly and expression become superfluous.

The *third* count of the prosecution accuses the students of inciting non-observance of the anti-terrorism law by openly calling the government for its amendment.[123] One does not see the link between how the request for amendment of the law could be equated with a call for its disobedience. A number of important questions might ensue. Is it fair to criminalize citizens just for demanding an amendment of a law on anti-terrorism? What is wrong with even asking for the amendment of the Constitution or its replacement with another one so long as it is done in a democratic and peaceful manner? Overall, the outright criminalization of assemblies conducted in the absence of notification without risk of public order or peace in Ethiopia is inconsistent with the interpretation of the UN Human Rights Committee regarding freedom of assembly as envisaged in the ICCPR. Accordingly, it is time for Ethiopia to revisit its laws and practices on freedom of assembly and ensure their conformity with the country's obligations under international human rights treaties such as the ICCPR.

5. 'Place, Time and Manner Restrictions' on Assemblies

The other cluster of limitations that adversely affects the exercise of the right to freedom of assembly is the one connected with place, time and manner. Two forms of restrictions are envisaged in the Proclamation concerning the venue of conducting assembly. The first is an outright or blanket restriction on undertaking demonstrations or political meetings within 100 meters from the places identified as prohibited.[124] A long list of such venues is provided in the

[123] Ibid.
[124] Demonstration and Political meeting Proclamation, *supra* note 7, art 7(1).

Proclamation which includes embassies, international organizations, hospitals, graveyards, churches, mosques, prayer houses, electric power houses, dams and 'unsuitable' market places on market days *inter alia.*[125] Such blanket venue restrictions are regarded improper by the UN Special Rapporeur on the right to freedom of assembly.[126] Further, no assembly could be conducted within 500 meter radius of detention centers, offices belonging to the military, or security personnel.[127] These place restrictions are very broad and one may need to go to the wilderness to conduct an assembly if these restrictions are to be applied strictly without any proportionality considerations.

The Proclamation also gives a wide range of power to municipalities to seek postponement of time or relocation of place by citing concerns of peace, security and ensuring the continuation of people's 'daily life' without any 'disruption'.[128] The manner in which the restriction is crafted is susceptible to wide interpretations especially in the Amharic version of the Proclamation. It states that the municipalities may recommend that it is preferable to undertake the assembly another time or place by stating their justifications.[129] Here, it is important to bear in mind the distinction between a decision and a recommendation, the latter being non-binding. According to this interpretation organizers could disregard the suggestion of the administration as it lacks binding force.

On the other hand, the provision which allows a recommendation in the beginning, states decision in the end, by stating that the municipalities cannot do ban the conducting of an assembly at any time or place.[130] A logical interpretation of the second part of the provision leads to the conclusion that, the city administration is at liberty to decide on postponement of time or changing of venue as often as it wants save for total prohibition of an assembly. The second line of interpretation seems to be the one agreeable to the municipalities of Ethiopia. Because, what they frequently do is ask organizers to relocate place or postpone date of the assembly upon receipt of notification by raising several concerns.[131] If the decision is not accepted by the organizers they will refuse to endorse submitted notification which makes the planned assembly illegal. The following examples demonstrate this problem.

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[125] Ibid.
[126] Report of the Special Rapporteur, *supra* note 67, para. 39.
[127] Demonstration and Political meeting Proclamation, *supra* note 7, art. 7(2).
[128] Id., art. 6(1).
[129] Ibid. (Amharic version of the law).
[130] Ibid.
[131] Daniel Berhane, 'Semayawi's Foiled Rally: A Reminder of Ethiopia's Deeper Problems', <http://hornaffairs.com/en/2014/12/16/ethiopia-blue-party-democratic-deficit/> accessed on April 1, 2016.

An open sky demonstration was organized by Semayawi Party (The Blue Party) together with other opposition parties on November 25, 2014.[132] The organizers submitted their notification to Addis Ababa City Administration. However, it declined to allow the assembly by alleging 'security force shortage as there are other scheduled events.'[133] It further advised the organizers to conduct an indoor assembly as an alternative. The organizers were not convinced with the justifications provided by the authorities after the expiry of the 12 hour period set by the law and proceeded with the assembly as planned. Then, the city administration quickly broke the gathering by deploying police force immediately. It also characterized the event as an 'anti-constitutional activity'.[134]

The coalition of parties submitted another notification to conduct a 24 hour demonstration at *Meskel Square* set to begin on December 8, 2014 and to finish on December 9, 2014 mid day.[135] What makes this demonstration interesting was the day selected for its undertaking, i.e. December 8 which coincides with Nations and Nationalities day celebrated nationally. Some contend that the organizers chose this date on purpose to irritate the current government that celebrates this day, yet others say it is accidental.[136] Leaving this aside, the city administration rejected to approve the notification as it did in the past. Its justification this time was 'the increased traffic [in the square] due to ongoing construction activities.'[137] This was followed by a statement by the government on national TV that warned the organizers to refrain from conducting the assembly as planned. Nonetheless, the coalition of parties defied the decision of the city administration and proceeded with the gathering until the police detained more than 75 participants including the leaders of different opposition parties.[138] They were later accused of 'outrage against the Constitution' 'rioting' and 'inciting terror and chaos.'[139]

Moreover, the recent controversy between the Ethiopian Federal Democratic Unity Forum (MEDREK) which is a consortium of several opposition parties and the Addis Ababa City Administration further illustrate the magnitude of the problem. What caused the dispute was the refusal of the city administration to approve a notification submitted by the party for conducting demonstration on

[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.

three separate occasions.[140] The party first notified the authorities of its intent to organize a peaceful procession on Sunday December 27, 2015. It also indicated the route that starts at a place called *Afencho Ber* passing through *Ras Mekonnen* Bridge, Churchill road and ending at *tiglachen* statute or Ethio-Cuba Friendship Park. The purpose of the march was to condemn the killing of protestors in the Oromia regional state and pay tribute for the dead.[141] As noted time and again, the city administration refused to acknowledge the undertaking of the procession. Its justification for cancelling the procession was the presence of several higher learning and government institutions in the route chosen for the march, traffic congestion and the current situation of the country.[142] These grounds were not convincing for the leaders of the party and they characterized them as 'irrelevant and petty.'[143] Nonetheless, the administration stated that it will give approval to a demonstration that will be organized in another place 'with no traffic congestion.'[144]

Accordingly, MEDREK presented another letter of notification to the city administration to conduct a procession on January 17, 2016. This time they chose another place as per the instruction of the administration but the objective of the march was the same as the one rejected earlier. The planned procession was set to start from Ginfile River and end at a place usually called Sholla Yeka Epiphany celebration place.[145] Yet again, the city administration rejected the undertaking of the procession as the time and place chosen by the organizer is not agreeable to it because of the upcoming Epiphany holiday will be celebrated at the place chosen for demonstration. It further said that several international meetings including that of the African Union would be held in the same time and the timing of the procession is not acceptable.[146] After hearing the response of the administration, the organizers noted that such decisions could only be

[140] Neamin Ashenafi, 'Cancellation of Planned Demonstration annoys Medrek' < http://www.thereporterethiopia.com/content/cancellation-planned-demonstration-annoys-medrek> accessed 1 April 2016

[141] Ibid.

[142] 'Addis Ababa City Administration Turns Down MEDREK's Request for Demonstration Permit' <http://addisababaonline.com/addis-ababa-city-administration-turns-down-medreks-request-for-demonstrationpermit/?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=@aababaonline> accessed 1 April 2016

[143] Neamin Ashenafi, *supra* note 140.

[144] 'Addis Ababa City Administration Turns Down MEDREK's Request for Demonstration Permit' <http://addisababaonline.com/addis-ababa-city-administration-turns-down-medreks-request-for-demonstrationpermit/?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=@aababaonline> accessed on 1 April 2016.

[145] VoA Radio Amharic News 19 February 2016.

[146] Neamin Ashenafi , *supra* note 140.

interpreted as absence of good faith on the part of the authorities and their unwillingness to allow the exercise of the constitutional right to freedom of assembly.

They particularly underscored the fact that the day chosen for procession in both cases was Sunday where there is no traffic congestion and the public institutions and schools are closed on that day.[147] Concerning the Epiphany holiday, they said it was going to be celebrated three days after the planned demonstration and it is difficult to imagine how it could be a sufficient reason for banning the procession. The same is true for the said African Union meeting as it was due to be held fifteen days after the planned date of procession.[148]

Despite successive rejections, MEDREK submitted another notification to conduct a peaceful gathering at *Meskel square* on Sunday February 14, 2016. According to the organizers, the administration kept quiet this time but they received a threat from the police informally which made them to cancel the gathering. They further noted their frustration with the decision of the administration saying MEDREK's existence as a political party would be meaningless without freedom of assembly. The leaders of the party particularly said: 'if we are prevented from all this, then what instrument is left for us to remain politically active and visible as a political organization?'[149]

The problems discussed in the preceding paragraphs raise several issues, the first being whether the authorities should have unlimited power to postpone time or change the venue for a planned assembly. To address this issue, it is important to bear in mind that one component of the right to freedom of assembly is the entitlement of organizers to choose the place and time they think is appropriate for achieving their purpose unless there is an overriding concern. A corollary of such entitlement is that authorities cannot arbitrarily make time and place restrictions as they wish by mentioning insignificant concerns.

On this issue, the UN Special Rapporteur and Venice Commission of Experts underscore that time and place restriction should take into account the principle of proportionality which requires legitimate aim, suitability, necessity and weighing the cost as well as the benefits of restriction.[150] As such, a decision to postpone the assembly to another time or place must be made after due consideration of several factors, i.e. only when it is not possible to address the concern by using another measure which is less restrictive. Further, they noted

[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] 'Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association' , Maina Kiai, A/HRC/20/27 (2012) par.40, & OSCE/ODIHR , *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) para.101

that organizers are not obliged to comply with the suggestion of the authorities regarding alternative place and time for conducting the assembly if it undermines the 'essence' of the gathering.[151]

A good example in this regard could be the suggestion of the Addis Ababa City Administration to *Semayawi* Party to conduct an indoor meeting in a hall instead of undertaking a demonstration in *Meskel* Square. Such alternatives obviously erode the essence of the gathering since the purpose and effect of an open sky demonstration and a meeting in a closed hall cannot be identical. This is because freedom of assembly includes a right of undertaking a demonstration within 'sight and sound' of its target audience.[152] Hence, whenever the administration seeks to apply time and place restriction –including postponement or relocation– it must go through every step in the scrutiny of proportionality to ensure the legitimacy of the measure.

The same position is reflected in the jurisprudence of the UN Human Rights Committee. In *Denis Turchenyak v Belarus*,[153] the applicants sought the permission of Brest City Administration for conducting a picket of 10 people for three days from 1 pm to 3 pm in an area reserved for pedestrians. The city administration rejected their application by citing a bylaw which designates 'Lokomotive Stadium' as the only place of undertaking a picket.[154] Courts also affirmed the decision of the authorities as appropriate. This forced the applicants to approach the UN Human Rights Committee alleging the violation of their right to freedom of assembly.

Their main contention was, the alternative place available for them is an 'isolated location in a stadium that is surrounded by a concrete wall' which detaches them from their target audience making their whole activity futile.[155] The Committee endorsed their argument by reasoning that the place restriction of the authorities on the applicants is capricious and disproportionate since it was imposed without showing 'how a picket held in the said location would necessarily jeopardize national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.' [156]

This would take us to another related question whether there should be a hierarchy among different uses of public spaces like streets, parks or squares. The other question is whether the utilization of public places for conducting

[151] Ibid.
[152] Ibid.
[153] *Denis Turchenyak v Belarus,* Human Rights Committee(Communication No. 1948/2010) 10 September 2013.
[154] Id., para. 2.4.
[155] Id,, para 3.1.
[156] Id., para. 7.5.

gatherings is of secondary importance compared to other uses such as traffic, trade fairs or celebration of religious festivals. Addressing these issues is very crucial since the practice in Ethiopia seems to favour the use of public places for other purposes than for conducting demonstration and public political meetings. As noted in different parts of this article, the Addis Ababa City Administration has repeatedly cancelled various notifications for conducting demonstrations by raising concerns for the smooth flow of traffic or the occupation of these places by other activities such as trade exhibition of micro-enterprises and giving an outright priority for the latter.[157]

Such practice is contrary to the recommendation of the UN Special Rapporteur on the right to freedom of assembly and Venice Commission of Experts. Both authorities underscore the need to give equal value for the utilization of public spaces for assemblies by stating that 'the free flow of traffic should not automatically take precedence over freedom of peaceful assembly.'[158] The Venice Commission of Experts further notes that 'assemblies are as much a legitimate use of public space as commercial activity and the movement of vehicular and pedestrian traffic.'[159] As such, administrative officials must not consider assemblies as having a secondary importance which could be easily forfeited whenever a competing use arises. Such approach violates the proportionality that must be observed whenever freedom of assembly is restricted. Hence, the municipality is duty bound to come up with a mechanism to reconcile various uses instead of invariably choosing to sacrifice the undertaking of assemblies for the sake of other uses. For instance, concerns of traffic flow could easily be addressed by 'rerouting pedestrian and vehicular traffic in a certain area.'[160]

It is also important to bear in mind that, any restriction imposed on freedom of assembly should be in line with ideals of democracy as enshrined in the FDRE Constitution and ICCPR.[161] The hallmark of a democratic society is its tolerance of minor inconveniences and its ability to accommodate various legitimate interests without imposing unnecessary burden on some for the sake of others. Authorities regulating freedom of assembly need to appreciate that 'in

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[157] 'Blue Party Demonstration Postponed to 22 September 2013' (Amharic), <http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/> accessed on March 31, 2016.

[158] 'Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association' , Maina Kiai, A/HRC/20/27 (2012) par.41, & OSCE/ODIHR , *Venice Commission Guidelines on Freedom of Assembly*, (2nd ed Venice, 2010) para.3.2 & 20.

[159] Ibid.

[160] Ibid.

[161] Constitution of Kenya, 2010, art. 37; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) art. 21

a democratic society, the urban space is not only an area for circulation, but also for participation.'[162] This shows that the provision of the Ethiopian assembly law that gives municipalities the power to restrict assemblies as they wish on account of preventing 'disruption of ordinary life of the people'[163] must be qualified as it is inherently disproportionate. This is because it is impossible to conduct gathering free from any inconvenience to the public in some way. The consideration must rather be whether such nuisance is bearable in a democratic society founded on respect for fundamental freedoms. Thus, unless the participants of the assembly resort to violence 'it is important for public authorities to show a certain degree of tolerance towards peaceful gatherings.'[164]

This would take us to another related issue regarding the *manner restrictions* on freedom of assembly (i.e. restrictions related to the manner of participants in the assembly). As noted earlier, peacefulness constitutes a core element of the right to freedom of assembly that bestows the right a protected status. So it is only logical if authorities take measure against assemblies that are imminent threat to peace and security. It is also acceptable if the law bans assemblies and gatherings that incite racial hatred or discrimination which undermines the right of others enshrined in Ethiopian assembly law.[165]

Yet, restrictions related to the manner of participants (i.e. *manner restrictions*) imposed by administrative officials need to be subjected to proportionality test to avoid unnecessary limitations. Contrary to this principle, some municipalities in Ethiopia seek organizers to secure the peacefulness of assembly in advance as a pre-condition for allowing the gathering to proceed.[166] Such restriction is too cumbersome on organizers. According to the UN Special Rapporteur on freedom of assembly, what organizers need to demonstrate is their intention to conduct the assembly in a peaceful manner.[167] Hence, asking them to guarantee the peacefulness in advance does not seem appropriate because it is the state that has the primary duty as well as power to do so. If any duty is to be imposed on organizers it should be that of assisting state security officers in ensuring the smooth running of the assembly.

The state's positive obligation of facilitating assemblies to ensure its peaceful completion is particularly relevant for Ethiopia. This is because; most

[162] Report of the Special Rapporteur, *supra* note 67, para. 41.
[163] Demonstration and Political Meeting Proclamation, *supra* note 7, art 6(1)
[164] *Balçik and Others v. Turkey*, ECHR (Application No. 25/02) 29 November 2007 para. 52.
[165] Demonstration and Political Meeting Proclamation, *supra* note 7, art. 8(1).
[166] 'Blue Party Demonstration Postponed to 22 September 2013' (Amharic), <http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/> accessed 31 March 2016.
[167] Report of the Special Rapporteur , supra note 67, para.25-26.

demonstrations are dispersed by the police citing incidence of violence.[168] Often, few individuals participating in a demonstration will start throwing stones or provoke the crowd towards violent action. It is difficult to know whether these persons are sent by the state itself or not. The usual approach of security personnel is to disperse the assembly immediately irrespective of the magnitude of violence.[169] Such dispersal orders violate the principle of proportionality. As recommended by the UN Special Rapporteur and Venice Commission of Experts, security personnel should react by singling out provocateurs or those who disturb instead of dispersing the whole assembly.[170] Such measures will help peaceful participants of the assembly to proceed with their demonstration until the very end.

The Proclamation regulating assemblies in Ethiopia says nothing about the type of weapon that should be utilized by security personnel. However, 'the only circumstance warranting the use of firearms, including during demonstrations, is the imminent threat of death or serious injury.'[171] Hence, security forces should not start firing whenever they see some degree of violence in an undergoing protest. They are rather expected to show more tolerance towards the demonstrators by considering the importance of the right to freedom of assembly and other fundamental rights. As such, what they should do primarily is facilitate the peacefulness of the assembly by picking out those who are utilizing violent means and by using the least harmful but effective force possible.[172] This would make the measure legitimate, suitable, less intrusive and proportional. However, if life or body is subjected to serious danger, that is about to happen, the use of more force on by the police would be tolerated so long as it meets all the tests of proportionality.

[168] Aaron Maasho 'Ethiopian Police Tear-Gas Crowds Protesting Against Libya Killings' <http://www.reuters.com/article/2015/04/22/us-mideast-crisis-islamicstate-ethiopia-idUSKBN0ND0QW20150422><http://www.reuters.com/video/2015/04/22/ethiopian-police-tear-gas-crowds-protest?videoId=363951067&mod=related&channelName=worldNews> accessed on April 1, 2016.
[169] Ibid.
[170] Report of the Special Rapporteur, *supra* note 67, para. 33.
[171] Id, para. 35.
[172] Ibid.

6. Public Peace, Public Safety and Public Order Restrictions

The grounds of public peace, safety and order are considered legitimate for limiting the right to freedom of assembly in many jurisdictions including Ethiopia. However, the application of these grounds needs to be scrutinized properly to prevent their unjustified use in restricting peaceful gatherings. Ethiopian courts lag behind Kenyan courts in this regard. Kenyan courts are becoming active in discharging their constitutional duty 'to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights'[173] including the right to freedom of assembly. The following two cases pertaining to freedom of assembly demonstrate how Kenyan courts are utilizing the proportionality test incorporated in the Constitution for reviewing legislative or the executive restrictions imposed on an assembly.

In *Eugene Wamalwa v. Minister for State for Internal Security*,[174] the applicant Mr. Walmalwa was an elected member of the Kenyan national assembly from the Sabouti constituency who was also interested in running for presidency in the 2012 presidential election. He chose 'Kamukinji Grounds' as a place to officially begin his election campaign.[175] Subsequently, as per the requirement of the Kenyan Public Order Act, he submitted a notice of intent of organizing such event at 'Kamukunji Grounds' on January 29, 2011 from 10 am to 6 pm.[176] He further sought the cooperation of the security personnel to ensure the peaceful undertaking of the political meeting. In the meantime, the applicant continued to make other necessary arrangements such as advertisement and preparation of posters by allocating around 1 Million Kenyan Shillings.

The response of the authorities came fifteen days after the submission of the notice and four days before the undertaking of the planned event. Their decision was to ban the planned political meeting by expressing their fear that "members of an unlawful group known as 'the Mungiki' may attend the meeting and disrupt public order in Nairobi".[177] They further noted that allowing the political meeting to proceed will also endanger 'the rights and fundamental freedoms of others'.[178] Hence, the planned gathering was cancelled.

Upset by the verdict of the police, the applicant approached the High Court in Nairobi alleging the violation of his right to freedom of assembly enshrined under article 37 of the Kenyan Constitution. Before it proceeded to resolving

[173] Constitution of Kenya 2010, art. 23(1).
[174] *Eugene Wamalwa v Minster for State for Internal Security & Another* [2011] eKLR.
[175] Ibid.
[176] Ibid.
[177] Ibid.
[178] Ibid.

the dispute, the court underscored that the right to freedom of assembly could not be restricted in the absence of proportionality considerations laid down in article 24 of the Kenyan supreme law.[179] More importantly, the court held that the 'state should not be allowed to suppress the freedom of assembly without sufficient and genuine reasons.'[180] It further suggested that if people are denied their right to assemble peacefully and express their view, they might be pushed to resort to other violent means.[181]

It held that the reason provided by the state for cancelling the gathering was not convincing and sufficient. This is because the alleged threat is something which is within the capacity of the state to be averted. The court further stated that the cancellation of the assembly on ground of security 'is tantamount to admitting that the State is incapable of dealing with members of outlawed groups or sects, which is not the case.'[182] From this decision, one can see that the court made an exalting scrutiny to determine whether or not the ground mentioned by the authorities for restricting freedom of assembly is proportional. It particularly shows the failure of the state to meet the necessity element since the security issue could be addressed by less restrictive means than entirely cancelling the assembly thereby causing significant impairment to the right.

In *Randu Nzai Ruwa & two Others v. Internal Security Minister,*[183] the applicants were members of Mombasa Republican Council which was declared by the Kenyan government as a criminal organization in accordance with the law regulating organized crime.[184] The justification provided by the government for taking the measure was that, the council is not registered as an association and it propagates a secessionist agenda contrary to the Kenyan Constitution which proclaims Kenya as 'one indivisible sovereign state.'[185] The applicants challenged the decision of the Kenyan government –to dissolve the association– as incompatible with their right to freedom of association and assembly recognized under the Kenyan Constitution.

Before giving its verdict, the court noted that the rights to freedom of association and assembly are indispensable tools for exercising all political rights.[186] Then, the court went on to determine whether these rights are violated. The court noted that outlawing the association clearly infringes the right to

[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] *Randu Nzai Ruwa & 2 others v Internal Security Minister & another* [2012] eKLR
[184] Ibid.
[185] Constitution of Kenya, *supra* note 168, preamble.
[186] *Randu Nzai Ruwa & 2 others v Internal Security, supra* note 183.

freedom of assembly and association.[187] However, since these rights are not absolute, the court went further to assess whether the infringement was justified and reasonable. To arrive at its conclusion, the court referred to the limitation clause of the Constitution which states that any restriction must be 'reasonable and justifiable in an open and democratic society'.[188] It further underscored the fact that 'democracy is meaningless without tolerance'.[189] In effect, the court expressed the importance of having tolerance towards hearing different viewpoints including those propagating secession, no matter how much the majority disagrees with them.

The court stated that advocating a secessionist agenda is not in itself a threat to public security or peace so long as the proponents want to achieve their end through peaceful and democratic means.[190] Since secession is not entertained under Kenya's current constitutional framework, executing such idea needs constitutional amendment which has to follow the necessary procedure.[191] Yet, promoting such idea alone is not a sufficient reason to deny recognition to the association. The court found that the measure taken by the Kenyan government violates the principle of proportionality since it chose the most restrictive method of dealing with the problem which is a total ban.[192]

Instead of such measures, the court suggested for controlling the activities of the organization through appropriate registration or imposition of criminal liability on members of the association who engage in violence, thereby pursuing a less restrictive means of preventing the feared risk to national security.[193] This decision is very instructive for countries like Ethiopia which take serious measures against political organizations have different positions on matters stipulated in the FDRE Constitution. As long as individuals or association utilize peaceful means and abide by rules of democracy, they should be allowed to assemble and express ideas even if the views may not be favoured by the current constitutional framework. The public can then be left free to decide whether or not these ideas are acceptable and beneficial without unnecessary involvement of the government.

[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid.

7. Decision Making Procedure and Judicial/Administrative Review

7.1 Decision Making Procedure

Most of the problems associated with the notification of assemblies in Ethiopia and the restrictions related to place, time and manner could have easily been resolved had the existing implementing law on freedom of assembly provided for a clear, transparent and inclusive procedure of decision making. The Proclamation governing Peaceful Demonstration and Public Political Meetings rather makes the municipalities or local authorities sole decision makers in the process without the need to involve organizers.[194] The organizers are not allowed to have a say in the decision making process pertaining to assemblies or restrictions imposed on them as of right. What the law entitles them to is to merely get reasoned decision within the time prescribed by law.[195] This would make the decision unfair from a procedural point of view since it is made without adequate hearing.

Such practices and procedures are regarded as inappropriate by the Venice Committee of Experts who underscore the importance of ensuring 'that the decision-making and review process is fair and transparent.'[196] They contend that the right to freedom of assembly bestows upon the organizers 'full rights to participate in any hearing that takes place', and that such hearing is required if 'limitations or a prohibition are being proposed'.[197] Hence, any decision rendered without involving the organizers of the gathering violates the right to freedom of assembly.

The Committee of Experts has also given an illustration of what constitutes *adequate participation* in decisions that have a limiting implication for assemblies. These include the right of organizers to be represented by a lawyer in the decision making process and to adduce any evidence that support their claim be it an oral testimony or documentary evidence.[198] These entitlements are very crucial in the decision making proceedings applicable to assemblies since they ensure the fairness of the process and enhance the possibility of making the right decision. Hence, Ethiopia should consider incorporating these procedures in its law that regulates assemblies.

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[194] Demonstration and Political Meeting Proclamation, *supra* note 7, art. 6(2).
[195] Ibid.
[196] OSCE/ODHIR, Opinion on the Draft Law on Meetings, Rallies and Manifestations of Bulgaria, Opinion no. 532 / 2009 (5 June 2009), s.39.
[197] OSCE/ODHIR, Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, Opinion no. 596/2010 (22 December 2010) ss.56-57.
[198] Ibid.

7.2 Judicial or Administrative Review

Another big lacuna in the Ethiopian law of assemblies is the absence of any administrative or judicial mechanism that reviews the decision of authorities imposing limitations on peaceful demonstrations or political meetings. As far as the Proclamation is concerned, the decision of the municipalities/local administration on accepted notifications or related limitations thereof is final. This is very dangerous because it gives wide discretionary power to authorities to restrict freedom of assembly for whatever reason they think is appropriate since there is no mechanism to hold them accountable. What is striking here is that, despite numerous problems and ineffectiveness of notifications for holding assemblies in Ethiopia, no single application for the review of such decisions has been submitted to courts. What the organizers have done in this respect so far is issuance of statements threatening authorities that they will challenge the decisions in a court of law without actually doing so.[199] They have also made a few attempts to seek review of such decisions by higher officials of the city administration in an informal manner.[200]

There are other complex issues concerning the role of courts in the interpretation of constitutional rights in Ethiopia including the right to freedom of assembly. On the one hand, the Constitution obliges courts at federal and state levels 'to respect and enforce' fundamental rights and freedoms enshrined in the Constitution.[201] On the other hand, the Constitution reserves the power of interpreting the 'constitutional disputes' to the House of Federation which represents the Nation and Nationalities of Ethiopia.[202] This stipulation has been misconceived by members of the judiciary as precluding courts from entertaining any claim that is principally based on the Constitution.[203] Hence, judges subscribing to this view have opted to send various cases to the Council of Constitutional Inquiry merely because the Constitution is invoked as the primary legal basis.[204]

Such practice is strongly criticized by some scholars with whom the author agrees. For instance, Takele argues that it is a 'literal' and extended interpretation of the term 'constitutional dispute' that led to the absurd scenario

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[199] Blue party Demonstration Postponed to 22 September 2013' (Amharic), <http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/> accessed 31March 2016

[200] Ibid.

[201] FDRE Constitution, *supra* note 6, art. 13(1).

[202] Ibid, art. 83.

[203] Takele Soboka, 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory,(2011) 19 *African Journal of International and Comparative Law,* vol.1 (2011) pp.107-110.

[204] Ibid.

in which courts have little say in entertaining cases of constitutional importance.[205] Accordingly, he argues for a restrictive understanding of 'constitutional disputes' which fall under the jurisdiction of the House of Federation.[206] Such a dispute arises only when the judge on whose bench a constitutional case appears is faced with two or more constitutionally sound interpretations of a certain constitutional clause or article, during which he/she must refer the case to the House of Federation for decision.[207] As Takele duly notes, such construction ensures harmony among different provisions and gives effect for all.

Not every dispute or controversy raised by the parties over the meaning of a constitutional provision or clause in concrete cases will automatically deprive the court its mandate to entertain the case. If the judges could easily resolve the issues by undertaking a coherent scrutiny of the Constitution, then there is no constitutional controversy and the case ends there. The remedy for the parties will be appeal. It is to be noted that, a constitutional case involves 'constitutional dispute' only when –after due consideration of several issues, the court is of the opinion that there are more than one equally legitimate interpretations of the contested constitutional provision which are in line with its purpose. Such cases involve constitutional controversy and thus fall under the realm of the House of Federation.[208]

This interpretation is in line with the duty of the court (stipulated under the Constitution) to ensure the observance and enforcement of human rights recognized by it including the right to freedom of assembly. It would also make the provision of the Constitution –that provides all people 'the right to bring justiciable matters to court of law'– meaningful.[209] Hence, decisions restricting freedom of assembly are justiciable matters that could be resolved by courts by examining national and international laws including the Constitution. Furthermore, the duty of the judiciary to enforce human rights recognized by the Constitution should include its obligation to explicate the content of the right to freedom of assembly by referring to treaties ratified by Ethiopia. Such duty should also be extended to determining the appropriateness of restrictions imposed on the right to freedom of assembly (by authorities in Ethiopia) in light of constitutional and international standards. In the absence of such authority, courts cannot legitimately claim to be guardians of fundamental rights enshrined in the Constitution.

[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] FDRE Constitution, *supra* note 6, art. 37

The proclamation establishing federal courts in Ethiopia (i.e. Federal Courts Proclamation No. 25/1996) recognizes the power of courts to enforce fundamental rights incorporated in the Constitution since it gives them material jurisdiction to entertain any case 'arising from the Constitution or federal law'.[210] Hence, a person claiming the violation of his right to freedom of assembly by arbitrary decision of municipalities could rightly approach courts as his claim is founded on the Constitution. They also have a duty to hear and decide cases. The phrase 'case arising from the federal law' may evoke arguments because the current legal regime applicable for regulation of assemblies was adopted during the transitional period and before the adoption of the present Constitution and the federal structure. However, considering its application at the national level to date, one can regard it as federal law and say that federal courts or regional courts by way of delegation have the right to entertain cases pertaining to the right to freedom of assembly.

The next question would be which kind of courts i.e. administrative or ordinary courts should resolve assembly related cases. On this issue, the practice of other countries shows that some have chosen the former and others the latter as mentioned by the study of the UN Special Rapporteur and Venice Committee experts.[211] What is important for both bodies is having an opportunity to 'appeal before an independent and impartial court, which should take a decision promptly'.[212] It is also important to clearly state this right in the law regulating freedom of assembly. Hence, Ethiopia should fill the lacuna in its assembly law by clearly incorporating the right to appeal of organizers of an assembly against any decision they think is an arbitrary restriction of the right to freedom of assembly. The nature of the remedy could be an injunction order or a monetary compensation if civil damage is sustained. Besides, national human rights institutions such as the Ethiopian Human Rights Commission and the Ethiopian Institution of Ombudsman should provide an additional oversight over discretionary administrative decisions pertaining to the right to freedom of assembly since they have the constitutional duty to ensure protection to the right to freedom of assembly.

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[210] Federal Courts Proclamation No. 25/1996 2nd year No. 13 Federal Negarit Gazzeta Addis Ababa - 15th February, 1996, art 3(1).

[211] 'Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association' , Maina Kiai, A/HRC/20/27 (2012) para.42 & OSCE/ODIHR , *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010), para.66.

[212] Ibid.

8. The Role of Political Will in Safeguarding the Right to Freedom of Assembly

The preceding sections have shown the gaps in the legal landscape governing the right to freedom of assembly in Ethiopia, problems associated with its implementation and best practices in other jurisdictions. The discussion on these issues serves as a basis for the question as to how we can change this situation by addressing the problems. A very important factor in this regard is political will towards promoting good governance, ensuring rule of law and strengthening democratic institutions. This is very critical because the challenges discussed in the preceding sections are not only attributable to the lacunae in the Constitution and the legislation regulating freedom of assembly. Even the best constitutional and statutory protection afforded to the right to freedom of assembly might not guarantee adequate realization of the right on the ground. In other words, constitutional and legislative gaps have certain contributions but everything cannot be attributed to them. Thus, we need to inquire further and ask other fundamental questions concerning factors that could hinder legislative reform and its implementation.

These questions may include the reason/s for (a) the failure of the government/legislature to enact a law which better safeguards the right to freedom of assembly; (b) unfettered arbitrary power of institutions regulating freedom of assembly without accountability; (c) gross failure of courts (whose independence is formally guaranteed by the Constitution) in discharging their constitutional duty of defending the right to freedom of assembly when it is restricted; (d) the indifference of courts when the right to freedom of assembly is curtailed; (e) the failure of the national human rights institutions (established by the Constitution) to guard against the encroachment of the right; and (f) failure of the media and civil society to play their roles toward ensuring the protection of the right. In sum, there is the need to inquire into the core factor that is preventing democratic institutions recognized by the Constitution such as parliament, courts, national human rights institutions (such as the Ethiopian Human Rights Commission), media's and civil society from defending the protection of fundamental rights including freedom of assembly. As elaborated in the following paragraphs, the main factor which explains many of these questions is the lack of *political will* of those who hold political power towards good governance, rule of law and functioning of strong democratic institutions.

In his message for the 2013 world human rights day, the UN Secretary General Ban Ki-moon underscored the importance of *political will* on the part of

states to ensure the adequate protection of human rights.[213] Post *et al* define political will as 'the extent of committed support among key decision makers for a particular policy solution to a particular problem'.[214] They identify the key decision makers as elected or appointed officials who formulate and make the final policy decision on certain matters.[215] Depending on the democratic nature of the regime, the decision maker could be a single person or group of persons or shared among the different branches of government in a proportionate manner as envisaged in democratic regimes.

The *first* element in political will relates to the manner of elections and appointments. Factors like the presidential or parliamentary nature of government, its unitary or federal character, the practice of single party or multi-party system are also crucial in determining key decision makers.[216] Applying these criteria may shed some light in answering who is holding the key power of making important decisions in Ethiopia. The answer to this question is central to address the role of *political will* in realizing fundamental rights including the right to freedom of assembly. Constitutionally speaking Ethiopia is a federal state in which power is apportioned between the federal and state governments.[217] Beside horizontal division, the Constitution also apportions key powers between the legislative, executive and judicial branches of the government.[218] The Constitution also dictates for a parliamentary democracy with multiple parties.[219]

However, examining the practice may lead to a totally different conclusion. In practice it is often the federal government that makes important decisions for the central government as well as for members of the federation.[220] Even among the federal government organs, the power relationship is not balanced. Hence, too much power is concentrated in the hands of the executive and the parliament compared to the weak judicial organ. Consequently, the judiciary is unable to exercise a strong oversight over their activities.[221] With regard to political

[213] United Nations, Secretary-General's Message for 2013 <http://www.un.org/en/events/humanrightsday/2013/sgmessage.shtml > accessed on October 21, 2016

[214] Lori Ann Post *et al,* 'Defining Political Will' (2010), *Politics and Policy* p.653.

[215] Ibid.

[216] Ibid.

[217] FDRE Constitution, *supra* note 6, art 1&46, 50(1).

[218] Id., art 45,

[219] Id., art 50(2)

[220] Kalkidan Kassaye, *Center–State Relations in the Ethiopian Federal Setup: Towards Coercive Federalism-A Glance From The Federal Practice* (LL.M Thesis, Unpublished) School of Law Addis Ababa University, 2010 pp.133-134.

[221] Assefa Fiseha (2011), 'Separation of powers and its implications for the judiciary in Ethiopia' *Journal of East African Studies* Vol.5 No.4 (2011).

parties, even if Ethiopia is constitutionally a multi-party state, it has been a single party state *de facto* for the past 25 years. This has resulted in the blending of the executive branch and the ruling party. Hence, arguably, one can consider the Executive Committee of the ruling political party EPRDF (Ethiopian Peoples Revolutionary Democratic Front) as the key decision maker in present day Ethiopia. [222]

The *second* element in *political will* requires the decision makers' understanding 'that a particular issue or condition has reached problem status' and thereupon 'agree on the nature of the problem, and that the problem requires government action'.[223] For our purpose, the issue which needs adequate government attention or political will is ensuring good governance, observing rule of law and preserving strong democratic institutions in general and protecting the right to freedom of assembly in particular without which sustainable peace and development are unthinkable.

Good governance is a broad concept and it includes a number of elements within its ambit including rule of law and strong democratic institutions. In the general sense it may be construed as 'principles of accountability, participation, transparency and rule of law'.[224] In the particular sense it means, 'free, fair and frequent election; representative legislature that makes laws and provides oversight; an independent judiciary that interpret laws; … guarantee of human rights and rule of law; and …transparent and accountable institutions'.[225] Decentralization of power and engaging civil society in decision making process is also an attribute of governance that is good.[226]

The policy decisions made on these critical issues by the key decision makers will have a negative or positive impact on the exercise of the right to freedom of assembly. If they decide to conduct free and fair elections and abide by rule of law as stipulated in the Constitution, a representative parliament will be established. This parliament will be guided by *rule of law*, not rule by law. This means, the legislature will not rush into adopting whatever law is proposed by the executive or its members. It will rather seriously consider the human right implications of the laws that it adopts, and makes sure that every law it makes will not infringe them in a disproportional manner.[227] Such policy decisions will

[222] Kalkidan, *supra* note 220, pp.133-134.
[223] Post *et al, supra* note 214, p. 662.
[224] G.Shabbir Cheema (2005), *Building Democratic Institutions Governance Reforms in Developing Countries*, Kumarian Press Inc., pp. 5-6.
[225] Ibid.
[226] Ibid.
[227] Stefanie Ricarda Roos, The "Rule of Law" as a Requirement for Accession to the European Union, <http://www.kas.de/wf/doc/kas_15604-544-1-30.pdf?090306091009> accessed on October 21, 2016.

better safeguard the right to freedom of assembly and pave the way for the adoption of a right friendly law.

Likewise, if the key decision makers decide to give complete autonomy and operating space for democratic institutions such as courts, national human right institutions, media and civil society, freedom of assembly would be guarded by these actors from arbitrary encroachment. Further, if decision makers make accountability and transparency their number one priority, the institutions regulating freedom of assembly would take extra care not to infringe the right and provide sufficient justifications when they do so. The central question here is whether the key decision maker in Ethiopia i.e. EPRDF regards issues of good governance and democracy as matters worthy of governmental action. Although the party has (on several occasions) stated the gaps in good governance and its willingness to address them,[228] it has failed to take crucial policy decisions of good governance in a manner that would have ensured better protection of human rights in general and the right to freedom of assembly in particular. Further, it is not clear how good governance, democracy and rule of law are understood by the party.

The *third* and most important component of political will refers to the commitment of the decision makers. According to Post *et al,* the heart of political will is commitment on the part of the decision makers 'in supporting a particular policy'.[229] The central question would be why the leaders of the ruling party who are the key decision makers in Ethiopia are not showing a strong support or commitment to address the serious issue of good governance, rule of law, democratic institutions and respect for human rights including freedom of assembly? This question is important because the ruling party often admits the gaps in good governance and makes pledges to take certain measures to improve the situation, but we do not often see the promised changes in practice.

On this point, Post *et al* provide two factors which might force the decision makers to be committed to the pledged measure. The *first* is fear of '*reputational cost*' due to which decision makers might be committed to pursue a certain policy measure because failure to bring the promised changes will damage their image in the eyes of the public.[230] In other words, they will lose credibility in the public and no one will take their pledges seriously. Based on the observation of this author, the ruling party has made so many promises to bring reforms of good governance and rule of law, but has failed to deliver them

[228] 'EPRDF pledges to fulfill responsibility in New Year' 12 September 2016 <http://www.fanabc.com/english/index.php/news/item/6869-eprdf-pledges-to-fulfill-responsibility-in-new-year > accessed: 23 October 2016.

[229] Post *et al, supra* note 214, p. 663.

[230] Id., p.664.

in a tangible manner. The *second* factor (identified by Post *et al*) which forces decision makers to be committed towards a certain measure is *the pressure of accountability* to the general public.[231] This presupposes the existence of free and fair election and multi party-democracy. In such systems, if the decision makers fail to show commitment towards certain policy measures that are desired by the public, it will replace them with another party in the next election. This is a strong incentive for decision makers to show strong commitment for their pledges in democratic regimes. But this does not seem to be relevant for Ethiopia because the ruling party has no reasonable fear that it will be replaced by elections at the moment since all relevant institutions for conducting fair elections are under its control or influence.[232]

In spite of these gaps (in the factors that force decision makers towards political will that facilitates good governance, rule of law and strong democratic institutions), the unpredictability of what may transpire in the future with respect to the overwhelming power of the ruling party, long term consideration of peace and development that would accrue from good governance may allure the party to take these reforms. Considering these factors, the ruling party should demonstrate a firm *political will* to address issues of good governance, rule of law and strong democratic institutions in general which have contributed to the fragile protection of the right to freedom of assembly in Ethiopia.

Conclusion

The comparative study in this article has identified a number of problems in the Ethiopian legal regime that regulates freedom of assembly. At the constitutional level, the absence of an explicit and full-fledged proportionality requirement in the FDRE Constitution for assessing the acceptability of limitations on freedom of assembly is noted as a problem. Even though the Constitution requires the interpretation of human rights (incorporated in it) to be in line with international treaties, the reference is too generic and proportionality is not immediately evident. This will make the task of enforcement and application unrealistic given the bad track record of the country in democracy, rule of law and human rights protection. Hence, there is good reason to be sceptical about this approach. Instead, an explicit incorporation of proportionality and its constitutive elements in the Constitution (as in the Kenyan Constitution) is a better approach for protecting freedom of assembly rather than merely relying on international treaties as guide for interpretation and conformity.

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[231] Ibid.

[232] Jason Mosely, 'Ethiopia's elections are just an exercise in controlled political participation', *the guardian* <https://www.theguardian.com/global-development/2015/may/22/ethiopia-elections-controlled-political-participation > accessed on October 21, 2016.

Second, at the sub-constitutional level, the existing Ethiopian legislation governing assemblies contains many lacunae. Particularly, its provisions regulating the notification procedure for conducting an assembly and the decision making process are deeply flawed giving too much discretionary power for authorities to do whatever they want. The non-existence of a provision that guarantees the accountability of the authorities through judicial and administrative review has further rendered the right to freedom of assembly defenceless and the authorities unaccountable. Thus, an Ethiopian assembly law that meets the test of proportionality must be enacted without delay to fill significant gaps in the existing law and to make it compatible with international standards set by the UN Special Rapporteur on freedom of assembly and association, UN Human Rights Committee and the Venice Commission of Experts. But for these reforms to happen in the existing legal landscape governing freedom of assembly and be implemented subsequently in appropriate manner, it requires the political will of the ruling party of Ethiopia (EPRDF) which holds the key decision making power toward facilitating the enhancement of good governance and rule of law, and enabling democratic institutions to discharge their constitutional responsibilities.

All these interrelated matters require political will and they have a direct repercussion for in/adequate protection of the right to freedom of assembly. For instance, adopting a good law on freedom of assembly requires a strong democratic institution i.e. parliament which critically debates on proposed bills and ensures its proportionality with regard to the affected right. This in turn depends on free and fair elections and a genuine multi-party democracy that puts fundamental rights at its core which is an imperative element of good governance. Likewise, commitment to rule of law is essential to constrain the parliament from enacting a law that infringes freedom of assembly and to control the executive from applying the law in an improper manner. It also instils transparency, a culture of justification and accountability in their functions.

Moreover, when the parliament and the executive commit infringements in respecting and protecting the right to freedom of assembly, strong democratic institutions such as courts, national human rights bodies, the media and civil societies are expected to intervene and defend the right, and this requires autonomy and operating space. Hence, in the interest of sustainable peace and development, the ruling party should demonstrate genuine commitment to issues of democracy, good governance, rule of law and respect for fundamental rights including freedom of assembly. In the absence of such commitment and political will, it would be naïve to expect the full-fledged protection of the right to freedom of assembly in the Ethiopian law and practice. ■

The Normative Basis for Decision on the Merits in Commercial Arbitration: The Extent of Party Autonomy

Seyoum Yohannes Tesfay ♣

Abstract

This article examines the extent of party autonomy in determining the norms that apply to the substance of a commercial dispute in arbitration. Particularly, it analyses 'principles of law,' the normative basis for arbitration under Ethiopian law. The article further explores whether parties to arbitration are at liberty to mandate the application of foreign law, rules of law and equity. It also examines whether a '*mandate to settle*' is enforceable under Ethiopian law. The article concludes that Ethiopian law allows maximum flexibility to parties as regards to the determination of norms applicable to the substance of a commercial dispute. The law can even be construed as recognising '*mandate to settle*'.

Key terms

Commercial arbitration, party autonomy, principles of law, foreign law, rules of law, equity, mandate to settle, amiable composition, Ethiopia.

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Introduction

Different jurisdictions have slightly differing laws as regards the normative basis for decision on the substance of commercial disputes. In some jurisdictions, arbitrators are required to decide according to 'law', in some others according to 'rules of law'[1], and in yet others based on 'principles of law'. Even when identical terms are used, they are understood differently in various jurisdictions. Jurisdictions also differ in the latitude that they give to

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[1] UNCITRAL Model Law, on International Commercial Arbitration with amendments as adopted in 2006, General Assembly Resolution 61/33 adopted on 4 December 2006. For instance, Article 28(1) requires arbitrators to decide on substance of dispute based on 'rules of law.'

parties toward enabling them to choose foreign laws and non-legal norms to resolve their differences.[2] Moreover, the laws of some jurisdictions are silent about the foregoing issues thereby necessitating interpretation.

Not all of these matters have been dealt with clearly under Ethiopian law. Hence, parties that intend to settle their disputes by arbitration inquire about the normative options open to them. Arbitrators dealing with specific disputes may also be confronted with the question of the norms they should apply to the substantive merits of the dispute before them. This question is discussed in following sections with due focus on commercial arbitration. In particular, the latitude that is provided –under Ethiopian law– to parties in choosing substantive norms applicable to their dispute is examined.

The first section of this article deals with the arbitration agreement and its role in the determination of the norms applicable to the substance of the dispute. Section 2 dwells on 'principles of law', their meaning and role in the determination of merits of the dispute. Section 3 examines the latitude that parties have to choose foreign law and 'rules of law.' Equity, its different shades of meaning and its role in substantive resolution of disputes is discussed in section four. The last section dwells on whether parties may vest in an arbitral tribunal power to modify the contract between them. Finally, some conclusions are drawn with regard to the extent of party autonomy in the determination of norms applicable to the substance of the dispute between them.

1. The Arbitration Agreement: Meaning and Relevance

An arbitration agreement is a contract by which two or more parties undertake to resolve their dispute, if any, by arbitration. It has a number of purposes. The first is ouster of a court which would otherwise have jurisdiction to resolve the dispute. The second is empowering an arbitral tribunal to resolve the dispute, in *lieu* of the court.[3] Third and the most pertinent for our purpose, the parties' choice of law governing the substance of the contract is usually made in this contract itself.[4] Owing to these reasons, among others, the agreement to arbitrate is an indispensable precondition for commercial arbitration.[5]

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[2] Simon Greenberg *et al* (2011), *International Commercial Arbitration: An Asia-Pacific Perspective*, New York, Cambridge University Press, pp. 101 to 102.

[3] Id., p. 144.

[4] Id., p. 101. In 2009, for example, 88% of parties to arbitration before the International Chamber of Commerce, ICC made their choice of the applicable law.

[5] Alan Redfern and Martin Hunter (2004), *Law and Practice of International Commercial Arbitration* (London, Sweet and Maxwell, 4th ed.), p. 131. As a matter of exception parties may be deemed to have agreed to arbitration without there being an arbitration agreement. This is, for instance, the case if estoppel or similar other doctrine in a jurisdiction precludes a party from objecting to arbitration because of its failure to raise the absence of arbitration

An agreement to arbitrate may be entered into as regards a future dispute or a dispute that has already occurred. When the agreement to arbitrate concerns a possible future dispute it is usually contained in the main contract between parties to a transaction. It is commonly known as *arbitration clause*. Such agreement is usually brief because parties do not know, at this point in time, that a dispute will arise.[6] If the agreement is concluded after a dispute has arisen it is called a *submission agreement*. At this stage parties have made their mind as to how best to handle the problem. Hence, submission agreements tend to be more detailed.[7] The majority of commercial arbitration results from arbitration clauses. Yet, they are often 'midnight clauses' drafted at the very end of negotiations with minimum thought and effort, partly because, at this point in time, parties are uncomfortable to contemplate falling into a dispute. As a result, wrong choices such as regarding the law applicable to the substance of the dispute tend to be made.[8]

Ethiopian law deals with arbitration agreement in the Civil Code. Specifically, Articles 3325 to 3346 deal with arbitration agreement *albeit* under the title of 'arbitral submission.'[9] The Civil Procedure Code supplements these provisions. Some of the latter's provisions deal with the arbitration agreement itself.[10] It is the Civil Code that defines arbitration and lays down the most important principles that are relevant to arbitration.

The Civil Code defines 'arbitral submission' as 'a contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who

agreement early in the arbitration process. In some jurisdictions there may even be a statutory provision to the same effect as estoppel. *See also*, Greenberg *et al*, *supra* note 2, at 145. The question is can such an award be enforced outside the jurisdiction in which it is made given the New York Convention Art II and IV(1)b require proof of a written agreement to arbitrate. The answer is no unless the country in which recognition and enforcement is sought has less stringent requirements than those in the Convention.

[6] Ibid.

[7] Id. pp. 131-132. Submission agreements tend to deal with details of the arbitration such as place of arbitration, applicable substantive law, name of the arbitrators, specifics about matters in dispute, and may even deal with procedures that the arbitration is to follow such as exchange of written submissions, deadlines etc..., where such details are deemed desirable by the parties.

[8] Ibid.

[9] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Negarit Gazeta, Gazette Extraordinary, 19th Year, No. 2. Title XX of this Code is entitled 'Compromise and Arbitral Submissions. The Code dedicates Articles 3325 to 3346 to arbitration while the rest of the Title deals with compromise.

[10] The Civil Procedure Code Decree, Decree No.52 of 1965, Negarit Gazeta, Gazette Extraordinary, 25th Year, No. 3, Articles 315 to 318.

undertakes to settle the dispute in accordance with the principles of law'.[11] Despite the use of the term 'arbitral submission', the Civil Code indicates that both existing and future disputes may be referred to arbitrators for resolution.[12] In light of the usage in the Civil Code, we may conclude that the term 'arbitral submission' is equivalent to arbitration agreement under the Code. It is not limited to an agreement to arbitrate a dispute that has already arisen as is the case in the usage of many commentators. Therefore, on this point Ethiopian law has kept pace with global developments in arbitration law.[13] The definition is also at par with or even relatively more specific than modern arbitration laws in the articulation of the elements of arbitration.[14]

The next section briefly identifies the normative basis for arbitration that flows from the foregoing definition of arbitration in Ethiopia. We will then examine whether parties to a dispute have other options. We start with 'principles of law' and their role in arbitration under Ethiopian law.

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[11] Civil Code, *supra* note 9, Article 3325(1). Under Sub article (2) of the same Article the law indicates that an arbitrator may also be entrusted with establishing only a point of fact without deciding on the legal consequences flowing from those facts.

[12] Id., Article 3328. This article titled 'object of contract and arbitration clause' provides under sub article (1) an existing dispute could be referred to arbitration while sub article 2 of the same provides parties 'may also submit to arbitration disputes which may arise out of the contract in the future.' That sub article 2 of this article dealing with disputes which may arise in the future singles out those that 'arise out of a contract' does not mean future disputes that do not arise from contract may not be resolved by arbitration. Sub article 3 of the article clearly indicates that submission agreements regarding future disputes are valid so long as they arise from other 'specific legal obligations.'

[13] It is to be noted that, in earlier times many jurisdictions did not enforce arbitration clauses subjecting future disputes to arbitration. Agreement to arbitrate could only be concluded as regards disputes that had already arisen. This was the case, for example, under the Napoleonic Codes of France. See, Jean de la Hosseraye *et al* , *Arbitration in France*, *CMS Guide to Arbitration*, Vol. I, p. 333. Available at: <http://eguides.cmslegal.com/pdf/arbitration_volue_1/CMS%20GtA_Vol%20I_FRANCE.pdf>, accessed on 19 January 2017.

[14] Arbitration Act 1996 (of England), Section 6(1) defines 'arbitration agreement' as an agreement to submit to arbitration present or future (whether they are contractual or not). UNCITRAL Model Law, *supra* note 1, Article 7 defines arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of defined legal relationship, whether contractual or not.' The Civil Procedure Code of Germany, ZPO, issued in 1998, Section 1029 defines arbitration agreement (*Schiedsvereinbarung*) in an essentially the same way as the UNCITRAL Model Law. Available at: <www.disarb.org/en51/materials/german-arbitration-law-98-id3>, accessed on 12 February 2016.

2. Substantive Resolution Based on 'Principles of Law'

In Ethiopia, the Civil Code and Civil Procedure Code espouse, on the face, different set of norms as the basis for the resolution of the merits of the dispute. According to Article 317(2) of the Civil Procedure Code, the arbitral tribunal is required to '… decide *according to law* unless by the submission it has been exempted from doing so.' On the other hand, the Civil Code provides that arbitral submission is 'the *contract* whereby the parties to a dispute entrust its resolution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the *principles of law*.'[15] (Emphasis added)

A close look at these provisions and the two Codes leads us to resolve this conflict in favour of the Civil Code provision. To start with, it is the Civil Code that deals with arbitration and its nature in a meaningful detail.[16] In contrast, the Civil Procedure Code merely dedicates few provisions to arbitration that are spread out and not coherently blended in harmony. Therefore, it is the Civil Code that may be deemed a special law as far as the nature of arbitration is concerned. Moreover, one notes that it is in the context of listing down what the tribunal should do that Article 317(2) of the Civil Procedure Code provides: '[t]he tribunal shall, in particular, hear the parties and their evidence respectively and decide according to law … .'

The *ejusdem generis* rule of interpretation requires that when one has an illustrative list of things that can be added, the items to be added to the list must share basic features with those on the list. If we go by that rule, 'hearing the parties and their evidence' are procedural matters rather than matters of substantive law. Moreover, Article 317 is titled 'procedure before arbitration tribunal.' So, its application is limited to the procedural conduct of arbitration rather than the norms applicable to the substance of the dispute. In any case, the Civil Code is a proclamation while the Civil Procedure Code is only a decree. Owing to its higher status in the hierarchy of laws, the Civil Code supersedes the Civil Procedure Code in the event of conflict between their provisions. The Civil Procedure Code, itself substantiates this point because Article 315(4) provides that, in case of conflict Articles 3325 to 3346 of the Civil Code prevail over the provisions of the chapter in which Article 315(4) of the Civil Procedure Code is found. In sum, the Civil Code prevails, and arbitrators are not required to merely decide 'according to law'. They may decide 'in accordance with *principles of law*.'[17] (Emphasis added).

[15] Civil Code of Ethiopia, *supra* note 9, Article 3325(1).
[16] Id., Articles 3325 to 3346.
[17] Id., Art 3325(1).

2.1 Decision Based on Principles of Law and According to Law: Any Difference between the Two?

Settlement of a dispute based on 'principles of law' is not identical with settlement in accordance with the 'law'. Principles of law consist of objective and abstract notions often developed over the centuries.[18] They may be derived from domestic, foreign or common rules of legal thinking. Some of them find their way into the national laws of countries.[19] Where they are, thus, incorporated into a specific national legal system, they form part of the 'legal norms' in force in the jurisdiction concerned.

Some other principles, however, remain unincorporated into a national legal system. In such cases, the principles of law are not really 'legal norms' as regards that particular jurisdiction. They are merely directives of behaviour rather than legal norms as such.[20] In the context of commercial arbitration, it is said that notions like '*pacta sunt servanda*, . . . *force majeure*, the principle that execution of a contract implies its existence, the principle of interpretation *contra proferentem*, the obligation to mitigate damage, and good faith' are accepted as general principles of law, if they are not already incorporated in the domestic law of a jurisdiction.[21] Ethiopian law allows arbitrators to decide based on principles of law without the need for specific authorisation by the parties to that effect, and this makes it very liberal compared to jurisdictions that require arbitrators to decide based on law only.

2.2 Principles of Law and *Lex Mercatoria*: Are the Two Coextensive?

The substantive content of *lex mercatoria* and its relationship with national laws are vigorously contested matters.[22] It may be argued that the confusion is partly attributable to the fact that the concept evolved to acquire different meanings in

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[18] Łukasz Błaszczak and Joanna Kolber (2013), 'General Principles of Law and Equity as a Basis for Decision Making in Arbitration', *Comparative Law Review*, pp.189-190.

[19] Id., pp. 191 and 198. Polish doctrine, for example, considers: 'freedom of contract in international trade, principle of *rebus sic stantibus*, *pacta sunct servanda*, the principle of good faith, prohibition of abuse of subjective rights, the principle of cooperation between the creditor and debtor to perform the contract, the principle of liability for breach of contract and damages, prohibition of contradicting the effects of own behaviour or prior acts of will (*venire contra factum proprium nemini licet*), the principle that the impossible excludes obligation (*imposibilium nulla obliagatio*), the principle of protection of acquired rights, the principle of protection of trust as transnational general principles of law.

[20] Id., p. 194.

[21] Id., p. 192.

[22] Ana Mercedes Lopez Rodriguez, 'Lex Mercatoria', available at: <law.au.dk/fileadmin/site_files/filer_jura/documenter/forskning/rettid/artikler/20020046.pdf>, accessed on 20 July 2016.

different times.[23] In any event, the various conceptions of this nebulous concept may be grouped into three headings. According to the first view, *lex mercatoria* is simply a legal order that is created spontaneously by parties engaged in international economic interaction. It exists independent of national legal orders. The second conception is that it is a set of rules, sufficient to resolve a dispute that can be used as an alternative to an otherwise applicable national system of laws, which could be rooted in laws of various nations and trade practice. *Lex mercatoria* is, according to the third conception, a 'gradual consolidation of usages and settled expectations' in international commerce which may supplement the applicable law.[24]

The first conception, *lex mercatoria* as an autonomous legal order, is not tenable. To start with, one cannot demonstrate where such an autonomous legal order derives its normative power from. Secondly, at present, at least, it is not comprehensive enough to deal with all aspects of a commercial dispute.[25] The second understanding of *lex mercatoria* too is not convincing as a matter of current reality. Simply, there are no universal rules of commerce whether grounded on national laws or practice that can sufficiently deal with the intricacies of commercial transactions.[26] It thus appears that only the third conception of *lex mercatoria* (i.e., international *trade usages* sufficiently established to warrant that parties to international contracts are deemed to be bound by) stands the test of a rigorous analysis.

It is to be noted that *lex mercatoria,* and 'principles of law' are not coextensive although some authors conflate the two concepts.[27] Particularly, the sources of *lex mercatoria* are more diverse compared to principles of law. Its

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[23] Ralf Michaels (2007), 'The True Lex Mercatoria: Law Beyond the State', *Indiana Journal of Global Legal Studies*, Vol. 14, No. 2, p. 478. It is possible to divide the evolution of this concept into three stages: ancient *lex mercatoria* of the middle ages meaning a 'transnational set of norms and procedural principles that established by and for commerce in (relative) autonomy from states.' The second stage refers to what one may call 'new *lex mercatoria'* as was understood in the 20th Century to mean 'an informal and flexible net of rules and arbitrators establishing a private international commercial law.' The third stage which we may call 'new new *lex mercatoria* which moves from an amorphous and flexible soft law to an established system of law with codified legal rules' principally the UNIDROIT Principles of International and Commercial Law and strongly institutionalized court-like international arbitration.

[24] William W. Park (2012), *Arbitration of International Business Disputes*, 2nd Ed., Oxford University Press, pp. 591 and 596.

[25] Id. p. 595.

[26] Id. pp. 596-597. Though one may argue, for instance, the *Principles of International Commercial Contracts* published by UNIDROIT in 1994 represent *lex mercatoria* this is not tenable. This can at best be a snapshot of *lex mercatoria* as of 1994, not lex mercatoria itself. In fact, this document can turn out to be a competitor to *lex mercatoria* gradually.

[27] Blaszczak and Kolber, *supra* note 18, p. 191.

sources include '… principles of law common to most national legal systems (or at least those relevant to the contract in question), norms set down in widely accepted international treaties, *trade usages of the relevant transnational sectors*, and indeed international arbitral awards'[28] (emphasis added). As can be gathered from this, trade usages and customs are part of *lex mercatoria* but do not constitute principles of law, hence, making *lex mercatoria* wider in its coverage.

When the Civil Code of Ethiopia authorizes arbitrators to settle disputes based on 'principles of law', it thus allows them to go beyond legal norms embodied in the national laws of a specific country. It authorises them to make use of legal principles that the arbitrators deem appropriate under the specific circumstances. However, it does not authorise arbitrators to apply *lex mercatoria* in its entirety as this notion includes trade usages and customs that do not necessarily qualify as principles of law. In sum, the application of *lex mercatoria*, in its entirety, does not flow from Article 3325(1) of the Civil Code that recognises principles of law as substantive parameters applicable to the merits of a dispute before arbitrators.

3. Foreign Law and 'Rules of Law': Are They on the Menu?

Historically, the conflict of laws rules of the seat of arbitration played a predominant role in determining the law applicable to the merits of the dispute. The wish of the parties to arbitration, in this regard, was only a secondary consideration. This position was embodied even in the resolution of the Institute of International Law. Article 11 of the 1957 Resolution on the 'Law Applicable to the Substance of the Difference' provides that '[t]he rules of choice of law in force in the state of the seat of arbitral tribunal *must be followed* to settle the law applicable to the substance of the difference. *Within the limits of such law,* arbitrators shall apply the law chosen by the parties . . . .'[29] ***(Emphasis added).***

This mandatory recourse to the conflict of laws rules of the seat of arbitration in determining the substantive law applicable to the merits of the dispute was severely criticised in the years following the adoption of the above Resolution. Many scholars such as Lazare Kopelmanas in 1964, Philippe Fouchard in 1965 and Pierre Lalive in 1967 contended that this position is arbitrary.[30] According to Lalive, for instance, a country which is a seat to an international arbitral

[28] W. Michael Reisman *et al* (1997), *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes*, New York: The Foundation Press, Inc., p. 202.

[29] Emmanuel Gaillard (2010), *Legal Theory of International Arbitration*, Martinus Nijhoff Publishers, p. 107.

[30] Id. p. 109.

tribunal has little, if any, interest in having its choice of law rules determine what rules should apply to the merits of the dispute, because the dispute, in most cases, is totally unconnected to it. He takes the case of Switzerland where numerous international arbitrations take place although the disputes have nothing to do with Switzerland other than the parties choosing it as a preferred venue. Hence, he wondered what interest Switzerland could have to insist that its choice of law rules should prevail over the choice of parties regarding the applicable substantive law.[31]

Three decades after the adoption of the 1957 Resolution, opinion regarding the role of parties shifted significantly, and even the Institute of International Law had to formally reverse its position. Article 6 of its 1989 Resolution reads:

> The parties have full autonomy to determine the … substantive rules and principles that are to apply to the arbitration. In particular, … these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law, and the usages of international commerce. To the extent the parties have left such issues open, the tribunal shall supply the necessary rules and principles drawing on the sources indicated in Article 4 … .[32]

Article 4, to which the foregoing provision of the 1989 Resolution makes reference, indicates as possible sources: the law chosen by the parties to a dispute, the law that is indicated by applying the choice of law rules chosen by the parties, general principles of private and public international law, general principles of international arbitration or the law that the courts of the seat of arbitration would apply.[33] We need to underscore, in this connection, that Ethiopia has no conflict of laws rules that could tie the hands of the parties and arbitrators as regards the law that must be applied to the substance of the dispute.[34]

Today, most countries have arbitration laws that require arbitrators to respect the choice made by the parties regarding the law applicable to the merits of the dispute. The UNCITRAL Model Law, which has been adopted in many jurisdictions, for example, provides that, '[t]he arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute'.[35] The Model Law further clarifies this by pointing out that any reference made to the law or legal system of a

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[31] Ibid.
[32] Id. p. 110.
[33] Ibid.
[34] Samuel Teshale (2000), 'Toward Generalizing Judicial Jurisdiction in Ethiopia.' *TFLR-Private International Law*, Vol. 8 p. 195.
[35] UNCITRAL Model Law, *supra* note 1, Article 28(1).

country is to be construed as directly referring to the substantive law of the jurisdiction concerned to the exclusion of the conflict of laws rules of such state, unless otherwise provided expressly.[36]

According to the *travaux préparatoires* of the Model Law, the phrase 'rules of law' is broader than the law of a given national jurisdiction. The use of this term in Article 28(1) is aimed at expanding the range of options open to parties. Thus, for example, parties to an arbitration agreement could choose instruments such as the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) as the rules of law applicable to the merits of the dispute.[37] There are only few countries that still do not clearly provide parties (to an arbitration agreement) the freedom to determine the laws or rules applicable to the merits of the dispute. Such countries tend to be on the fringes of global commerce.[38]

Ethiopia's law does not expressly deal with whether parties are at liberty to determine the norms to be applied to the merits of the dispute. One can make arguments in support of the view that the law leaves this matter to the parties to the arbitration agreement. According to the definition of arbitration agreements under the Civil Code, the arbitrator '… undertakes to settle the dispute in accordance with *the principles of law,*'[39] and not the law only. As discussed under Section 2 above, 'principles of law' are broader than laws adopted by a specific jurisdiction. Moreover, unlike in some other jurisdictions, we note that under Ethiopian law, the arbitrators need not have specific authorisation to decide on the basis of principles of law. If arbitral tribunals can go beyond applying the law, and apply principles of law, we may (for a stronger reason) hold that parties are at liberty to determine the 'laws' or 'rules of law' to be applied to the merits of the dispute. The fact that arbitrators need not be lawyers indirectly supports this point.[40]

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[36] Ibid.

[37] Id. at p. 33.

[38] For example, in Uzbekistan the national law applies and in Georgia the law is silent on this issue. In Belarus and Moldova, the parties to a dispute are free to choose among the laws of other countries or jurisdictions but not 'rules of law' such as international customs as codified by some organisations etc.... European Bank for Reconstruction and Development (2007), International Commercial Arbitration Assessment: Report on the Results of the Assessment in the CIS (Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Mongolia), Roman Chapaev consultant to the project, p. 10. Available at: <www.ebrd.com/downloads/legal/judicial/arbitration.pdf>, accessed on 03/11/2013.

[39] Civil Code of Ethiopia, *supra* note 9, Article 3325(1).

[40] Id., Article 3339(1). According to this provision, '[a]ny person may be appointed as an arbitrator.'

As René David, the drafter of the Civil Code of Ethiopia notes, the Code accepts the general principle of contractual freedom.[41] The parties to a contract are, therefore, at liberty to define the object of the contract. David underscores that the law sanctions and 'gives effect to the will of the parties as manifested by their contract' as long as they do not violate any legal prohibition.[42] The law should be understood as presuming freedom rather than prohibition. The contrary view that only matters expressly allowed by the law are lawful would compel society to move at the pace of the lawmaker and hence would seriously arrest progress. It is this point that René David makes when he states that contractual freedom is 'fundamental to a society and an economy that wants to leave considerable scope to private initiative.'[43] Article 16 of the Civil Code which vests in every person 'freedom of action' is in tandem with such freedom.[44] The fact that the law is silent on this matter other than allowing arbitrators to decide based on 'principles of law' implies the freedom of parties to choose the applicable norms. In other words, laws of any jurisdiction and arguably 'rules of law' embodied in instruments that have not necessarily been adopted in the national laws of any country can be chosen by the parties.

Even though such interpretation is plausible, any future revision of Ethiopian law should clearly indicate party autonomy in this regard. That will help obviate unnecessary confusion and limit the room for unwarranted litigation on this subject. Furthermore, any future legal revision should indicate that the designation of the law of a specific jurisdiction as applicable refers to the substantive law of that chosen jurisdiction to the exclusion of the conflict of laws rules of that jurisdiction. This way, the law can preclude the risk of the substance of the dispute being governed by the laws of a third country that the parties did not envisage. The application of conflict of laws rules of the designated country could have potentially that effect. In order to avoid this scenario, the Model Law provides, '[a]ny designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.'[45]

[41] René David (1973), Commentary on Contracts in Ethiopia, Translated into English by Michael Kindred (Haile Sellassie I University) p. 29.
[42] Ibid.
[43] Ibid.
[44] Civil Code of Ethiopia, *supra* note 9. According to Article 16(1) '[e]very person is free to exercise any activity which he deems proper . . . .' Per sub article 2 of the same article '[t]he only restrictions which such freedom admits of are those which are imposed by the respect for the rights of others, morality and the law.'
[45] UNCITRAL Model Law, *supra* note 1, Article 28(1).

4. Equity: Its Shades of Meaning and Role

Arbitration laws of various jurisdictions differ in the extent to which they allow parties to authorize the arbitration tribunal to derogate from the strict application of laws and rules of law and decide based on equity. They also seem to attribute different meanings to the word equity.[46] In fact, the term is understood in many different ways even within the context of a specific legal tradition let alone in different jurisdictions and legal traditions.[47] Perhaps, the best way to understand the various shades of meaning of this term is to analyse it in terms of 'weaker' and 'stronger' understanding of equity following the classification by German legal theoreticians such as Karl Engish and Jeseph Esser.[48]

4.1 'Weaker' (or narrow) interpretation of 'equity'

According to the 'weaker' understanding of the term, decision based on equity is a 'decision taken *in light of the law* and in accordance with the legal directions which emanate from the strict legal rules in force'.[49] In this understanding, the law may direct a judge to employ equity to solve a problem in cases of vagueness of the law or when it is silent regarding some aspects of the case at hand. So, equity plays a role in decision making within the bounds of the legal system. It is an intra-systematic way of decision making.[50] According to the proponents of this 'weaker' understanding, decision making in equity cannot be at variance with the law. Decisions should always start from the law in force because the law '... expresses, in its highest degree of development, what in a given society is considered as just, ethical, adequate and convenient.'[51]

Analysis of Ethiopian law, particularly the Civil Code, reveals that equity in this 'weaker' sense is fully embraced in Ethiopian laws. For instance, the court may determine the remuneration due to a commission agent on the basis of equity where the remuneration has not been agreed upon and there is no custom regarding this matter at the place where the contract was concluded.[52] A court may determine wages due to an employee based on equity where this is neither settled by a contract nor by custom of the place where work is performed.[53] Remuneration due to an author is to be fixed by a court based on equity in the

[46] Błaszczak and Kolber, *supra note* 18, p. 198.
[47] Ibid. .
[48] António Sampaio Caramelo (2008), 'Arbitration in Equity and Amiable Composition under Portuguese Law', *Journal of International Arbitration*, Vol. 25, p. 571.
[49] Id., p. 572.
[50] Ibid.
[51] Ibid.
[52] Civil Code of Ethiopia, *supra* note 9, Article 2243.
[53] Id., Article 2535.

absence of agreement regarding the matter between him and the publisher.[54] In some other cases, the Civil Code empowers the court to award compensation where equity so requires. For instance, the court is empowered to award compensation on the basis of equity to the owner of land upstream where the exploitation of his land is impaired by prohibition from using water bordering or crossing his land.[55] Likewise, the law authorises a court to award compensation, where equity so requires, to a person whose image has been sold or otherwise used for the enrichment of some other person.[56]

We also note that a number of provisions of the Civil Code direct the court to determine or reduce the *quantum* of compensation due in cases of tortuous acts and omissions having regard to equity. For instance, a court may reduce compensation due where the damage caused by a person 'expands beyond what could reasonably be expected, in consequence of unforeseeable circumstances'[57] or in cases where the person who committed the wrongful act was not in a state to appreciate the wrongful nature of his conduct.[58] Although it is rare, the Civil Code may authorise total or partial invalidation of a juridical act on grounds of equity. A case in point is Article 368(3) of the Civil Code that authorises a court to invalidate, in part or in whole, a will made by an interdicted person prior to his interdiction where provisions contained in such will are deemed to be contrary to equity.

Although the Civil Code of Ethiopia directs courts to utilize parameters of equity, the use of equity envisaged by the Civil Code seems to have aimed at reinforcing the rules or principles enunciated by the Code so that the courts can resort to equity in certain legally determined situations. The Code does not seem to mandate courts to ignore or disregard the rules embodied in the Code, in a bid to render a decision based on what a judge considers equitable irrespective of the law. Hence, it is safe to conclude that the foregoing are instances of interpreting the notion of equity in the 'weaker' sense. Since, courts are empowered to use parameters of equity in these legally predetermined situations, arbitrators too are empowered to do that as party appointed judges.

[54] Id., Article 2692. The law authorises the court to grant compensation to a farmer tenant in regard of expenses he incurred for cultivation of fruits that are still un-detached at the time of the termination of the contract according to Article 3015(1) and (2) of the Civil Code.
[55] Id., Articles 1239 and 1240(1).
[56] Id., Article 29(2).
[57] Id., Article 2101.
[58] Id., Article 2099. *See also* Articles 2100, 2142 and 2160(1) for more on the Courts use of equity.

4.2 'Stronger' (or wider) interpretation of 'equity'

Equity is used in its 'stronger' sense when it is applied in order to resolve a disparity that arises when 'the morally accurate, abstract and general norm is in conflict with the moral evaluation of the specific circumstances subject to decision making'.[59] Aristotle, in *Nicomachean Ethics,* stated that all laws are 'universal' in that they do not deal with a specific case. Because the lawmaker is compelled to speak universally, and it is not possible to do so correctly about each and every case, the law takes the usual case and addresses that though it is aware of the possibility of errors entailed in this approach: [60]

> [w]hen the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission - to say what the legislator himself would have said had he been present, and would have put into his law if he had known . . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality.[61]

Understood in this wider sense, decisions based on equity are not solely based on the regulatory logic of the legal system and its rules. The decision-maker, in this understanding of equity, is entitled to depart from the rigid legal solutions, which by definition provide rigid decision criteria, and base his/her decision on the so-called justice of the concrete case.[62] We note, at this juncture, that an arbitrator vested with the power to decide on the basis of equity, understood in this stronger sense, wields wider powers than an arbitrator that is empowered to decide based on 'principles of law' discussed under section 2 above.[63]

However, it is to be noted that such 'strong'/wide interpretation of equity does not empower the decision-maker to disregard the paramount values of the legal order or to violate public policy. It only gives the decision-maker a certain leeway that transcends legal norms. Particularly, in relation to arbitral tribunals, we note that their powers and competence always lie within the boundaries of the parties' own competence. Since the parties to arbitration themselves have no power or right to violate public policy, *a fortiori*, arbitrators too may not do this.[64] If arbitrators violate public policy even where they are authorised by parties to decide based on equity, understood in the 'stronger' sense, the arbitral award could be annulled or refused enforcement on the ground of violation of

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[59] Blaszczac and Kolber, *supra* note 18, at 199.
[60] Quoted in Mauro Rubino-Sammartano (1992), 'Amiable Compositéur (Joint Mandate to Settle) and Ex Bono Et Aequo (Discretional Authority to Mitigate Strict Law- Apparent Synonyms Revisited'*, Journal of International Arbitration*, Vol. 9, No. 1, p. 7.
[61] Ibid.
[62] Caramelo *supra* note 48, p. 573.
[63] Blaszczak and Kolber *supra* note 18, p. 190.
[64] Id., p. 204.

public policy. For instance, decision–making on the basis of equity may not justify the violation of the rights of defence. The precise contours and boundaries of this right, however, differ in various legal systems. Thus, all circumstances must be evaluated *a casu ad casum* in order to determine whether or not public policy has been violated in this regard.[65]

4.3 Synthesis of the narrow and wide interpretations in Ethiopian law

We do not come across instances in which the court, under Ethiopian law, could make use of 'equity' in the stronger sense and disregard the law. However, that does not mean that an arbitrator will be similarly confined to the narrower or 'weaker' understanding of equity, despite powers conferred on him/her by parties to make use of equity in the stronger sense of the term. Although not in relation to Ethiopian Law, Professor René David, the drafter of the Ethiopian Civil Code contends that an arbitrator has wider powers than a judge in this regard. He maintains, in voluntary arbitration, the arbitrator has the powers vested in him by the parties. Hence, the first 'law' he must follow is the private agreement from which arise his powers.

The state law does not mean exactly the same thing to a judge sitting in a state court and an arbitrator. For the judge, there is no law beyond what the state prescribes. His powers and duties emanate only from the law. This is not the case with the arbitrator who neither derives his powers from the state nor decides in its name. The arbitrator must take into account what the parties that empowered him/her (to decide in equity) expect of him/her and thus decide based on 'equity' understood in a stronger sense.[66] Though Ethiopian law requires the arbitrator to settle dispute based on 'principles of law', it does not prohibit parties from authorising the arbitrator to decide based on equity. In the absence of a prohibition against that, interpreting the law in line with what Professor René David says is reasonable.

Therefore, we may conclude that arbitrators in Ethiopia can go beyond 'principles of law', and decide cases on the basis of equity understood in both the 'weaker' and 'stronger' sense of the term. Equity in the 'weaker' sense is embraced by the law itself expressly since the law authorises courts to make use of *equity* in a number of situations. As regards, equity understood in the 'stronger' sense there is nothing in the law that prohibits parties from authorising its use by arbitrators. The authority of an arbitral tribunal is derived from the agreement to arbitrate, and not the law as such, and the tribunal does not decide in the name of the state. This implies that parties in dispute can validly authorise the use of *equity* in the stronger sense of the term in Ethiopia. This is, of course, subject to compliance with public policy of the state. Hence,

[65] Ibid.
[66] Caramelo *supra* note 48, p. 574.

we hold that Ethiopian law is abreast of jurisdictions in the vanguard of adopting the stronger version.[67]

5. Beyond Equity: 'Mandate to Settle' and Modify Contract

At least in theory, it is possible for arbitrators to base their decisions (on substantive issues) on parameters outside rules of law, principles of law and even equity. They may, in some jurisdictions be given a free hand to the extent of modifying the contract between the parties to reach a settlement, if so authorised by the parties. In section 5.1 below, we will explore the trend in this regard in other jurisdictions. We will then examine the state of the law and practice in Ethiopia in section 5.2.

5.1 Overview of the Trend in Other Jurisdictions

Parties to an arbitration agreement sometimes authorise arbitrators to decide as *amiable compositéurs*. However, there is no consensus as to what this term means. Particularly, whether it means the same thing as *ex aequo et bono* or something different is contestable. We gather, on the one hand, that the two terms are understood differently at least in some jurisdictions, though that is very seldom sufficiently dealt with in case law and legislations. On the other hand, it seems that many authors and lawyers treat the two terms as identical in effect, and use them interchangeably.

Historically they seem to be different. The earliest use of the term seems to be in the context of public law. For example, we find it used as early as in 1272, when Bishop Barthélémy and the elders of Cahors appointed *arbitres et amiables compositéurs* to settle their disputes regarding local customs. Similarly, in 1334, we come across the appointment of Philippe de Valois as 'judge, arbitrator, and *amiable compositéur'* to resolve a dispute between the Duke of Brabant and various German princes. In this context, it appears that the task of *amiable compositéurs* was finding a landing place that both sides to the dispute would accept as fair rather than decision resulting from strict tenets of

[67] Arbitration laws and case law show a number of countries (considered as important centres of international arbitration) allowing arbitrators to decide on the basis of equity. For example, Article 1051(3) of the German ZPO and Article 822 of the Italian Code of Civil Procedure allow parties to authorise arbitrators to decide based on the principles of equity. Similarly, in Switzerland and Poland parties are entitled to authorise the arbitral tribunal to decide on the basis of equity. Interestingly, perhaps in keeping with the English tradition that is less disposed to accept decision based on equity, the English Arbitration Act of 1996 only implicitly allows arbitrators to decide based on equity. Article 46(1)b of the Act provides that the tribunal may decide: 'if the parties so agree, in accordance with *such other considerations* as are agreed by them or determined by the tribunal.' *See* Blaszczak and Kolber *supra* note 18, at 199 and 201.

international law, if international law did exist in that distant era.[68] This notion then found its way into commercial law. By early 19th century it was well established in French law that arbitrators mandated to proceed *comme amiable compositéur* could 'dispense with observing strict rules of law so that they rule solely by following their conscience and the impulse of natural equity'.[69]

The question of relevance for us, now, is whether a tribunal with such powers may modify or 'rewrite' the contractual terms between the parties to a dispute. It can, if we go by the literal meaning of the term *amiable compositéur.* This is the case because the term means one who effects a settlement.[70] According to Caramelo, the Portuguese law of arbitration takes this view. It vests in the *composição amigável*, the power to decide 'the dispute by appealing to the composition of the parties, on the basis of the balance of interests at stake.'[71] Caramelo argues that since the Act also allows parties to arbitration agreement to empower the arbitrator to decide according to equity, the language of Article 35 must mean something more. He contends we should presume that the legislator uses different words to mean different things. So, settlement of a dispute on the basis of equity in the stronger sense of the term is only part of the powers of the *amiable compositeur;* and an arbitrator can go beyond that.[72]

This should not, however, be understood as giving complete discretion to the extent of empowering the arbitrator to take a sentimental or psychological approach to justice. That would lead to arbitrary decisions. The *amiable compositeur* should, therefore, adhere to certain principles that are widely shared by the members of the relevant business community. These principles are the following:[73]

a) a presumption that the parties intended to establish an economic equality or balance regarding their contributions agreed in the contract entered into (a balance, if it has been broken, the *amiable compositeur*, deciding in equity, should try to restore);

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[68] Edward P. Krugman *et al* (2010), 'Honourable Engagement', *Bloomberg Law Reports, Insurance Law*, Vol. 4 No. 8 , p.3 available at <https://www.cahill.com/publications/published-articles/000092/_res/id=Attachments/index=0/Honorable_Engagment.pdf>, accessed on 20 July 2015.

[69] Ibid.

[70] Id., p. 4.

[71] Caramelo, *supra* note 48, p. 576. He cites Article 35 of the Portuguese Arbitration Act as conferring such extensive powers in this kind of arbitrator.

[72] Ibid. According to Mr. Caramelo the wording of Article 35 leads one to conclude that the '*composição amigável de litígio* contemplated therein is not a decision in equity *minus*, but rather a decision in equity *plus*.

[73] Id., p. 577.

b) a presumption of intended equality of risk, as initially set out in the contract concluded by the parties (which, if it has been later significantly disturbed, the *amiable compositeur*, deciding in equity, should attempt to rebuild to the extent that is possible, fair and reasonable); and
c) applying the requirement of good faith in the execution of contracts (employing equity should allow the *amiable compositeur* to sanction certain behaviours of a party to a contract in bad faith which are not reproachable under the strict rules of law, as well as to temper the responsibility of a defaulting party who acted in good faith).

Caramelo maintains that the dissertation of Professor Eric Loquin embodies the above understanding of *amiable composition* and it is likely to have been known to the members of the Portuguese Parliament that introduced the wording seen above to Article 35 in the final text of the Arbitration Act.[74] Hence, he contends that an *amiable compositeur* has quasi settlement making power in the Act. He has the power to search for a settlement that has the best prospect of being accepted by both sides. He appeases the parties. For this purpose he can 'rewrite' the contract to re-establish the initially agreed equilibrium of the contractual *quid pro quo*.

This does not, however, go to the extent of rewriting the contract to correct the disequilibrium created by the parties intentionally at the very outset when they signed the contract.[75] In sum, when parties authorise the arbitrator to act as a *compositor amigável* in accordance with Article 35 of the Portuguese Arbitration act, the arbitrator is empowered to go beyond equity understood in the 'stronger' sense of the term discussed in the foregoing section. He should discharge the 'appeasement function' described above on top of equity.[76]

In a 2008 Canadian case[77] an arbitral tribunal took essentially the same view as that seen above although the trial court and the Court of Appeal in Québec vacated the award on a 'different' ground. The dispute involved a family business. One faction of the family bought the other out of the family's business. The payout agreed upon was based on a formula that linked the amount to be paid to the profitability of the business at the time of the agreement. The buyout contract contained an arbitration clause authorizing the arbitrator to act as *amiable compositeur*.[78] The business turned out to be

[74] Id., p. 578.
[75] Id., pp. 577 to 578.
[76] Id., p. 578. *See also,* Blaszczak and Kolber *supra* note 18, p.203 According to some authors in Polish doctrine too an *amiable compositeur* may disregard the rights and obligations 'formulated imperatively' in the contract between the parties.
[77] *Coderre* v. *Coderre,* Montreal Court of Appeal, as quoted in Krugman *et al*, *supra* note 68, p. 4.
[78] Ibid.

extremely profitable. Yet, the family that sold its entitlement to part of the business received no payout, on the main, owing to the fact that the formula did not sufficiently integrate future acquisitions into the calculation of 'available funds.' Hence, when the dispute was eventually brought before the *amiable compositeur,* he struck two provisions from the formula in the contract. His determination was that the definition in the formula led to a result neither of the parties had anticipated. Hence, he reasoned that 'the formula may be amended to ensure that the intention of the parties is fulfilled,' and that the powers vested in the *amiable compositeur* empower him to do so.[79] He reasoned he was not ignoring the contract. Rather, he was making changes in the contract in order to fulfil the intention of the parties to the contract and concretise the same.[80]

The trial court of Québec, however, vacated the award, and its decision was confirmed by the Court of Appeal. The decision of the Court of Appeal contains a scholarly exegesis of the powers of the *amiable compositeur.* It concludes that the award would have been above reproach under the law in force in the past. Its confirmation of the trial court's decision vacating the award was based on Article 944.10 of the Québec Code of Civil Procedure. The said provision which follows the UNCITRAL Model Arbitration Law approach gives effect to *amiable compositeur* designations. However, like the UNCITRAL Model Law, it expressly states that the arbitrators 'shall *in all cases* decide according to the stipulations of the contract.'[81] (Emphasis added). In other words, even when authorised to act as *amiable compositeurs*, the arbitrators under the Model Law cannot depart from the terms of the contract.

Overall, it appears that the international arbitration discourse has not yet reached a consensus on the role of *amiable compositeur*. According to some, arbitrators cannot disregard the contractual terms even when authorised to act as *amiable compositeurs* while others maintain that such arbitrators are allowed to revise the contract, where necessary. The former view is popular in Swiss doctrine. According to this view, allowing arbitrators to revise a contract is irreconcilable with the fundamental principle of *pacta suncta servanda*. There are instances indicating that arbitral case law is in line with this viewpoint. Błaszczak and Kolber offer –as examples– ICC case No. 3267 of 1979 and ICC Case No. 3938 of 1982.[82] In the latter, for instance, the arbitral tribunal reasoned[83]:

> [a]ccording to the dominant doctrine and practice of international commercial arbitration, an arbitrator amiable compositeur remains bound by the contract

[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Blaszczak and Kolber, *supra* note 18, pp. 207-208.
[83] Id., p. 208.

> […]. Considerations that may lead the amiable compositeur to mitigate the effects of the application of dispositive provisions of law in specific circumstances are inapplicable in respect of the contract, a special regulation arising out of the parties' own will.

In sum, it must be said that, at least, in arbitration laws drafted following the Model Law approach on this point, arbitrators are not empowered to change terms of the contract even when entrusted to act as *amiable compositeurs* by the parties. Article 28(3) of the Model Law allows parties to authorise arbitrators to act as *amiable compositeurs;* but Article 28(4) makes it clear that '*in all cases'* the arbitral tribunal is to '*decide in accordance with the terms of the contract*' taking into consideration the usages of trade relevant to the transaction in question.[84] (Emphasis added)

5.2 '*Mandate to Settle*' under Ethiopian Law

Ethiopian law does not make any reference to *amiable composition*. In fact, all it says regarding substantive basis of arbitral decisions is that arbitrators 'undertake to settle the dispute in accordance with *the principles of law*.' As already discussed, this empowers arbitrators to decide based on 'law', 'rules of law' and even more. The question is whether this implies powers to the extent of revising (or to some extent disregarding) the terms of the contract between the parties. For example, Article 1763 does not allow courts to modify a contract on grounds of equity unless that is expressly provided by law.[85] As already discussed, arbitrators as party appointed judges, decide neither in the name nor on behalf of the state. Hence, it may be contended that they have broader powers than a court in this regard where they are authorised to decide based on equity. More specifically, it may be held that where parties authorise arbitrators to act

[84] UNCITRAL Model Law, *supra* note 1, Article 28(4). According to the *Travaux Préparatoires* empowering arbitrators to act as amiable compositeurs and for that matter to decide based on equity is not used in all legal systems. So, the model law did not want to regulate this. It only wanted to bring this type of arbitration to the attention of the parties and clarify that the terms of the contract cannot be affected even by arbitrators given such powers. *See* on this United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* at p. 112.

[85] Civil Code, *supra* note 9, Article 1763. In the Civil Code of Ethiopia equity plays a role in determining the content of contracts. Article 1713 provides that parties to a contract are 'bound by the contract and such incidental effects as are attached to the obligations concerned by custom, equity, and good faith having regard to the nature of the contract.'' According to Article 1766 of the Civil Code the court may vary a contract where a special relationship such as family relationship exists between the parties and such relationship compels them to deal with each other in accordance with equity.

as *amiable compositeurs* they may have even more powers and hence revise the contract subject to limitations imposed by public policy.

However, we must admit that there is no much legal authority on this point in Ethiopia. Only one Cassation Bench decision lends support to such expansive powers of arbitrators though it does not expressly deal with *amiable composition*.[86] The dispute involved three members of an extended family who were engaged in business together. They could not continue as business partners because of serious disagreement. Hence, they entrusted settlement of their dispute regarding the winding up of their business to *Sergan Jama* family council (elders from their community).[87] The agreement does not characterise itself as an arbitration agreement, but they undertook to be bound by the decision of these elders. In fact, the agreement indicates that it was the elders who took the initiative and offered to intervene to 'reconcile' the business partners. The latter only accepted efforts at 'reconciliation' and undertook to be bound by the decision of the *Sergan Jama*, i.e., family council.[88]

On 18 November 1997 (08 *Hidar* 1990 E.C), fifteen days after the signing of the agreement, the *Sergan Jama* elders made known their findings reached after conducting inquiry and 'convincing' the parties to the dispute. After partial compliance with the decision of the elders Mr. Miftah Kedir discontinued effecting payments. Hence, Mr. Mukemil Mohammed applied to the Federal First Instance Court for the execution of the decision of the elders.[89]

Mr. Miftah Kedir contended that there was no agreement to arbitrate, and therefore, the findings of the elders do not amount to an arbitral award. He argued that there was no award that could be 'executed' by a court. The Federal First Instance Court heard the testimony of the persons involved in 'resolving' the dispute. It found that they were engaged in reconciling and convincing the parties, and concluded that the elders were not acting as arbitrators. The First

[86] *Mukemil Mohammed v. Miftah Kedir*, Federal Supreme Court of Ethiopia, Cassation File Number 38794, decision of 31 March 2009 (24 *Megabit* 2001 EC) Reported in *Cassation Decisions of the Federal Supreme Court*, Vol. 9, pp 173-175.

[87] Agreement between Miftah Kedir, Mukemil Mohammed and a third partner also signed by seven traditional elders dated 3 November 1997 (23 *Tikimt* 1990 E.C). The file was obtained from the attorney of one of the parties and a copy is retained.

[88] Ibid. The agreement contains a penalty clause. It stipulates the person who fails to abide by the decision of the Sergan Jema family council will have to pay by way of penalty 50,000 Birr to the State, 40,000 Birr to the other party and 10,000 Birr to the Sergan Jema elders. The agreement was signed by the three people in dispute and seven *Sergan Jema* elders.

[89] Application for execution of 'arbitral award' lodged by Mr. Mukemil Mohammed dated 12 December 2001(03 *Tahsas* 1994 EC). The outstanding amount for which execution was lodged was Birr 170,122.75(One hundred seventy thousand one hundred twenty two and seventy five cents).

Instance Court decided that the exercise was 'conciliation' rather than arbitration,[90] and thus held that there was no award to execute. According to the First Instance Court, the parties are not bound by the findings of the conciliators unless they 'expressly agree in writing to confirm them' per the requirement of the Civil Code.[91] In the case at hand, there was no written agreement between the parties confirming acceptance of the terms of the compromise drawn by the conciliators, the First Instance Court noted.[92] Mr. Mukemil Mohammed appealed to the Federal High Court. The High Court confirmed the decision of the First Instance Court.[93]

Aggrieved by this decision of the two courts, Mr. Mukemil Mohammed sought review on cassation for 'basic error of law'. For the Cassation Bench, the fact that the parties to the dispute had agreed to be bound by the decision of the elders was sufficient to characterize the exercise as arbitration. The Cassation Bench stated that the agreement between the parties indicates that 'the tribunal' was established to **'***reconcile the misunderstanding'* concerning property and money between the named parties and that the said parties '*undertook to accept findings and* decisions' of the tribunal.[94] According to the Cassation Bench, this agreement shows that the parties have vested in the *shimagles* power to pass decisions and have 'agreed to accept the decisions' passed by them. Thus, the Cassation Bench ordered that the 'award' be executed by reversing the decision of the lower courts that had considered the exercise as conciliation rather than arbitration.[95]

The Cassation Bench of the Federal Supreme Court considered the *Sergan Jama* council as an arbitral tribunal although the council aimed at '*reconciling'* the misunderstanding between the relatives. This is because the parties to the dispute had 'undertaken to accept the findings and decisions' of the Council. The Cassation Bench disregarded the testimony given before the First Instance Court by the elders themselves (as regards how they proceeded) from which the First Instance Court had concluded that the exercise was conciliation rather than arbitration. The Cassation Bench did not inquire into the substantive basis of the

[90] *Mukemil Mohammed v. Miftah Kedir*, Federal First Instance Court, Case No. 00136, decision rendered on 26 September 2007.

[91] Civil Code of Ethiopia, *supra* note 9, Article 3322(2) provides '[t]he parties shall not be bound by the terms of the compromise drawn up by the conciliator unless they have expressly undertaken in writing to confirm them.'

[92] *Mukemil Mohammed v. Miftah Kedir*, *supra* note 90.

[93] Mukemil Mohammed v. Miftah Kedir, Federal High Court, Case No. 60530, decision dated 17 April 2008 (*Miazia* 9, 2000 EC).

[94] *Mukemil Mohammed v. Miftah Kedir*, Federal Supreme Court Cassation Bench, *supra* note 86. My own free translation of the Cassation Court decision reported in Cassation Court Decisions Volume 9, pp 173 to 175.

[95] Ibid.

decision of the elders. As traditional elders, what they did was render a decision that they deemed fair in view of, among other things, the blood relationship between the parties to the dispute, and the need to close the chapter and move forward as relatives.[96] Yet, the Cassation Bench accepted their decision as an arbitral award. An arbitration agreement need not necessarily designate itself as such[97] if there is the express intention that involves arbitration.

Leaving aside whether the Cassation Bench got the facts of the case and the intention of the parties right in this particular case, the undertaking to be bound by the outcome of the decision of a third party is the critical factor. If we go by this decision, there is no need to even consider the normative basis of the decision by the third party. In contrast to its finding in *Mukemil Mohammed v. Miftah Kedir*, the Cassation Bench (in a later case) emphasises the duty of arbitrators to stick to the agreement of the parties and the arguments raised by the parties before the tribunal in deciding matters before them.[98] In *Ethio-Telecom v. PTE International Incorporated*, the latter had undertaken to carry out various tasks aimed at improving the performance of the personnel of *Ethio-Telecom*. As per the contract, *Ethio-Telecom* was required to pay US$ 4 million in three instalments. 12% of each instalment was to be withheld as guarantee for performance of the contract. The amount so withheld was to be released to *PTE International* within 15 days from completion of the project, if implementation of the project was found to be satisfactory.[99]

PTE International could not complete the tasks envisaged by the contract. The evaluation carried out by *Ethio-Telecom* revealed that only 71% of the tasks

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[96] Telephone interview, with Mr. Miftah Kedir, conducted on 21 February 2015. Unfortunately, I could not get the views of Mr. Mukemil Mohammed, who reportedly, has passed away.

[97] Bruce Haris *et al* (2007), *The Arbitration Act 1996: A Commentary*, 4th ed., Blackwell Publishing Inc., p. 52 In David Wilson Homes Ltd v. Survey Services Limited, a clause in an insurance policy that read as 'any dispute or difference arising hereunder . . . shall be referred to a Queen's Counsel of the English Bar to be mutually agreed … or in the event of disagreement by the Chairman of the Bar Council'' was deemed to constitute an arbitration agreement despite no mention of arbitration at all in the clause. That the dispute was referred to a third party that would render a binding decision and that the matter related to an insurance policy rendered any construction of this clause to mean something different from arbitration lead to this conclusion.

[98] *Ethio-Telecom v. PTE International Incorporated*, Cassation Case No. 63063, Cassation Bench of the Federal Supreme Court, decision of 13 November 2012(03 *Hidar* 2005). Reported in Cassation Bench Decisions Vol. 14. The central issues the Cassation Bench addressed are whether review on Cassation is possible despite a finality clause in the arbitration agreement and the substantive issue of whether the facts of the case indicate there was *novation* of contract. So, the case is not really authority on the issue of amiable composition. It is only an *obiter dictum.*

[99] Ibid.

agreed were successfully carried out. *PTE International* did not contest this finding.[100] Yet, *Ethio-Telecom* did not seek performance of the balance of the contract. *PTE International* demanded that *Ethio-Telecom* release, from the amount withheld by the latter as guarantee of good performance, a sum that represents work successfully completed (i.e. 71% of the amount withheld).[101]

The Arbitral Tribunal, formed based on the arbitration clause, granted the claim of *PTE International* on the ground that the internal review undertaken by *Ethio-Telecom* amounts to novation, a new contract. It reasoned that the payment of a percentage of the amount withheld as guarantee can be implied from that.[102] The Cassation Bench did not find this tenable. It disagreed on grounds of form requirements for modification of contract. It remarked that 'an arbitral tribunal should decide based on valid undertakings agreed upon by contracting parties.'[103] The Cassation Bench was not addressing the issue of *amiable composition*; in this particular case its emphasis on the importance of arbitrators sticking to the terms of contract does not augur well for the notion. In this case, the Cassation Bench sounds predisposed to reject modification of contract by arbitrators, even where the latter are given mandate to settle.

Ethio-Telecom v. PTE International does not really imply rejection of *amiable composition*. The Cassation Bench only made a remark about a doctrine that was not dispositive in the particular case without even mentioning it by name. *Mukemil Mohammed v. Miftah Kedir* appears to be a more pertinent authority. Hence, we may conclude that an arbitral tribunal may revise the contract between the parties to a dispute, at least so long as the parties have authorised it to do so, and if the parties have undertaken to be bound by the resultant decision.

Conclusions

Ethiopian law is flexible as regards norms applicable to the substance of a dispute in arbitration. The law defines arbitration as settlement of dispute by reference to principles of law, a notion that is much wider than law or even rules of law. So, unlike some other jurisdictions,[104] arbitration agreement in Ethiopia

[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid. Incidentally, the Cassation Bench underscored that arbitral tribunals should also decide based on arguments raised in the proceedings implying arbitral proceedings are adversarial.
[104] Blaszczac and Kolber, *supra* note 18, pp. 191-192. In Poland, for example, express authorization by the parties is required for the tribunal to apply principles of law. In contrast, the Swiss and French laws as well as legal doctrine developed in the two countries provide that the basis of decision should be '*règles du droit*', thus implicitly

need not even authorize the application of principles of law to the merits of the dispute. This shows that Ethiopian law is more liberal than many arbitration friendly laws such as the UNCITRAL Model Law,[105] when it comes to party autonomy to determine norms applicable to the substance of a dispute.[106]

Moreover, the law does not prohibit parties to arbitration from choosing foreign law and even rules of law that apply to the substance of their dispute. Given this absence of prohibition, we may hold that parties are at liberty to choose foreign law and rules of law. Likewise, parties may authorise arbitrators to apply equity both in the weaker and stronger interpretations. Somehow less settled, however, is the issue of whether parties to arbitration can vest in the tribunal *mandate to settle* –i.e., conferring on it power to re-write some contractual obligations of parties, to re-establish the balance of interest at stake short of violating public policy. Even this mandate can be regarded as a possibility in view of what the decision of the Cassation Bench in *Mukemil Mohammed v. Miftah Kedir* suggests. ■

allowing the use of general principles of law as the basis for decision, so long as at least the general principles are part of the legal system. *See also,* Hosseraye *et al*, *supra* note 13, at p. 352. The 2011 French Law leaves to the parties the choice of law applicable to the substance of the dispute but, where the parties have not made choice, the arbitrators are free to apply the 'rules of law' That they consider appropriate. In other words, the arbitrators do not need an express authorization by parties to apply 'rules of law' instead of limiting themselves to the law of a specific country. The use of the words 'rules of law' instead of 'law' is deliberate. They aim at enabling the arbitrators to apply principles of law rather than being bound to the laws of a specific country.

[105] UNCITRAL Model Law, *supra* note 1, Articles 28(1) and (2) of the Model Law indicate disputes are to be resolved based on '*rules of law'* chosen by the parties to the arbitration agreement. In case parties to arbitration agreement fail to choose the applicable law, arbitrators are to apply *'the law'* determined by the conflict of laws rules they consider are applicable. So, where parties have not chosen 'rules of law', what will apply is a specific law reached through the application of conflict of laws rules. So where the 'law' of the specific state reached at by application of conflict of laws rules does not mandate the application 'principles of law', only the laws of the specific state will apply to the substance of the dispute.

[106] Section 1051(1) of the German law provides that arbitrators are to decide disputes in accordance with such '*rules of law'* as are chosen by the parties. 'Rules of law' are generally construed to be broader than the 'law' as seen in relation to French Law. So, the use of this term suggests parties can, according to German law, validly choose the application of principles of law. But providing for cases where parties to dispute have not chosen substantive law applicable to the dispute, sub 2 of Section 1051 says '*the law* of the state', with which the subject matter of the proceeding is most closely related applies. Here the change in language indicates use of 'principles of law' is not the default option unlike in Ethiopia. *See* German Arbitration Law of 1998, tenth Book of the Code of Civil Procedure, available in English at: <http://www.dis-arb.de/en/51/materials/german-arbitration-law-98-id3>, accessed on 13/09/2011.

The Practice of Informal Changes to the Ethiopian Constitution in the Course of Application

Nigussie Afesha ♣

"Where the natural path of formal amendment is difficult or blocked, alternative paths open to political actors to achieve its functional equivalent."
Richard Albert [1]

Abstract

Given the generality of a constitution, it requires amendments in order to enable it to cope up with the socio-economic and political dynamics. As a result, formal constitutional amendment procedures have remained vital mechanisms in this regard. However, the rigidity of formal constitutional amendment procedures and/or the political context of a country have often kept constitutions static and frequently induce politicians to look for alternatives. Informal constitutional amendment mechanisms are thus designed in response to the difficulty of formally amending the constitution. In this sense, the role of non-constitutional mechanisms in the alteration of a constitution is essential. The FDRE Constitution encompasses a constitutional provision that spells out how the Constitution can be amended. However, there has not yet been a single formal constitutional amendment. This article examines instances of actual but unwritten constitutional changes in the course of application that have been occurring in Ethiopia for which formal constitutional amendment cannot account for. These include constitutional changes through constitutional interpretation, or by legislation. The article contends that there are time-honoured practices that regulate and continue to guide the course of the Ethiopian federal state in contradiction to the Constitution. Equally important, party structure also influences the federal distribution of power.

Key terms

FDRE Constitution, informal constitutional changes, constitutional amendment, constitutional interpretation, political custom, law enforcement, Ethiopia.

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[1] Richard Albert (2014), "Constitutional Disuse or Desuetude: The Case of Article V, Boston College Law School", *Legal Studies Research Paper Series*, No, 327 p. 1062.

Introduction

A constitution outlines the major principles and the basic organization, structure, and process of a state.[2] Most of its content is brief, and "constitutions, by their nature, operate in time, seeking to regulate the future on behalf of the past."[3] Many drafters of constitutions act as if their handiwork should last for a long period of time.[4] Indeed, every normative constitutional theory presumes that constitutions are able to function over a relatively extended period of time. Without endurance, constitutions cannot provide a stable basis of politics. This assumption of endurance is built into the very idea of a constitution and closely related to core normative issues, such as constitutional amendment.[5]

The idea of constitutional amendment stems from the argument that no generation has a monopoly on knowledge enabling it to bind future generations irreversibly, and that "a constitution that will not bend will break".[6] There is thus an 'inherent right' to amend a constitution in order to perfect 'imperfections' and to strengthen its provisions where necessary.[7] Amendment denotes the idea of making correction or improvement in the text of a written constitution.[8] Formal constitutional amendment is more of a norm and continues as a widely shared and intrinsic quality of national constitutions.[9] The primary means of legitimate adjustment on constitutional document is a formal procedure specified in the Constitution itself.[10] It is equally important to bear in

[2] Donald J. Boudreaux and A. C. Pritchard (1993), *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, Fordham L. Rev. Vol., 62, Pp. 111-162, p. 111.

[3] Tom Ginsburg (2011), "Constitutional endurance" in Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law*, Edward Elgar Publishing, p. 112.

[4] Ibid.

[5] Ibid.

[6] John Hatchard, Muna Ndulo, Peter Slinn (2004), *Comparative Constitutionalism and Good governance in the Commonwealth: An Eastern and Southern African Perspective*, Cambridge University Press, New York, pp. 44-45.

[7] Ibid.

[8] Rosalind Dixon (2011), "Constitutional Amendment Rules: A Comparative Perspective" in Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law,* Edward Elgar Publishing, p 96.

[9] Ibid.

[10] Bjørn Erik Rasch, (2008), Foundations of Constitutional Stability: Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures, A Paper presented at the ECPR Joint Sessions of Workshops Rennes, France, April 11-16, 2008 pp. 3-4[Hereinafter called, Bjørn Erik Rasch, Foundations of Constitutional Stability].

mind that the more fundamental the constitutional change, the weightier becomes the reason for resorting to formal processes.[11]

However, there are arguments over the function of formal procedures for constitutional amendment and comparative difficulty of such processes.[12] Most constitutional scholars agree that not all forms of constitutional change in fact involve formal constitutional amendment processes. Some even have suggested, ultimately formal constitutional amendments will be irrelevant to shape constitutional meaning.[13] Irrespective of these arguments, constitutions have special procedures and require the involvement of majorities for their amendment, often requiring some measure of consent from the legislatures or the public.[14] Nevertheless, amendment rules have often made constitutions difficult to change and the politics of their constitutional amendment has proven to be very divisive. As a consequence, several countries frequently look for alternatives to formal constitutional amendment mechanisms.[15] In this regard, the role of non-constitutional mechanisms in the alteration of the Constitution is essential. In particular, the function, relation and co-existence of formal and non-formal constitutional amendment mechanisms need to be clearly spelled out. The extent to which and the circumstances under which informal constitutional mechanisms modify the contents of a given constitution need to be ascertained.

The FDRE Constitution expressly provides for the mechanisms of its modification which includes, setting different amendment formula to amend various sections of the Constitution.[16] The Constitution also expresses that a proposed constitutional amendment is required to be submitted for discussion and decision to the general public and to those whom the amendment of the Constitution concerns.[17] Despite this fact, the Constitution has not undertaken any formal amendment so far. The exception to this was the move to amend article 98[18] of the Constitution, titled 'concurrent power of taxation' that gave the federal government the legislative and executive power over the concurrent taxation restricting the power of the state only to get the proceeds thereof.

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[11] Getachew Assefa (2012), *Ethiopian Constitutional Law with Comparative Notes and Materials*: A Text book, p. 103.
[12] Ibid.
[13] Id., p. 100.
[14] George Anderson (2008), *Federalism: An Introduction*, Oxford University Press, p 59.
[15] Ibid.
[16] *See* article 105 of the FDRE Constitution.
[17] Id., article 104.
[18] Solomon Negussie (2008), *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Rev. ed. Netherlands Wolf legal publishers p.64.

In doing so, formal amendment was initiated, and the proposed amendment passed through a number of stages. However, Negarit Gazette did not proclaim the proposed amendment.[19] In practice, this provision of the Constitution changed and, the federal government has been empowered to determine the scope of the tax as well as the rate, and administer the same (concurrent power of taxation), while the regional states are entitled for their share. Except for this circumstance, the Constitution has served for more than two decades without making a formal amendment. However, there are ample instances of actual but unwritten constitutional changes conceivably occurring in Ethiopia for which formal constitutional amendment cannot account for. One can thus argue that informal procedures for constitutional amendment can play a role in reconstituting the Constitution and to reset the constitutional meaning for subsequent constitutional developments.

This article examines these practices of informal constitutional changes in Ethiopia. The first section deals with conceptual and theoretical frameworks of constitutional amendment. The second section discusses formal constitutional amendments in general. This part explains textual amendments, which are usually considered as conventional vehicles for amending a Constitution. Section 3 takes up various mechanisms of non-textual ways of introducing changes in the life of the Constitution such as judicial interpretation, legislation, party practice and political customs. The Ethiopian experience of formal constitutional amendment and mechanisms of informal change are discussed in Sections 4 and 5. These sections further highlight historical and conceptual perspectives of formal and informal constitutional changes in Ethiopia.

1. The Concept of Constitutional Amendment: A theoretical framework

The constitution of any country is intended to capture the essence and wishes of the people. Such norms and desires of the people are dynamic and evolve after they are initially formed.[20] In view of the dynamic nature of society and their aspirations over time, constitutions cannot remain immutable.[21] Ginsburg argues that constitutions "exist in a world of change, and so must adjust to changing conditions".[22] Amendment is a mechanism that preserves the continuity of the

[19] Ibid.

[20] Rosalind Dixon (2010), "Amending Constituting Identity", Chicago Public Law and Legal Theory, Working paper No. 332, p. 1.

[21] Gabriel L. Negretto (2011), *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, paper prepared for delivery at the 2011 American Political Science Association Meeting, Seattle, Washington, September 1-4, p 751.

[22] Ginsburg (2011) *supra* note 3, p. 112.

constitution in a changing environment.[23] By implication, constitutional amendment processes are of foundational value for making changes, and allow political actors to respond to the changing political, social, and economic needs of the political community.[24] For this reason, every constitution must provide some method by which it could be amended as conditions and circumstances dictate to make periodic reconsideration of fundamental principles. A constitution is supposed to be changed in ways that the provision of the constitution describes.[25] It is imperative that the essence of amendment be sufficiently articulated and understood.

Rosalind Dixon defines constitutional amendment as the idea of making correction or improvement upon prior constitutional design choices in light of new information, evolving experiences or political understandings.[26] He contends that constitutional 'amendment' generally requires some kind of formal legal deposit in the text of a written constitution.[27] Unlike ordinary legislation, constitutions thus commonly entrench one or more amendment formula to modify their text.[28] Providing a legal and transparent framework that enables to alter the constitution[29] and fix defects (revealed by time and experience) is an essential function of formal amendment rules.[30] Formal amendment rules structure the process by which political actors change the text and meaning of a constitution.[31] This may lead to the argument that a formal constitutional amendment process can be (and are typically) used to a wide range of constitutional alterations. However, this is not tantamount to requiring every constitutional modification to pass through the formal amendment channels.

In support of informal amendment, Strauss argues that formal amendments, which are adopted in a constitution, are actually not a very important way of changing it.[32] "Most constitutional scholars agree that not all forms of constitutional change in fact involve formal processes of constitutional amendment".[33] The claim here is that some forms of modification can be made

[23] Negretto, *supra* note 21, p. 749.
[24] Richard Albert (2013), "The Expressive Function of Constitutional Amendment Rules", *McGill Law Journal* Vol. 59, No.2 Pp. 225-281, p. 233.
[25] David A. Strauss (2010), *The living Constitution, Oxford University Press*, New York, p. 115.
[26] Dixon (2011) ., *supra* note 8, p. 96
[27] Id., p 97.
[28] Albert (2014), *supra* note 1, p. 1033.
[29] Albert (2013), *supra* note 24, p. 232.
[30] Id., p. 227.
[31] Id., p. 232.
[32] Strauss, (2010), *supra* note 25, p. 115.
[33] Dixon (2011), *supra* note 8, p. 97.

informally without setting the constitutional amendment process in motion. This is because some institutions like courts and legislative bodies are also established to undertake such task. As Richard Albert noted, although the idea of formal amendment has American roots, as expressly embodied in Article V of the United States Constitution,[34] the pace of formal amendment in the United States is decelerating.[35] And now, the dominant mode of 'updating' constitutional meaning has turned out to be *via* a process of judicial interpretation.[36] This leads to an argument that constitutions can be modified over time without textual changes, typically by means of constitutional court rulings and, less visibly, by legislative and executive decisions, or by the informal practices of political actors'.[37]

One may generally state informal amendment as a process involving alteration of constitutional meaning in the absence of textual change.[38] An informal amendment occurs when political norms change, or courts, the most conventional actors of informal amendment, interpret or construct the constitution so as to bring it in line with policy preferences.[39] Hence, political actors alter constitutional meaning or update the constitutional text informally without a corresponding alteration to the constitutional text as time and experience expose faults in its design and new challenges emerge in the constitutional community.

It can be argued that formal amendment rules provide a legal and transparent framework within which a constitution can be altered, whereas informal amendment occurs supposedly pursuant to extralegal procedures. To call informal amendment 'extralegal' is not to make a claim against its legitimacy.[40] For that matter, the purpose of describing formal amendment rules as 'legal' and informal amendment procedures as 'extralegal' is merely meant to highlight that the former is vividly outlined in a constitutional text while the latter is entrenched within it.[41] Put differently, the difference between formal and informal amendment is not that one is a set of legal rules and the other is not; it is, that the former is textually entrenched through legal rules while the latter is not.[42] It should be noted here that both formal and informal amendments adjust

[34] Albert (2014), s*upra* note 1, p. 1033.
[35] Ibid.
[36] Dixon (2011) *supra* note 8, p. 339.
[37] Negretto, (2011), *supra* note 21, p. 3.
[38] Richard Albert (2014a), "The Structure of Constitutional Amendment Rules", *Wake Forest Law Review*, Vol. 49, pp. 913-75, p. 914.
[39] Albert (2013), *supra* note 24, p. 227.
[40] Id., p. 232.
[41] Ibid .
[42] Id., p. 233.

basic constitutional values in tune with changing political and social circumstances by incorporating into a constitution a broader and more inclusive understanding of these values.[43]

2. Formal Constitutional Amendment

Constitutions obsolesce rapidly, and must be updated over time to cope with changes in the country's circumstances and citizens' values.[44] Changing social circumstances and understandings will often make provisions of a constitution outdated.[45] Therefore, a constitution is expected to regulate new/dynamic circumstances that have evolved after the constitution was initially framed. The issue here is: what process should be followed in updating a constitution? Richard, in this regard, notes that fixing defects of a constitution is an essential function of formal amendment rules.[46] Getachew also underlines that amendment "is without any doubt the most formal way in which a constitution takes care of problems it suffers".[47] It is thus natural for a constitution to describe the principal modes of changing its rules, be it the substance of the provision or its scope of applicability. If periodic replacement of a constitution is not feasible, the next plausible option is sticking to a formal constitutional amendment process, which is stated in the constitution itself. In this sense, formal constitutional amendment procedures have important functions in a constitutional democracy. In cases of major constitutional change, they help to ensure that change occurs via legal, rather than extra-legal, means.[48]

As Albert states: "[i]n the normal course of affairs, a state amends its constitution in accordance with the constitutional amendment procedures spelled out in the constitutional text. These amendment procedures will typically identify the individuals, institutions or bodies" that are authorized to propose an amendment to the existing constitution and they prescribe the necessary and sufficient conditions for amending the same.[49] Thus, amendment becomes valid only if it adheres to the procedural requirements set out in detail in the Constitution and is proposed by those persons who are authorized to do so. Such amendment becomes law only if it meets those, often stringent, requirements.

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[43] Albert (2014), *supra* note 1, p. 1061.
[44] Adrian Vermeule (2004), "Constitutional Amendments and the Constitutional Common Law", *Chicago Public Law and Legal Theory Working Paper*, no. 73 p. 1.
[45] Rosalind Dixon and Richard T. Holden (2011), "Constitutional Amendment Rules: The Denominator Problem", *Chicago, Public Law and Legal Theory Working Paper*, No. 346, p. 1.
[46] Albert, (2013), *supra* note 24, p. 227.
[47] Getachew, *supra* note 11, p. 103.
[48] Dixon and Holden (2011), *supra* note 45, p. 1.
[49] Richard Albert, (2010), "Nonconstitutional Amendments", *Canadian Journal of Law and Jurisprudence*, Vol. xxii, No.1 pp. 1- 43, p. 13.

The textual procedures are, therefore, "both the beginning and the end of the constitutional amendment process".[50] It is only when the amendment effort successfully goes through the procedures that it would introduce changes into the written constitutional order.[51]

However, there are substantive limits to valid constitutional changes. These occur where a constitution contains "Eternal Clause" or "unamendable" provisions.[52] This relates to constitutional provisions that immunize certain provisions of a constitution against amendment. These parts of the constitution can be altered neither by judicial construction nor through constitutionally entrenched amendment procedures.[53] Changing an unamendable constitutional provision is unthinkable except through comprehensive constitutional renewals that would bring about a paradigm shift.[54]

Save the issue of eternal clause as an exception to a formal amendment process, countries have different amendment requirements which may be grouped into three general categories: legislative majority, double passage requirements (this is the case where the bill is expected to pass through two houses of parliament), and referendum requirements.[55] Others (that opt to express the exact degree of difficulty) categorize amendment requirements into four groups: legislative supermajority requirements, parliamentary quorum requirements, state ratification, and referendum requirements.[56]

While affirming formal constitutional amendment mechanism is extremely important (and a necessary means) to introduce change into the constitution, the onerous nature of amendment requirements and the difficulty of adhering to the requirements spelled out in the constitution render a constitutional amendment difficult. For example, if an amendment is required to pass two Houses of parliament, its approval can be too difficult as compared to a bill which can be enacted by one house.[57] The rigour of the process can be even more difficult if a bill is required to pass through a constituent unit legislative council as well.[58] In effect, stiff amendment requirements that were initially envisaged by framers of a constitution would inevitably cause the dilemma for countries between pursuance of the formal amendment path or looking for other mechanisms.

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[50] Ibid.
[51] Ibid.
[52] Getachew, *supra* note 11, p. 103.
[53] Albert, (2010), *supra* note 49, p. 9.
[54] Ibid.
[55] Dixon and Holden (2011), *supra* note 45, p. 8.
[56] Ibid.
[57] This assertion should be viewed in a State where both houses are not dominated by a single party or a single house not controlled by a single party.
[58] Dixon and Holden (2011), *supra* note 45, p. 8.

Based on this reasoning, we can find several examples of constitutional change that did not follow formal procedures laid down in constitutions. For example, the U.S. and Australia[59] have written requirements for constitutional amendment that are unusually onerous. In both countries, it is practically difficult to conduct wholly successful constitutional amendment campaigns.[60] Given the fact that almost every constitution worldwide imposes some form of super-majority requirement for successful constitutional amendment, this has negative bearings on the chance of successful textual constitutional change.[61] In the United States, the difficulty to adhere to the amendment procedure outlined in Article V of the US Constitution has rerouted the pursuance of constitutional from formal to informal amendment.[62] The difficulty of formally amending the Constitution has accordingly forced political actors to update the Constitution informally through non- Article V methods, leaving the actual constitutional text unchanged.[63] Some argue that the amendment procedures under Article V are too cumbersome and erratic to serve as the sole vehicle for constitutional development in a complex and rapidly changing society.[64]

There are several other more flexible modes of constitutional change that do not rely on the mechanistic procedures of Article V in order to keep the constitutional regime current and reflective of new social and political equilibria.[65] These modes enable constitutional change by political adaptation as well as legislative and executive bodies. Such informal constitutional amendment mechanisms have drawn growing attention within governments and among scholars as they are ubiquitous and inevitable.[66] This flows from the inevitable fact of informal ways of introducing changes in the life of a constitution, as a result of the rigidity of formal constitutional amendment methods and given the quantity and generality of a written constitution. Therefore, informal constitutional amendment procedures may play a role in reconstituting constitutional meaning in response to cumbersome constitutional amendment requirements. As a result, non-text-based constitutional changes can attain the objectives of formal amendment mechanisms in resetting the constitutional meaning for subsequent constitutional developments.

[59] These two countries are known for introducing change in their constitutions informally, and are being cited in a numbers of scholarly articles for so doing.
[60] Dixon (2010), *supra* note 20, p. 9.
[61] Ibid, p. 10.
[62] Albert, (2014), *supra* note 1, p. 1051.
[63] Id., pp. 1051-2.
[64] Id., p. 1052.
[65] Ibid.
[66] Albert, (2013), *supra* note 24, p. 225.

It should be noted that a constitution does not specifically list informal amendment processes as forms of its modification.[67] Rather, these methods depend on interpretations of what the constitution says and on interpretive understanding of the underlying intent.[68] These may happen where there are new situations, which cannot be addressed by existing provisions of a constitution, or when there are gaps in an existing constitution. In these scenarios, courts and the representative bodies interpret provisions of a constitution in a creative manner to keep the constitutional regime up-to-date and reflective of new social and political changes without relying solely on the formal procedure. This is because it is not feasible to rely on formal constitutional amendment procedures for all unfolding new circumstances and gaps in a constitution created by dynamic realities. Against this backdrop, one may dare argue that informal constitutional amendment procedures may somewhat have remote constitutional base.

3. Informal Constitutional Amendment

As highlighted in the preceding sections, constitutional change can occur in the course of its application even in the absence of formal amendments.[69] Most countries with difficult constitutional amendment procedures have developed *"non-textual"* alternatives of introducing constitutional changes, *inter alia*, through judicial review.[70] So, the level of rigidity has direct repercussions on the extent to which the courts and the representative bodies interpret provisions (more informally) in a creative manner.[71] These informal mechanisms mainly result from experiences of government action under the constitution. Hence, informal amendment is the need to correct constitutional deficiencies with diligence and efficacy.[72]

There are different types of informal change in the constitutional arrangement of a country. The *first* possibility is gradual revision of the

[67] Boundless. "Informal Methods of Amending the Constitution: Societal Change and Judicial Review." Boundless Political Science. Boundless, 08 Aug. 2016. Retrieved 07 Oct. 2016 <https://www.boundless.com/political-science/textbooks/boundless-political-science-textbook/the-constitution-and-the-founding-of-america-2/amending-the-constitution 28/informal-methods-of-amending-the-constitution-societal-change-and-judicial-review-168-5169/>

[68] Ibid.

[69] Rasch, *supra* note 10, p. 9.

[70] Iris Nguyên-Duy, (2013), Playing Doctor Frankenstein when Re-forming the Constitution? Some thoughts on recent developments in the United Kingdom and Norway, a Paper for the international Conference "The Importance of Constitutions" Held at the Swedish Institute in Istanbul, Turkey, 23-25 October 2013, p. 9.

[71] Ibid.

[72] Id., p. 11.

constitutional framework by means of judicial interpretation.[73] Strauss, for example, argues that in the US, the Supreme Court generally interprets "the Constitution more or less in line with the kinds of changes in circumstances, understandings and even majoritarian demands that can lead to successful" constitutional amendments.[74]

The *second* possibility is revision of the constitutional text by irregular means. There are constitutional amendments that would not have been valid if the formal amendment and ratification process laid down in a constitution had been strictly followed.[75] One can find several examples of constitutional changes that do not follow the formal processes laid down in the constitution. The Sherman Antitrust Act of 1890, the Civil Rights Act of 1964, and the Endangered Species Act of 1973 are suggested examples of informal amendments in the United States without adhering to amendment requirements stated in Article V.[76] The *third* possibility is intended or unintended revision of the constitutional framework by means of political adaptation through legislative and executive bodies.[77] Such informal amendments include legislation, judicial interpretation, executive action and convention.[78].

3.1 Legislation

The framers of a constitution create the basic skeleton of different institutions, and they entrench particular solutions to a relatively narrow set of questions. For the rest, they seek to create a set of political institutions and empower those institutions to deal creatively with ongoing developments that cannot be effectively addressed by solely using the formal text in the constitution.[79] Therefore, there may be many other documents that supplement the text of the constitution and provide for the actual set of constitutional rules.[80] These might include court decisions and legislation that provide for core aspects of governance and supplement the formal text. In the latter case, constitutional

[73] Rasch, *supra* note 10, pp. 3-4.
[74] Dixon (2011), *supra* note 8, p. 96.
[75] Rasch, (2008), *supra* note 10, pp. 3-4.
[76] Albert, (2014) *supra* note 1, p. 1063.
[77] Rasch, *supra* note 10, pp. 3-4.
[78] Albert (2014) *supra* note 1, p. 1062.
[79] *See* for example, Ernest Young A. (2007), "The Constitution Outside the Constitution", *Yale Law Journal*, Vol. 117, pp. 408-473, p. 456.
[80] Tom Ginsburg, (2010) "Constitutional Specificity, Unwritten Understandings and Constitutional Agreement", in A. Sajo and R. Uitz, eds., *Constitutional Topography: Values and Constitutions*, Eleven international publishing, in The Netherlands, p.73.

documents are described as the 'law for making laws' through which all other laws are made and enforced.[81]

Constitutions include some of the most fundamental rules. These include rules about the machinery of government and make general specifications about rights of citizens. These constraints enable the legislature to make further law/decisions to achieve objectives of the constitution while reducing the risks of violating constitutional principles. These are a few mechanisms available to the legislature, outside formal amendment, to influence constitutional meaning. Empowering a legislature to detail the general principle is sufficient condition to alter and influence a meaning in a constitution. This enables informal amendment through national legislation.[82]

The legislature has been a major agent in informal constitutional amendments in two ways. *First*, it passes many laws to spell out several of a constitution's brief provisions.[83] Often, constitutions endeavour to set out the major tasks of governments and generally outline many issues in a holistic manner. Therefore, taking the general principles enshrined in a constitution into account, these matters should be governed by legislation. This is one way of making necessary changes in the provision of a constitution. *Second*, the legislature adds to a constitution the way in which it uses its powers.[84] As Rosalind Dixon notes:

> A principle of partial amendment does not purport to allow a legislature to add to or subtract from the text of the Constitution outside the requirements of amendment procedures. Rather, it allows legislature to provide information to the Court, with a view to influencing the Court's interpretation of existing constitutional text.[85]

In the United States, the theory of 'super-statutes' illustrates, with important limitations, how national legislation informally amends a constitution.[86] There are certain statutes (in the US) that are passed in the normal course of the legislative process but acquire quasi-constitutional status. However, these statutes are expected to fulfil four criteria to obtain such status.[87] *First*, they introduce a new principle or policy whose effect is substantial. *Second*, the new principle or policy becomes foundational or axiomatic to political actors. *Third*,

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[81] Roger D. Congleton, (2003), *Improving Democracy through Constitutional Reform, Some Swedish Lessons*, Kluwer Academic Press, Boston, p. 11.
[82] Albert (2014) *supra* note 1, p. 1063.
[83] Johnson Carl. Informal Amendment <www.jenksps.org/pages/uploaded_files/Informal%20Amendment.pdf>
[84] Ibid.
[85] Dixon (2011), *supra* note 8, p. 670.
[86] Albert(2014), *supra* note 1, p. 1063.
[87] Ibid.

they result from long and deliberative public discussions and substantial reflection by political actors. *Fourth*, they require some elaboration from officials and judges in order to achieve their intended effect.[88]

Super-statutes, which fulfil these criteria, acquire their normative force through a series of public confrontations and debates over time. Super-statutes influenced by social norms may occasionally change constitutional meaning. They do so by trumping ordinary legislation and by establishing 'foundational principles' against which people presume their obligations and rights are set, and through which interpreters apply ordinary law. The Sherman Antitrust Act of 1890, the Civil Rights Act of 1964, and the Endangered Species Act of 1973 are suggested examples. In addition to the aforementioned Acts of the United States, the United Kingdom Human Rights Act of 1998, the Canadian Bill of Rights of 1960, and the Canada Health Act also constitute typical examples of super-statutes.[89]

3.2 Constitutional interpretation

Constitutional interpretation has two meanings. The *firs*t meaning, usually regarded as the classic meaning, "relates to the review of constitutionality of laws and actions of the state authorities that contravene the constitution". [90] The *second* "meaning of constitutional interpretation is what we can call expounding on the text of the constitution" and it "may relate to any type of dispute that may arise in relation to the constitution or its provision", as in the case of a dispute "whether two provisions or principles in the constitution conflict with each other" thereby rightly becoming "a matter for constitutional interpretation".[91] Moreover, a gap in the constitution regarding important constitutional rights or principles may become a matter of constitutional interpretation.[92]

Drafters of constitutions often use general provisions, which are composed of ambiguous terms that provide flexibility to compromise.[93] Given the quantity and generality of a constitution, it is not surprising that such a document requires interpretation.[94] Constitutions proclaim all the values their framers believe essential to a good society but do not prioritize those values. Resolving conflict among basic values is thus left to the implementers and interpreters.[95] However, constitutional provisions often offer little specific guidance for the

[88] Ibid.
[89] Ibid.
[90] Getachew (2012), s*upra* note 11, p. 509.
[91] Ibid.
[92] Ibid.
[93] Martin Edelman (2005), "Written Constitutions, Democracy and Judicial Interpretation: the Hobgoblin of Judicial Activism", *Albany Law Review*, Vol., 68, pp. 585- 596, p 591.
[94] Ibid.
[95] Id., p 592.

resolution of particulars in constitutional claims.[96] This makes it necessary for constitutional adjudicators to specify the meaning of the provision in the context of actual cases.[97] Wherever there is a written constitution whose "text is indeterminate, the courts are called upon to fashion a meaning".[98] It is in this sense that "constitution amendment processes tend to be linked to judicial interpretation".[99] Thus, constitutional interpretation, unlike ordinary law cases, has greater impact in shaping a constitutional order.[100]

In the United States for instance, interpreting the constitutional text has been the preeminent activity of the Supreme Court for nearly two centuries. Indeed, the Supreme Court interpreting the written constitutional text is the essence of constitutional law in the United States. Courts, especially the Supreme Court, interpret and apply the Constitution in all of the cases they hear.[101] In an event when the court declares that the words of a provision are plain and clear, or in situations where several meanings are possible and one meaning is chosen over the other, one can imagine its effect in shaping the constitutional text.

A Supreme Court judgment that interprets a vague constitutional provision might amount to an unwritten constitutional amendment.[102] The Supreme Court has, from time to time, amended the United States Constitution without implementing the procedures required by Article V.[103]At this stage, it is possible to argue that in the United States, interpreting a constitution may involve constitutional amendment. Informal amendment by judicial interpretation is more likely to occur in countries with a low rate of formal amendment and a long-established constitution. The practices in Australia, Finland, and Ireland as well suggest frequent informal amendment by judicial interpretation as a supplement to the formal amendment process.[104]

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[96] Renáta Uitz (2005), *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication*, Central European University Press, Budapest, Hungary, p.63.

[97] Id., p. 67.

[98] Sheldon D. Pollack, (2004), "Constitutional Interpretation from Two Perspectives: Canada and the United States", in Stephen L. Newman, ed., *Constitutional Politics in Canada and Unite States*, State University of New York Press, Albany, p. 36.

[99] Dixon (2011), *supra* note 8, p 96.

[100]Assefa Fiseha (2002), "A New Perspective on Constitutional Review", *Tilburg Foreign Law Review*, pp. 237-255, p. 244.

[101] Pollack (2004) , *supra* note 98, p. 36.

[102] *See* for example, Albert, (2010), Non constitutional Amendments , *supra* note 48, p. 13.

[103] Eric J. Segall (2013), "Constitutional change and the Supreme Court: the Article V Problem", *Journal of Constitutional Law*, Vol.16, No.2, pp. 443- 451, p 451.

[104] Albert (2014) *supra* note 1, p. 1063.

3.3 Practices of political parties

Political parties have been major players in the shaping of governments. The structure of party systems and "the way political parties are organized might reinforce or corrode the federal division of powers".[105] There is also "a strong correlation between government party leaders tampering with the constitution to secure more terms than what is constitutionally permitted and the flaring up of acute conflict".[106] Therefore, "the roles played by political parties are important determinants in the operation of federal systems"[107] and can affect the constitutional and institutional guarantees. Constitutional and institutional guarantees are meant to prevent political leaders at the central level of the federation from breaking the rules or changing the federal bargain unilaterally. These guarantees could be ineffectual when one homogeneous party controls both levels of government, because then it is more unlikely that there will be opposition against the change.[108]

3.4 Political norms/ political custom

Custom implies usual practices that have no formal obligatory effect.[109] Despite its light obligatory nature, unwritten political custom may be as strong as written laws.[110] Political norms change or construct the constitution so as to bring it in line with policy preferences.[111] A well-established practice, which has been developed within a given political system, could alter the constitutional regime.[112] By the same token, constitutions may alternatively be amended informally by political norms/political customs. This occurs when a political practice is adopted and repeated, and gradually hardens over time without expressly overturning constitutional provisions. This also takes place by means of usage within the legislative and executive bodies.[113] In this regard, constitutions are susceptible to informal amendment through an established

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[105] Lovise Aalen (2002), *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience* 1991-2000, Bergen, Chr. Michelsen Institute Development Studies and Human Rights, No2, p. 20.

[106] International Institute for Democracy and Electoral Assistance (2007), Political Parties in Africa: Challenges for Sustained Multiparty Democracy. p. 91.

[107] Aalen (2002), *supra* note 105, p 20.

[108] Ibid, p. 21.

[109] Tadesse Melaku (2012), *Introduction to Constitutional Law*, Vol. I, Far East Trading P.L.C, p. 175.

[110] Carl, *supra* note 83.

[111] Albert, (2014) *supra* note 1, p. 1062.

[112] David A. Strauss, (1999), *Do Constitutional Amendments Matter*? University of Chicago Law School, Public Law and Legal Theory Working Paper No. 05, p. 20.

[113] Tadesse, *supra* note 109, p. 175.

political custom. This occurs when a political practice is adopted and repeated, and gradually hardens into what Gerhardt calls "non-judicial precedent."[114]

An example in this regard is the issue "whether the Vice President of the United States becomes President upon the President's death, or whether the Vice President simply assumes the powers and duties of the presidency as a caretaker. The text of the United States Constitution is ambiguous on this point".[115] Vice President John Tyler resolved the ambiguity upon the death of President William Harrison in 1841.[116] The Tyler precedent resolved the question left open by the constitutional text. Subsequent Vice Presidents followed the Tyler precedent and proclaimed themselves President when they succeeded to the presidency.[117]Although Tyler's claim probably contradicted the framers' intent, later Vice Presidents who found themselves in that situation embraced his position and ultimately the Tyler precedent is accepted as constitutional reality.[118]

4. The Ethiopian Legal Regime on Formal Constitutional Amendment

The FDRE Constitution embodies provisions that spell out how the Constitution can be amended.[119] These provisions are designed to ensure the involvement of states in incidents of constitutional amendment. The provisions embody clear procedural requirements toward formal amendment, and they show how a constitutional proposal, which is formally initiated and ratified, is inscribed in the constitutional text. Therefore, those amendments that pass through the conventional vehicles of formal amendment process become valid to all intents and purposes as part of the Constitution.

Although the Constitution expressly provides for the mechanisms of constitutional amendment, there are no express 'eternal clauses' that make some constitutional provisions non-amendable. It does not even prohibit the abrogation of or impediments to the rights conferred in Chapter Three of the Constitution (titled Fundamental Rights and Freedoms) with a view to rendering such amendment/s unconstitutional.[120]

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[114] Albert, *supra* note 1, p. 1070.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid .
[119] *See* article 104 and 105 of the FDRE Constitution.
[120] The FDRE Constitution specially mentions which provision is not derogated during the state of emergency. However, neither art 105 nor other parts of the Constitution indicates a right that is not subjected to formal constitutional amendment.

Formal amendment procedures usually identify the individuals, institutions or bodies that are authorized to propose amendment to the existing constitution. However, the FDRE Constitution does not expressly indicate who can propose an amendment, be it group of individuals or institutions, and the procedure to be followed for the initiation of constitutional amendment.[121] Fasil argues that the "formal initiation of constitutional amendment can come from either the regional or federal legislative organs".[122] He further states "where the initiation comes from the regional states, a two third of state councils must support the draft amendment by majority vote. Otherwise, either of the federal Houses can initiate a constitutional amendment by a two third majority vote".[123] One can possibly infer from Fasil's argument that an amendment to the Constitution can be tabled either by the federal Houses or State Councils but not by the general public.

On the other hand, the Constitution requires a proposed constitutional amendment to be submitted for discussion and decision to the general public and to whom the amendment of the Constitution concerns.[124] This can be done if the proposal for constitutional amendment is supported by a two-third majority vote in the House of Peoples' Representatives (hereinafter, HoPR), or by a two-third majority vote in the House of Federation or when one third of the State Councils of the member States of the Federation, by a majority vote in each Council.[125] The role of the public seems either to approve the proposed amendment whenever it provides for a better protection, or reject the proposal when a proposed amendment adversely affects the minimum constitutional privileges. If the general public stands against the proposed amendment, an issue arises whether the views of the legislative council or the general public would prevail.

The first line of argument is based on Article 105 of the FDRE Constitution that deals with constitutional amendment. This provision does not prohibit the submission of constitutional amendment proposal to the federal and regional state legislative councils for consideration if it is rejected by the general public. As a matter of fact, the Constitution does not indicate the role of the general public in the ratification process. It only mentions the involvement of the members of the federal Houses and regional state councils. One can thus argue that any proposal of constitutional amendment may be submitted for approval irrespective of its rejection by the general public. A bill, which is approved with

[121] *See* article 104 of the FDRE Constitution.
[122] Fasil Nahum, (1997), *Constitution for a Nation of Nations: The Ethiopian Prospect*, The Red Sea Press, p. 60.
[123] Ibid.
[124] *See* article 104 of the FDRE Constitution.
[125] *See* article 104of the FDRE Constitution.

the involvement of the legislative councils of both levels of government, becomes part of the constitution.

On the other hand, the aforementioned argument can be regarded as incongruent with the sovereign power of people since the members of the legislative councils are representative of the people. It is true that principally sovereignty lies on the people.[126] What follows from this is that the constitutional amendment process should be controlled and owned by the people who form state power. This leads to interrogating the legitimacy of legislative councils to act contrary to public need. Even if both have different tests, the need of the people should have greater weight on what should be included in and excluded from the Constitution.

Article 105 of the FDRE Constitution, titled "Amendment of the Constitution", provides for different amendment standards or amendment procedures to modify the various sections of the Constitution. The first category of procedures requires majority approval from both federal houses, in addition to simple majority vote from each of the nine regional states legislatures. This kind of amendment, for the purpose of the FDRE Constitution, may be characterized as *special amendment*. The second category of amendment formula requires a majority of both houses and majority approval from two third of the states' council. This sort of amendment can be referred to as *ordinary/ general amendment*.

4.1 Ordinary/General amendment procedure

This general amending formula applies to wider sections of the Constitution. This kind of procedure is applicable to all provisions of the Constitution other than those provisions, which are found in Chapter Three, Articles 105(1) and 104. A general amending procedure requires the assent of the two federal houses and two-thirds of the Councils of the member States of the federation.[127] It requires approval by a simple majority vote in state council of member states, followed by the approval of the House of Peoples' Representatives and the House of Federation by two-third majority vote in joint sitting. Thus, approval by a two-third majority in both houses, followed by ratification from the legislatures of two-third of the states, by majority vote, is a sufficient condition to endorse the proposed amendment.

[126] Getachew Assefa (2010) "Parliamentary oversight and Constitutionalism in Ethiopia: An Appraisal", in Assefa Fiseha and Getachew Assefa,(eds.) Institutionalizing Constitutionalism and Rule of law: Towards a constitutional Practice in Ethiopia, *Ethiopian constitutional Law Series*, Vol. 3 pp. 152-182, p125.

[127] *See* article 105(2) of the FDRE Constitution.

4.2 Special amendment procedure

A special amendment procedure is enshrined in the Constitution to amend some sections of the Constitution. These are Chapter Three,[128] Articles 104 and 105. The matters that fall within the scope of this stringent standard are the sections that deal with fundamental rights and freedoms and a provision that deals with constitutional amendment. These provisions require the unanimous assent of all member states, by majority vote, followed by the approval of the federal houses, sitting and voting separately, in which the requisite approval must be a 'double majority' of votes, which involves members of House of People Representatives and House of Federation.[129]

The general and special amendment procedures are applicable to amend the Constitution formally in a textual manner. This means that FDRE Constitution authorizes amendments that respect the textual strictures of the Constitution. In contrast, there is the inclination toward informal constitution changes in the course of application in Ethiopia. Probable reasons for this seem to be the *political cost* and *financial implications* of formal constitutional amendment. A case in point in this regard relates to failed efforts to amend article 98 of the Constitution shortly after the amendment proposal passed a number of stages. This gives us insight as to why a dominant party's power in government does not necessarily guarantee the introduction of any kind of amendment the party wants to make.

Formal constitutional amendment may *cost* the government politically. Opposition political actors had intensified call for constitutional change specifically to amend some of the provisions of the Constitution.[130] However, the EPRDF considers the Constitution as the foundation of the nation and it argues that any plan to amend the Constitution goes against constitutionalism. The EPRDF has also made bold statements describing the FDRE Constitution as one of the best constitutions in the world and not subject for amendment in recent decades. After having made these statements, engagement in formal constitutional amendment, might seem contradicting oneself. It opens, perhaps, room for further questions of constitutional amendment, which could be unwelcomed by the EPDRF and its supporters. More importantly, most of the informal changes made against the Constitution have the effect of increasing the power of the federal government. If the government makes similar changes by

[128] However, some argue that the special amendment procedure is not only applicable to provision of Chapter Three but also to those provisions that are directly related to Chapter Three but are not in Chapter Three, such as article 93 dealing with the suspension of rights that are embodied in Chapter Three.

[129] *See* article 105(1) of the FDRE Constitution.

[130] There has been frequent claim form opposition political parties, in particular, regarding the amendment of article 39 which deals with secession.

pursuing the conventional textual method, the government will be blamed of tendencies toward more centralization officially in violation of the principles of federalism.

With regard to the financial cost, formal constitutional amendments at least, require arranging consultative meetings with the society as well as lobbying and convincing them that the amendment will not affect their interest. Such forums are necessary to ensure adequate deliberation on the potential advantages and disadvantages of any proposed constitutional change.[131] Where this is the case, "the time– and therefore also opportunity cost– of debating proposed constitutional amendments will have a clear relationship with the size of the relevant voting body." [132]

The more members are involved at various stages of a proposed constitutional amendment process, the longer will be the time that is required for discussion and decision. As the size of the participants increases, arranging consultative meeting, which enables the participants to exchange ideas and debate (over a benefit and disadvantage of the proposed amendment), will increase the time taken to introduce change and this has financial implication. Organizing forums frequently with the society to lobby and convince them that the amendment will not affect their interest will cost the government financially. This cost has the potential not only to increase but also become high when the participants of the forum are large in number. [133]

In this sense, the Ethiopian discourse of constitutional amendment makes sense when one considers how a constitutional amendment is initiated and how this proposed amendment is ratified. In Ethiopia, the process of constitutional amendment envisages the involvement of the general public,[134] at various stages, i.e. the initiation stage, during the discussion and decision of the proposed constitutional amendment. Moreover, the FDRE Constitution also requires that any constitutional amendment "shall be submitted for discussion and decision to those whom the amendment of the Constitution concerns".[135] One can argue that since the Constitution requires involvement of the general public and those communities "whom the amendment of the Constitution concerns", the amendment process will take more time and debating over a proposed constitutional amendment will have high cost. As a result, informal amendment seems to be the course pursued in Ethiopia to adapt the current Constitution with changing socio-economic and political situations and understandings.

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[131] Dixon and Holden (2010) *supra* note 45, p 1.
[132] Ibid.
[133] Ibid.
[134] *See* article 104 of the FDRE Constitution.
[135] Ibid.

5. Informal Methods of Constitution 'Amendment': The Ethiopian Experience

Informal amendment mechanisms have been the subject of great controversy in contemporary constitutional politics and there is controversy as to when a change is regarded as informal amendment. It should be noted that, every kind of informal amendment may not necessarily have the same kind of justification and each informal amendment method may be justified independently. As Albert notes, "It is difficult to pin down the difference in the substantive effects of the formal acts of amending the Constitution and the informal acts of interpreting it".[136] For instance, in the US, informal amendment by judicial interpretation occurs when the Supreme Court interprets the Constitution as a final matter. In contrast, "judicial interpretation by lower courts is generally not nationally binding and it is therefore less accurate to define it as an informal amendment".[137]

Second, even at the Supreme Court level, not all-constitutional interpretations cause an informal amendment. An informal amendment by judicial interpretation occurs where the Supreme Court confers constitutional status upon an unwritten constitutional principle. In such a case, there is no functional difference in constitutional effect between a textual rule entrenched in the constitution by formal amendment and an unwritten rule entrenched by judicial interpretation.[138] With this state of affairs in mind, one can apply the same analogy to the decision of the House of Federation. The decision of the House is final over matters submitted to it and the decision of the House binds any government organ.[139] The decision of the House remains binding unless it is changed by itself. The decision of the House has general effect, which can be applicable on similar constitutional matters that may arise in the future.[140] This amounts to altering a constitution through unusual mechanisms or informally.

Political norms/custom is the other mechanism of making an informal constitutional amendment. When a constitution is ambiguous and where political actors consciously establish a new democratic practice that has been adopted and repeated, this can be regarded as informal constitutional amendment if the repetition of the new practice is intended to compel their

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[136] Richard Albert (2015), 'Constitutional Amendment by Stealth, Boston College Law school', Research paper 357, *McGill Law Journal,* p. 12.
[137] Ibid.
[138] Ibid.
[139] *See* article 56(2) of Proclamation No. 251/2001, Proclamation of Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities, Federal Negarit Gazeta, 7th Year No. 4, Addis Ababa , 6th July, 2001.
[140] Id., article 11(1).

successors into compliance,. This occurs when a political practice gradually hardens into what Michael Gerhardt calls "non-judicial precedent" that is accepted as constitutional reality. [141]

As far as constitutional amendment by legislation is concerned, there may be certain legislations that are passed in the normal course of the legislative process but acquire quasi-constitutional status. This is the case where there is a newly introduced principle or policy whose effect is substantial. Moreover, the new principle or policy becomes foundational to political actors and results from long and deliberative public discussion and substantial reflection by political actors. If a given legislation rearranges the constitutional powers, it has the equivalent effect of an amendment and its effect is indistinguishable from a formal amendment so long as both bind political actors.

In this respect, one can take the instance of the Dire Dawa City Charter. There were claims made by the Oromia and Somalia regions over Dire Dawa city administration. Until the claims of these regional states were resolved, as per the decision of the government, the HPR passed a law granting self-administration of the city in the meantime. Although the timeline to decide whether the city belongs to the Oromia or Somali regions had lapsed, the federal government continued to make special laws to ensure self-governance of the people of Dire Dawa city administration and made the city accountable to it. There were questions regarding the constitutional base of the charter. This legislation which vests autonomous powers to the city can be cited as an amendment to the Constitution through legislation.

It is not difficult to mention instances of actual unwritten constitutional change in Ethiopia. One example of informal change is the growth in the range of federal power. The text of the Constitution defines the scope of federal powers.[142] Deviating from this, the federal government may now regulate subject matters that a decade ago would have been regarded as concurrent powers of both tiers of government. No formal amendment to the Constitution authorizes this expansion of federal government's power. This expansion in federal power comes about principally through government decision.

Our constitutional account has seen many developments that must be regarded as changes of constitutional magnitude, but that have not been accompanied by a formal amendment. The examples in this regard include the taking away of the joint power of taxation by the federal government, enacting Dire Dawa City Administration Proclamation, and conferring the mandate to

[141] Albert (2014), *supra* note 1, p. 1070.
[142] *See* article 51 *cum* 55 of the FDRE Constitution.

organize intergovernmental relation to the federal government.[143] On the other hand, empowering regional states to decide identity questions, accepting the supremacy of federal laws by regional states and enforcing federal laws by their own right are some of the instances which have taken place informally although they need constitutional amendments. These aspects of change in our system have to be considered fundamental enough to assume constitutional magnitude.

5.1 Constitutional interpretation: The *Silte* case

Constitutional interpretation is one of the customary means by which constitutions are adapted to changing political, social or economic realities.[144] It is in this sense that the FDRE Constitution empowers the House of Federation to entertain matters that give rise to constitutional dispute.[145] Thus, a constitutional dispute, in the context of the Ethiopian Constitution, has two aspects: the first relates to general task of interpreting the Constitution with a view to ascertain the meaning, content and scope of a constitutional provision, and the second aspect refers to the task of determining the constitutionality of "federal or state law".[146]

Pursuant to the first aspect, the House may modify the contents of the Constitution in the course of asserting or defining the scope of a certain term. On the other hand, if the federal government overreaches or derogates, through its law or other decision, the powers and interests of the states against the federal Constitution's division of powers, this could be corrected by the House of Federation through its power of constitutional interpretation.[147] The decision of the House is applicable on other similar constitutional matters that may arise in the future.[148] This amounts to altering a constitution through unusual mechanisms or informally. The following decision of the House in the *Silte* case illustrates an informal constitutional amendment.

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[143] Solomon, *supra* note 18, p.32. *See* also the first paragraph of the Preamble, Proclamation No. 416/2004 the Dire Dawa Administration Charter Proclamation, 10th Year No. 60, Addis Ababa, 30th July, 2004.

[144] Gabriel L. Negretto (2008), *The Durability of Constitutions in Changing Environments: Explaining Constitutional Replacements in Latin America*, the Helen Kellogg Institute of International studies, working paper, No, 350, p. 8.

[145] *See* article 83(1) of the FDRE Constitution .

[146] Yonatan Tesfaye (2008), "Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia", *Journal of Ethiopian Law*, Vol. 22, No.1 pp. 128- 144 p 134.

[147] Getachew Assefa, (2008) Book Review on Assefa Fiseha, Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study (Revised Edition: 2007) Addis Ababa: Artistic Printing Enterprise. pp. xv; 480. *Journal of Ethiopian Law* Vol. 22 No. 2 pp. 189-203, p. 101.

[148] *See* article 11(1) Proclamation No. 251/2001, *supra* note 139.

This case was initially filed in the House of Federation.[149] The applicants filed their case to the House alleging that Silte had been considered Gurage against their will for a long period, although they are not truly Gurage.[150] They argued that Silte people have their own language, territory and history, which are unique from Gurage. They contended that being considered as Gurage contravenes with their right to self-determination and amounts to complete denial of their right to self-government. The relief they sought from the House was to ensure their right to self-determination, which is constitutionally granted, by recognizing them as distinct ethnic group separate from the Gurage.[151]

The House referred the case to the Council of Constitutional Inquiry (hereinafter called, CCI) to make the necessary investigation and come up with fitting recommendation on the following issue: Who can determine if a given community claims self-determination asserting that it fulfils all criteria specified in Article 39(5) of the FDRE Constitution.[152] Upon reviewing the case, the CCI framed the following questions for consideration: who shall decide on questions that arise in the determination of ethnic identity of a given community under the FDRE Constitution? What is the procedure that should be followed to reach a decision on such matters?

Upon its investigation, the CCI made the necessary examination on the Constitution and concluded that *there is hardly any clear and specific constitutional provision* that directly addresses these issues.[153] Then, it accepted the fact that the Constitution is silent with regard to these matters. The CCI was working on how the silence of the Constitution can be construed. The CCI identified four potential provisions of the Constitution, i.e., Articles 39(4),

[149] Getahun Kassa (2007), "Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System", *Afrika Focus*, Vol. 20, Nr. 1-2, 2007, pp. 75-104 p. 90.

[150] Ibid.

[151] The House of Federation of Federal Democratic Republic of Ethiopia (2000), "Decision of House of Federation on Identity Claim of Silte Community", *Journal of Constitutional Decisions*, vol. 1, No. 1 pp. 41-101, p 41.

[152] Article 39(5) of the FDRE Constitution enumerates different elements that need to be fulfilled by a given community to be considered as Nation, Nationality or People. It reads: "A Nation, Nationality or People for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory."

[153] The House of Federation of Federal Democratic Republic of Ethiopia, *supra* note 151, p. 43.

47(2), 52(2) (a) and 62(3) as provisions that might have relevance to address the questions at hand.[154].

The CCI embarked on an investigation with an attempt to check whether Article 39(4) is appropriate to regulate the matter. The CCI stated that Article 39(4) is essential to determine the right to secession of nations, nationalities and peoples of Ethiopia.[155] Since their question was to get internal self-determination rather than withdrawal from the jurisdiction of Ethiopia –and to create a new sovereign state–, this constitutional provision was considered as inapplicable to resolve the Silte case. The next provision examined by the Council is Article 47. The CCI viewed that this provision is invoked in cases where a given community is acknowledged as a distinct nation or nationality within the region in which it inhabits and claims to establish its own region. Hence, the CCI stated that this constitutional provision is not relevant to address the Silte claims.

The third constitutional provision, which was examined by the CCI, was Article 52(2 (a)), which pronounces that states shall have the power to establish a state administration that best advances self-government.[156] When regional states establish state administration that best advances self-government, they are expected to take into account the language, settlement pattern and identities of the community, which seeks self-determination. Moreover, regional states that seek to establish state administration are expected to primarily determine the identity of the community concerned. Therefore, the mandate to determine the identity of a given community is left to regional states and is expected to be considered in the regional council in which the community that seeks self-government inhabits.

The House (in its decision) indicated that in the process of determining this issue, the regional state council (to whom the claim is submitted) is expected to conduct referendum with direct participation of the community that has lodged the claim. According to the decision of the House, this should be conducted by secret ballot, in a free and fair manner and should be attended by impartial observers. However, if a community, which invokes an identity claim, is dissatisfied with decision of the State Council or if it feels that the decision of the State Council contradicts with the Constitution, it can appeal to the House of Federation. The House derives this power from the interpretation of Article 62(3) of the Constitution. The provision states that the House, in accordance

[154] Ibid.
[155] Ibid.
[156] Ibid.

with the Constitution, decides on issues relating to the rights of Nations, Nationalities and Peoples self-determination, including the right to secession.[157]

This decision is a breakthrough in updating the FDRE Constitution. The interpretation of the House in the *Silte* case adds new dimension which was not foreseen by the drafters of Constitution to be expressly included therein. The decision of the House updates the contents of the Constitution on three points. *First*, it empowers the regional states to determine the identity of a nation, nationality and people of Ethiopia. *Second*, the decision sets a time framework within which the identity determination claim that appears before a State Council shall be decided, by indicating in the decision that the concerned state council shall, within a year, render a decision on a dispute submitted to it. *Third*, the decision also authorizes the House of Federation to review the decision of the State Council if the claimant community lodges an appeal to it. The decision of the House will be final over the matter. The three points indicated hereinabove have general effect, which can be applicable on similar constitutional matters that may arise in the future.[158]

5.2 Informal constitutional changes through legislation

Starting from the Transitional Government after the downfall of the Dergue regime, the legislature has enacted numerous laws. The laws which were enacted before and after Constitution are required to be in conformity with the Constitution. This means, whenever the federal government enacts a law on certain matters, it is expected to show its constitutional source on the preamble of the legislation. In doing so, the federal government constitutionalizes its act of passing laws on the matter at hand. This stems from constitutional principles, which require the legislative body to indicate its constitutional source for those powers that can be exercised by any level of government.[159] However, there are a number of proclamations, which are enacted by the HoPR without authority that emanates from the Federal Constitution.

5.2.1 Dire Dawa city Administration Proclamation

As highlighted earlier, there were claims made by the Oromia and Somalia regions over Dire Dawa city administration following the regional boundary demarcation.[160] There was also a need to regulate self-determination of the Dire Dawa city residents by law until the claims of Somalia and Oromia Regions

[157] *See* Article 62(3) of the FDRE Constitution.
[158] *See* article 11(1) of Proclamation No. 251/2001, *supra* note 139.
[159] Assefa Fiseha (2006), *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*. (Netherlands: Wolf Legal Publisher), p. 121.
[160] *See* first paragraph of the preamble, Proclamation No. 416/2004 the Dire Dawa Administration Charter Proclamation, 10th Year No. 60, Addis Ababa, 30th July, 2004.

were finally resolved.[161] It was thus decided (since 1993) that Dire Dawa City be accountable to and be directed by the Federal Government.[162] It is this measure that enabled the federal government to pass a law that granted self-administration to ensure good governance and expedite development in Dire Dawa City until a lasting solution is secured.[163] It was based on this premise that the HoPR enacted Dire Dawa Administration Proclamation.

The Proclamation does not mention the constitutional basis that justifies the enactment of the Charter. However, the Charter is still functional and has not been declared unconstitutional. Pursuant to this charter, Dire Dawa is under the federal government in spite of competing claims from Oromia and Somalia regional states. The purpose of the legislation, according to the government, was to make it possible for the parliament to make special laws to ensure self-governance of the people of Dire Dawa city administration and to enable the federal government to co-operate with the States in searching a lasting solution for the claims of the two regions on the city.

Later on, the HoPR has revised the Dire Dawa City Administration Charter. The preamble of the revised Proclamation states that the amendment is made pursuant to Article 55(1) of the FDRE Constitution.[164] However, the provision cited in the revised Proclamation or other parts of the Constitution do not entrust this mandate to the HoPR. One may thus argue that this illustrates informal constitutional amendment that increases the powers of the federal government by legislation.

5.2.2 Intergovernmental relations (IGR)

In Ethiopia, the Constitution essentially provides dual governmental structure and allots separate jurisdiction to each level of government.[165] Though the jurisdictions of the federal government and the member states are distinctly delineated, there are important constitutional provisions emphasizing the need for consultation, coordination and collaboration.[166] It is possible to argue that, the federal government and the constituent states are interdependent in a wide range of matters. However, the FDRE Constitution is vague regarding the

[161] Ibid.
[162] Ibid.
[163] Id., *See*, second paragraph of the preamble of Dire Dawa Administration Charter
[164] See preamble of Proclamation No. 483/2006, the Dire Dawa Administration Charter (Amended), 12th Year No. 14, 5th January, 2006 [Hereinafter called, Dire Dawa Administration Charter (Amended)].
[165] *See* article 50(2) of the FDRE Constitution.
[166] Nigussie Afesha (2015), "The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy", *Mizan Law Review*, Vol. 9, No. 2, pp. 341-368: DOI: http://dx.doi.org/10.4314/mlr.v9i2.4

mandate to make law concerning intergovernmental relations. A focal point for intergovernmental relation remains unanswered by the Constitution. This power is neither given expressly to the federal government alone nor concurrently to the federal government and the regional states. Therefore, it is possible to argue that this mandate is reserved to the regional states.[167]

Nevertheless, the HoPR construed the ambiguity of the Constitution by authorizing one of the institutions of the executive branches to perform IGR tasks. This issue is largely answered by Proclamation No. 691/2010[168] which authorizes the Ministry of Federal Affairs to serve as a focal point to organize IGR.[169] The Proclamation sets general guidelines that regulate the relationship between the federal and the state governments. It requires that the federal-state relationship should be on the basis of a spirit of partnership and mutual understanding rather hierarchical relations[170] with a view to ensuring sustainable peaceful coexistence and strengthening of the federal system. A question that inevitably arises is whether this amounts to giving extra mandate to the Ministry, which is not envisaged under the FDRE Constitution.

The same Proclamation has made modifications on the *exclusive* power of the House of Federation, which is given to the House by the Constitution. The Proclamation confers this exclusive power (of the House) upon the Ministry of Federal Affairs. Article 62(6) of the Constitution provides: "It (House of Federation) shall strive to find solutions to disputes or misunderstandings that may arise between States." Despite the existence of such constitutional provision, the mandate to facilitate the resolution of disputes arising between regional states, –so long as it does not contradict with the powers of the House of Federation– is given to the Ministry of federal Affairs. Article 14(1) (b) of the Proclamation reads: "without prejudice to the provisions of Article 48 and 62(6) of the Constitution of the Federal Democratic Republic of Ethiopia, the Ministry of federal Affair has the power to facilitate the resolution of disputes arising between regional states." By so doing, the legislation apportions the express constitutional powers of House of Federation so that it can be shared with the Ministry of Federal Affairs. This can be viewed as an informal way of introducing change on the provision of the Constitution.

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[167] *See* article 52(1) of the FDRE Constitution.

[168] *See* article 14(1) of Proclamation 691/2010 'Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia' Federal Negarit Gazeta 17th Year No. 1, Addis Ababa 27th October, 2010.

[169] Id., *see* article 14(1) (e). It should be noted that the proclamation was enacted principally to define the power of the Federal Executive Institutions.

[170] Ibid.

5.3 Law Enforcement, Administrative and Political Practices

Institutional practice seeks to establish a new normative or institutional framework for state policy and, over time, it can be embedded in the public culture. Thus, political norms/practices and its institutional or normative principles have a broad effect on the Constitution including an informal constitutional amendment. There are many situations that are not regulated by a constitution but governed by political custom within the legislative and executive bodies. Such customary political practices have been designed for the purpose of adapting a constitution to new circumstances without affecting its legal continuity. In this sense, habitual institutional practices try to fill gaps in the Constitution and can be regarded as indicators of informal constitutional amendment. There are various political practices that emerge when a constitution is silent. The constitutionality of the practice may not be challenged because many practices may not clearly contradict express constitutional provisions.

The conduct of states in adopting the federal supremacy clause in their constitutions and various laws and in the enforcement of federal laws on matters that are not delegated to them are examples of issues that are not discernible from a reading of the FDRE Constitution. However, there is the practice in Ethiopia of enforcing federal law by states[171] and considering federal law as supreme over state laws. In this regard, Assefa argues that the federal government has at least three ways to influence the state governments and facilitate the enforcement of federal laws and programs: namely, the Ministry of Federal Affairs, party structure and the process of policy making.[172] Undoubtedly, these are powerful examples of unwritten constitutional principles that continue to guide the course of the Ethiopian federal state.

5.3.1 Federal Law supremacy

It is important to analyse the effect of enacting legislation by the federal government in the field of concurrent powers. "The Ethiopian Constitution is silent as far as the thorny issue of regulating the relationship between federal and state law" is concerned in case of conflict between state and federal law.[173] There are certainly two views. Some scholars argue that the Ethiopian federal system adopts federal supremacy clause by default.[174] But others adhere to the 'supremacy of nations, nationalities and peoples' and contend that federal law will not pre-empt state law.[175]Assefa, states that "the best compromise is to

[171] Assefa, *supra* note 159, p. 355.
[172] Ibid, p. 376.
[173] Ibid, p. 329.
[174] Ibid.
[175] Ibid.

decide the issues on a case-by-case basis rather than subscribing to either principle at an abstract level".[176]

The practice of regional states and their constitutions support the existence of federal supremacy clause in Ethiopia.[177] Normally, regional states acknowledge the supremacy of federal laws over inconsistent state laws. They give such recognition through their constitutions.[178] In the first place, regional state constitutions describe the state council as the legislative body of the state and also vest the highest political power regarding internal affairs of the regional state. The same constitutions also include a provision that gives the state council the mandate to issue laws that are consistent with the Federal Constitution and other federal laws.[179] It is true that the regional states' laws and federal laws are expected to be consistent with FDRE Constitution. However, the FDRE Constitution does not expressly state the supremacy of federal laws over state laws that are inconsistent to it. Nevertheless, most regional states subject their laws to the federal Constitution and other federal laws. This is one of the areas in which supremacy of federal law is admitted by the regional state.[180] Solomon Negussie argues: "states Constitutions and legislations which came at the later stage affirmed that all laws and practices should not contradict the federal constitution as well as federal laws".[181]

5.3.2 Cooperation through Executive Institutions

Federal executive institutions execute federal laws,[182] while regional governments may execute laws enacted by the federal government where the federal government delegates regional states to do so. The federal government is expected to grant this power through a proclamation, or this can be done through regulation when the legislative organ allows the executive organ to give its powers to its counterpart offices in the regional states. Departing from this principle, the Ministry of Justice (currently reorganized as the Federal Attorney

[176] Ibid, p. 330.

[177] This kind of argument begs the question, does it the purpose of the regional states constitution, to undermine their powers and autonomy? The author would like to discuss this argument acknowledging the possibility of such kind of question would come from readers.

[178] *See* article 51(1) of SNNPR, 49(1) Amhara Regional states (Amharic version) art 51(3)(3.1) Gambela Regional state, 47(3)(a)Afar regional state, 49(3)(a) Oromia regional state, 49(3)(a) Somalia regional state.

[179] Ibid. *See* also article 9(1) of the FDRE Constitution.

[180] *See* article 51(1) of SNNPR and other regional state constitutions, *supra* note177.

[181] Solomon Negussie, *supra* note 18, p. 65.

[182] *See* article 77(1) of the FDRE Constitution.

General), for instance, delegates its power of prosecution to a regional justice bureau through a letter where an offence is committed in a given region.[183]

This issue evokes further discussion. In order to file a criminal charge, the investigation is undertaken by a police officer. The issue then becomes whether the police officer at the federal or regional level makes the investigation. It is the Federal Police Commission that has the power to investigate crimes that fall under the jurisdiction of Federal Courts.[184] But, the move to establish federal police institutions within regional states to effect arrest and make necessary investigation on federal criminal matters is inconsequential. Due to the absence of federal police officers who undertake criminal investigation, it is the respective regional officers who are undertaking criminal investigation in all states. Another question that needs clarification is whether regional police officers have the authority to do so.

In this scenario, one may possibly mention Proclamation No. 313/2003 (Federal Police Commission Proclamation) that requires the Federal Police Commission to work in cooperation with the Regional Police Commissions in the prevention and investigation of crimes.[185] The Regional Police Commissions are accountable to the Federal Police Commission when they investigate criminal cases that fall under the jurisdiction of the Federal Courts in accordance with the delegation given to them.[186] This provision denotes the situation that makes regional police organs accountable to the Federal Police Commission while they investigate federal criminal cases.

This proclamation implicitly answers the inevitability of delegation of powers. However, neither the Proclamation nor other regulations delegate regional police organs to make investigation on federal criminal cases. Even the Federal Police Commission does not delegate its powers to the regional state through letter.[187] However, it is regular practice that the regional state police undertake investigation on criminal cases. This amounts to enlarging the powers of the regional state. This is also equivalent to informally amending the Constitution by disuse due to the fact that the Federal Police Commission has failed to establish and use its power of prosecuting offences in all regional states.

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[183] *See* letter issued by the Ministry of Justice file number 01/A14/12/12 , on 15/07/98 EC.
[184] *See*, Article 7(1) of Proclamation No. 313/2003, Federal Police Commission Proclamation, Federal Negarit Gazeta, 9th Year No. 30, Addis Ababa, 4th January, 2003.
[185] Id., Article 23(1)(2) of Federal Police Commission Proclamation.
[186] Ibid.
[187] Interview with senior government police commissioner (whose anonymity is respected).

5.3.3 Ruling Party *modus operandi* and its influence on federal arrangements and development plans

Political parties are extremely important elements of a federation. The nature of political parties and their internal operation has an impact on the working of a federation.[188] The structure of party systems and the way political parties are organized might reinforce or corrode the federal division of powers. In general, the role played by political parties is among the major determinant factors in the operation of federal systems,[189] and at times it affects the constitutional and the institutional guarantees. Constitutional and institutional guarantees are meant to prevent political leaders at the central level from changing the federal bargain unilaterally. However, these guarantees are ineffectual when one homogeneous party controls both levels of government because there will be no opposition against the change.[190] This is because central decisions can substitute federal bargain. As Assefa argues, if one homogeneous party controls both levels of government, there would be no occasion for intergovernmental conflicts.[191]

The character of parties and party systems can affect the working of the whole federation. This is because a "political party is expected to harmonize the policies of the federal government and constituent states".[192] Ethiopia, presently, is ruled by a coalition composed of several regionally based ethnic parties. Ethiopian Peoples Revolutionary Democratic Front (EPRDF) is controlling all the regional state governments in the Ethiopian federation; either directly through the member parties or indirectly through affiliated parties.[193]As a result, the party structure in Ethiopia undermines the federal division of power and subordinates the regional governments to the federal government with particular emphasis on socio-economic development policies.[194] It is clear that a mandate to make social, economic and development policies is distributed to the federal and state governments. Contrary to this constitutional power distribution, the Federal government, through the party line, has informally taken over the powers to make social, economic and development polices given to the federal and the state governments and has been engaged in preparing the same for both levels of government.

The practice in *Growth and Transformation Plan* is another area of practice which illustrates informal changes in federal arrangements. The FDRE Constitution clearly delineates the powers between the federal and member

[188] Aalen, *supra* note 105, p 20.
[189] Ibid, p 21.
[190] Ibid.
[191] Assefa, *supra* note 159, p 392.
[192] Id, p. 385.
[193] Id., p. 387.
[194] Ibid.

states with respect to social, economic and development plans.[195] Pursuant to this power distribution, the federal government is empowered to formulate and implement nationwide policies, strategies and plans with respect to overall economic, social and development matters.[196] The Constitution authorizes regional states to prepare the same at state level: to formulate and execute economic, social and development policies, strategies and plans of the regional states.[197] Despite this constitutional ruling, the social, economic and development strategic plan is prepared centrally for both levels of government. By implication, the power to make social, economic and development policies is shifted to the federal authorities. Under these circumstances, regional states draw their respective plan from the wider plan, which is generated and approved first through party lines.[198]

A central committee, which leads the ruling coalition, often through the chairman, generates specific plans of action, which are the basis for five-year plans that will be implemented nationwide. The five-year plan becomes the basis for the economic, social and development policies, strategies and plans of federal and state governments'.[199] Apparently, both tiers of government are expected either to prepare their respective plans based on the document which is prepared through party line or to revise their plan in line with centrally prepared plan since they are under the direct control and influence of the ruling party. As a result, currently, the federal government and the states draw their respective plans from the wider plan, which is generated and approved first through party lines.[200] This in turn undermines the constitutional mandate of the regional states to formulate and implement plans and policies of their own.[201] They implement the social, economic and development plan prepared by the party line. The growth and transformation plan serves as the social, economic and development plan of the regional states. In so doing, the party line has taken away their power to make social, economic and development polices in the context of harmony.

Concluding Remarks

The embodiment of a mechanism for constitutional amendment is among the universal features of constitutions. The mechanisms of amendment denote the idea of correction or improvement of prior choices in constitutional design in light of new information, evolving experience or political understanding.

[195] *See* article 51(2) *cum* article 52(2)(c) of the FDRE Constitution.
[196] Id., article 51(2).
[197] Id., article 52(2)(2).
[198] Assefa, *supra* note 159, p. 388.
[199] Ibid.
[200] Ibid.
[201] Ibid, p. 389.

However, significant controversy remains over the function of formal procedures for all kinds of constitutional amendment. Most constitutional scholars agree that not all forms of constitutional change in fact involve processes of constitutional amendment. Some scholars even suggest that formal constitutional amendments will be irrelevant to ultimately shape constitutional meaning. As a consequence, political actors frequently look for alternatives to formal constitutional amendment. Although the formal mechanism is a vital apparatus to modify a constitution, the role of non-constitutional mechanisms in the alteration of a constitution is also profound. Hence, the function, relation and co-existence of formal and non-formal mechanisms need to be clearly spelled out. The extent to which and the circumstances under which non-constitutional mechanisms modify the contents of the constitution need to be ascertained.

The FDRE Constitution, like many other constitutions, encompasses constitutional provisions that spell out how the Constitution can be amended. However, the Constitution has not been formally amended, except the unfinished move to amend it on a single occasion. The Constitution has served for more than two decades without substantial formal modification. On the other hand, it is not difficult to mention instances of actual unwritten constitutional changes in the Constitution. One of the means of informal change is through constitutional interpretation. This entails the possibility that decisions of the House of Federation can update the contents of the Constitution in the course of asserting or defining the scope of certain terms or provisions in general. The second instance where unwritten constitutional change in Ethiopia has taken place is when the federal government enacts a law on certain matters. There are a number of proclamations, which are enacted by the HoPR even if that particular power is not clearly given to the federal government. Proclamations that govern Dire Dawa City Administration and intergovernmental relation are some of the examples.

Another example of practices that is not discernible from the reading of the FDRE Constitution relates to the acknowledgment of federal law supremacy by regional states through their constitutions and their willingness to enforce federal laws on matters that are not delegated to them. It is to also be noted that the party structure in Ethiopia and its practices informally change the federal division of power and this setting subordinates social, economic and development polices of regional governments to the federal government. This is contrary to the constitutional power distribution given to the Federal and the State governments. In so doing, the party line has, without formal constitutional amendment, taken over the power of regional states to make social, economic and development polices. ■

The Proposed Plea Bargaining in Ethiopia:
How it Fares with Fundamental Principles of Criminal law and Procedure

Alemu Meheretu ♣

Abstract

The FDRE Criminal Justice Policy embodies multiple reforms that are meant to address the various problems in the Ethiopian criminal justice system. The reforms include the introduction of plea bargaining which represents an unprecedented and ambitious development in the realm of the criminal justice system in Ethiopia. This article examines plea bargaining as envisaged in the FDRE Criminal Justice Policy and the Draft Criminal Procedure Code, from a principle based approach and argues that it hardly lives up to many of the fundamental principles of criminal law and procedure recognised under Ethiopian law. The most affected principles/rights include: the principle of presumption of innocence, the principle of equality, the principle of equality of arms, the principle of truth discovery, the privilege against self-incrimination and the right to silence, and the right to appeal.

Key terms

Plea bargaining, models of plea bargaining, the proposed plea bargaining, efficiency, fairness, accuracy, Ethiopia

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Introduction

Plea bargaining not only occupies a central position in many adversarial jurisdictions,[1] but also transcends diverse jurisdictions including the inquisitorial

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[1] No jurisdiction relies on plea bargaining as the USA does –more than 90 percent of criminal cases are disposed of using plea bargaining. *See* United States Sentencing Commission, Statistical Information packet, Fiscal Year 2009 at: <http://www.ussc.gov/JUDPACK/JP2009.htm> (visited on July 14, 2010). While researches indicate that about 50% of cases have been settled through plea agreements in

structures. Ethiopia is not an exception. Inspired by such developments, it has adopted plea bargaining at policy level. It is also reflected in some proclamations, albeit not detailed. While defining the powers and duties of the Ministry of Justice (currently restructured as the Federal Attorney General), Proclamation No. 691/2010 and Proclamation No. 943/2016 entrust the latter with the power to plea bargain. This power goes to the newly established Federal Attorney General. This together with the policy represents a step towards providing a legal/policy framework for plea bargaining in Ethiopia, pending the issuance of the new criminal procedure code which is expected to address the concept in detail. However, this power of the Federal Attorney General is yet to be enforced.[2]

This is not to suggest that plea bargaining has no room for application in Ethiopia. Some studies reveal that an informal and rudimentary form of plea bargaining exists at the investigative stage, usually the suspect being unrepresented.[3] Prosecutors justify this practice in terms of efficiency and the difficulty in obtaining evidence in particular that of witnesses (*half a loaf is better than none*). The practice of plea bargaining has the following general features[4]: (a) it applies to any crime, (b) the defendant obtains a range of concessions from total immunity to sentence or charge reductions, (c) it does not involve defence attorneys, (d) it is not enforceable, nor does it form part of the record either in the investigation file or in the judgment.

What is more, cooperation agreements[5] are recognized through the Anti-Corruption[6], Anti-terrorism[7], and Witness and whistleblowers protection

Germany; around 90% of cases in magistrates' courts and 67 % in Crown courts get disposed of through guilty pleas without a trial. *See* Maike Frommann (2009), `Regulating plea bargaining in Germany: Can the Italian approach serve as a Model to guarantee the independence of German Judges`, *Hanse Law Review* , Vol. 5, p. 200; A. Ashworth and M. Redmayne (2010) , *The Criminal Process,* 4th ed, Oxford University Press, p. 418.

[2] Probably, the fact that the law is generic and the absence of procedural law on the subject matter could be partly responsible for this. As a law meant to define the power and duties of the AG/the Ministry, the proclamation simply lists the power and duties of the AG, the power to allow plea bargaining being one of them.

[3] *See* for example Alemu Meheretu (2014*), 'Introducing plea bargaining in Ethiopia: concerns and prospects',* (PhD thesis, University of Warwick, UK); UNODC (2011), 'Assessment of the Criminal Justice system in Ethiopia; in support of the Government`s reform efforts towards an effective and efficient criminal justice system', p. 54.

[4] Alemu M., *supra* note 3, ch. 5.

[5] *Cooperation agreements* are agreements whereby a defendant agrees to cooperate in the prosecution of co-offenders by supplying a testimony so that he/she receives lenient treatment or immunity. Some literatures see *cooperation agreements* as one form of plea bargaining. But this is not sound because *cooperation agreements* are about finding evidence that will be tested in full scale trials while plea bargaining is about avoiding full scale trials. However, it is important to note that the two may overlap in a sense that a

Proclamations.[8] Despite its practical significance in many jurisdictions, plea bargaining has been a subject of controversy since its inception. Detractors blame it for undermining fundamental safeguards, risking wrongful convictions, and eroding the purpose of criminal sanctions.[9] On the other hand, proponents dismiss such accusations altogether and capitalize on its positives.[10] Yet, some prefer to remain in the middle i.e., acknowledging the flaws of plea bargaining but at the same time enticed by its practical benefits uphold it and often propose reforms to rectify its flaws.[11]

Generally, proponents of plea bargaining praise it for its role in managing caseload, enhancing the efficiency of the criminal process, and sparing

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defendant may plead guilty and at the same time help the prosecution by testifying against his accomplices.

[6] Article 43(1), The Federal Anti-corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001.

[7] Article 33, The Anti-terrorism Proclamation No. 652/2009.

[8] Article 3, Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010.

[9] *See* for example Guidorizzi, Douglas (1998), 'Should we really ban Plea bargaining?: The core concerns for plea bargaining critics', *Emory L. J.* Vol. 47, p.753 ; Kipnis, Kenneth (1976) ,`Criminal Justice and the Negotiated Plea`, *Ethics* Vol. 86, p. 93; R.A. Fine (1987), 'Plea bargaining : an unnecessary evil', *Marquatte law Review*, Vol.70 No.4, p.615 (arguing that plea bargaining encourages crime by weakening the credibility of the system)**;** Sam W.Calan (1979) ,'An Experience in Justice without Plea Negotiation`, *Law & Society Review* Vol. 13 p. 327; Penny Darbyshire (2000), `The mischief of plea bargaining and sentencing rewards`, *Criminal Law Review*; Douglas Smith(1986) 'The Plea-Bargaining Controversy' *Journal of Criminal Law and Criminology,* Vol.77, No.3, pp. 949-968.

[10] *See* for example Joseph A. Colquitt (2000-2001), 'Ad hoc plea bargaining', *Tul. L. Rev*. Vol.75, p. 695 (who argues that plea bargaining is a necessary and a legitimate way of disposing criminal cases; the only problem lies on the practice where `many of the plea agreements struck are inappropriate, unethical, even illegal.`); John Bowers(2007-2008),'Punishing the Innocent', *U. Pa. L. Rev.* Vol. 156, p.1119 (Where the author argues that the innocence problem springs from misperceptions over: ` (1) the characteristics of typical innocent defendants, (2) the types of cases they generally face, and (3) the level of due process they typically desire`.); Thomas W. Church (1979), `In defense of pleas bargaining`, *Law & Society Review,* Vol.13, No.2, Special Issue on Plea Bargaining , pp. 509-525.

[11] For some detailed works in this regard *see* e.g. F.H. Easterbrook (1992), `Plea bargaining as compromise, *Yale L.J.* Vol.101, p. 1969; Oren Bar-Gill & Oren Gazal Ayal (2006), `Plea Bargains Only for the Guilty`, *J.L. & Econ*. Vol.49, p.353 (proposing a screening model to limit plea bargaining to the guilty); Note (1972), 'Restructuring the Plea Bargain', *Yale L.J.* Vol. 82, p.286 **(**arguing for judicial participation in plea negotiations*);* Note (1972), 'Plea Bargaining: the Case for Reform', *U. Rici. L. Rev.* Vol.6, p. 325 (proposing open, formalized plea bargaining procedures).

defendants and victims from the trauma of trials,[12] while opponents challenge the very foundation of plea bargaining as contrary to constitutional principles, ethics, and fair trial guarantees.[13] This article singles out one dimension of the controversy i.e., the debate on whether it is compatible with fundamental principles of criminal law and procedure and interrogates whether plea bargaining , as adopted by the criminal justice policy[14] and the draft criminal procedure code[15], lives up to the fundamental principles of criminal law and procedure recognised in Ethiopia. Whilst some of such principles are closely linked with plea bargaining, others are remotely associated with it. This article takes up only those principles (from the former category) which are designed to ensure the integrity of the criminal process. It is believed that the article can evoke debate and have positive contributions in shaping the proposed law on plea bargaining.

The first two sections of the article highlight the nature and type of plea bargaining and the models of plea bargaining in different structures of criminal justice. These sections explain plea bargaining, and its types and models. The third section briefly deals with policy justifications and the particular model that Ethiopia has aimed at. The last section examines whether this model is in conformity with principles and rights embodied in the Ethiopian legal regime such as the presumption of innocence, the principle of equality and non-discrimination, the principle of truth finding, the right to silence and the privilege against self-incrimination, the principle of equality of arms and the right to appeal. This involves analysis of policy documents (the Criminal Justice Policy being the main target), the proposed law on criminal procedure, the FDRE Constitution, criminal laws and the relevant literature.

1. Meaning and Types of Plea bargaining

1.1 Meaning

Definitions of plea bargaining vary considerably from one context to another. Some perceive plea bargaining broadly as any favorable treatment to a

[12] *See* for example K.V.K. Santhy (2013), 'Plea Bargaining in Indian and US Criminal Law: Confessions for Concessions' *NALSAR Law Review*,Vol.7,No.1, p.99; On the economic analysis of plea bargaining, *see* Landes, William M. (1971), 'An economic analysis of the courts', *J. L. & Econ.*, Vol.14, No.1, pp. 61-107; Kobayashi, Bruce H. and John R. Lott (1996), 'In defense of criminal defense expenditures and plea-bargaining', *Int'l Rev. L. & Econ.*, Vol.16, pp. 397-416.

[13] S. Schulhofer (1991-92), `Plea bargaining as disaster`, *Yale L.J*. Vol.101, p.1979.

[14] FDRE (2011), The Criminal Justice Policy of Ethiopia, (Here in after the Criminal Justice Policy).

[15] The Federal Democratic Republic of Ethiopia Draft Criminal Procedure Code, 2013 as was valid in June 2013.

defendant in return to not only pleading guilty but also waiving some rights as the right to appeal and the right to a preliminary hearing and testifying against other suspects.[16] However, this seems to unduly expand plea bargaining and confuse it with the broader spectrum of negotiated justice which involves many concessions. Simply put, all negotiated justice is not plea bargaining, but plea bargaining is one form of negotiated justice.

Plea bargaining has been defined as 'any agreement by the accused to plead guilty in return for a promise of benefit'.[17] In a similar fashion, plea bargaining is defined as 'the defendant`s agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state'.[18] In both definitions the defendant by pleading guilty (and not standing as a witness for fellow offenders, as some prefer to include) agrees to trade his/her right to full scale trial in exchange for 'some considerations from the state'. Some suggest that the phrase 'with reasonable expectation of receiving benefit' includes what is termed as *implicit plea bargaining* in a sense that the offer need not necessarily come expressly from the prosecutor. Instead, reasonable expectation of the defendant to be treated leniently by pleading guilty suffices to imply plea bargains.[19] In various literature, this is sometimes referred to as implicit plea bargaining

However, this conception unnecessarily expands the ambit of plea bargaining to include any guilty plea disposal of cases. This means that one can find plea bargaining in any jurisdiction which does not recognize or practice plea bargaining *per se* but simply allows guilty plea disposal of criminal cases. Such expansive conception overstretches the notion of plea bargaining off the mark.

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[16] *See* William F. McDonald (1979), 'From Plea negotiation to coercive Justice: Notes on the respecification of a concept', *Law & Society Review*, Vol. 13, pp.389-90.Testifying against other suspects, often known as *cooperation agreements* is different from plea bargaining. While cooperation agreements are about finding evidence and thus do not avoid full-scale trials, plea bargaining is about avoiding or shortening full-scale trials. "when one defendant agrees to testify against another … his statements will be subject to refutation and critical evaluation in the courtroom", a phenomenon alien in plea bargains. *See* Alschuler (1979) , `Plea bargaining and its History`, *Colum L. Rev.*Vol.79, p.4. On the contrary, some recognize cooperation agreements as one form of plea bargaining. See William F. McDonald, already cited.

[17] Joseph Di Luca (2005), 'Expedient MC Justice or Principled Dispute Resolutions? A review of plea bargaining in Canada`, *Crim. L.Q.,* Vol.50, p.14 [citing Law Reform Commission of Canada (1975), Criminal Procedure: Control of the process, working paper No 15, p. 45].

[18] William F. McDonald (1979), 'From Plea negotiation to coercive Justice: Notes on the Respecification of a Concept', *Law & Society Review*, Vol. 13, Special Issue on Plea Bargaining, p.388 [citing Herbert S. Miller et al (1978)*, Plea bargaining in the United States*].

[19] Ibid.

Another limitation of the above definitions is that they do not specify the considerations defendants get in exchange to pleading guilty. The broad nature of the definitions may create an impression that any form of concession even if unrelated to sentence or charge may be included. Nonetheless, it must be understood that such considerations should manifest themselves only in lower sentences or charges or some favorable facts.[20] Thus, plea bargaining can be defined as a form of negotiation/settlement between the state and the defendant whereby the latter agrees to plead guilty in return to charge or sentence concessions.[21] These concessions take the form of less severe charges or dropping of charges/counts (commonly referred to as charge bargaining) or some leniency regarding the punishment (sentence bargaining). It is this definition that will be employed in this article.

1.2 Types of plea bargaining: charge bargaining and sentence bargaining

Generally, the type of concessions a defendant gets in exchange for pleading guilty determines the type of plea bargaining. Plea bargaining that involves reduction of either the number of charges (counts) or the severity of charges (offences) is commonly referred to as *charge bargaining*; whereas, a type of bargaining which involves a recommendation of more lenient sentence is referred to *as sentence bargaining.*

Charge bargaining represents a kind of negotiation where a defendant agrees to plead guilty to a criminal charge in return for dismissal of one of the counts or the defendant pleading guilty for a lesser charge than he/she could otherwise face at the trial.[22] The former is known as *horizontal plea bargaining* and the latter *vertical plea bargaining.*[23] Charge bargaining does not directly involve the sentence the defendant receives although the driving force behind it obviously rests on the desire to get the least possible sentence for a reduced charge. Inquisitorial/mixed structures are generally skeptical of the virtues of charge bargaining. For instance, Germany and Italy, by expressly proscribing it, exclusively rely on sentence bargaining; and so does Russia. In contrast,

[20] For some detailed list of concessions that may accrue to a defendant see Cohen and Doob (1989-90), `Public Attitudes to Plea bargaining`, *C.L.Q* Vol.32,pp. 86-87.

[21] Black`s Law (8th ed. 2004), p. 3657, defines the term in a similar fashion as:

> A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu. a more lenient sentence or a dismissal of the other charges.

[22] Ibid

[23] While *vertical charge bargaining* relates to the severity of the charge (a charge of first degree homicide can be lowered to that of ordinary homicide), *horizontal charge bargaining* affects the counts (one or more of the several counts may be dropped).

adversarial structures such as USA consider charge bargaining as part of a prosecutor`s charging discretion and thus put very limited restraint on it. In England too, charge bargaining, which often takes place well before the charge is formally filed, is less objectionable than sentence bargaining which in some way involves the judge, and is in effect, believed to interfere with his /her neutrality.[24]

Under *sentence bargaining,* the prosecutor agrees to propose lenient sentence following the defendant`s guilty plea, and the concessions may include shorter prison terms, probation or referring to rehabilitation centers.[25] Some further expand the scope of sentence bargaining to include a wide range of concessions.[26] Sentence bargaining appears to involve an abandonment of the judge`s sentencing responsibility.[27] Nevertheless, at least in theory, this is not the case as it is up to the judge to endorse or reject such recommendations. It is interesting to note that sentence bargaining varies across jurisdictions. Unlike adversarial systems, its scope is much more limited in inquisitorial procedures. The limitation manifests itself in the type of the offense it applies to, the type of concessions involved and the amount of sentence that can be reduced by negotiation.[28]

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[24] Francoise Tulkens,(2005), 'Negotiated Justice', [in Demas–Marty and J.R. Spencer, Editors(2005), *European Criminal Procedures* 4th ed, (Cambridge University Press), p. 665].

[25] Larry K. Gaines and Roger Leroy Miller,(2009) *Criminal Justice in Action*, (Cengage Learning, Inc,), p. 295. For more discussion, *see* for example Sanders, *et al* (2007), Criminal Justice, (Oxford: Oxford University Press).

[26] Such concessions include:

> "judges agreeing to impose specific time limits on probation...;prosecutors refraining from raising special sentencing provisions for repeat offenders; prosecutors remaining silent at the sentencing hearing ;or not opposing defendants request for leniency or specialized rehabilitation program; prosecutors downplaying the harm to the victims; and agreement that a defendant serves sentence at a particular institution;..., imposition of a fine or restitution; prosecutors agreeing to schedule sentencing before a lenient judge."

See Kress(1980), *Prescription for Justice: the theory and the Practice of Sentencing Guidelines*, 87 cited in William W. Wilkins(1988), `Plea negotiation ,Acceptance of responsibility, Role of the offender and departures :Policy decision in the promulgation of Federal Sentencing Guidelines', *Wake Forest L. Rev.* ,Vol. 23, pp. 185-86.

[27] Ibid.

[28] While sentence bargaining in adversarial procedure in general applies across the board to all crimes and the amount of sentence concession is not limited (at least statutorily), it works otherwise in inquisitorial procedures- the type of offence and the amount of sentence concession are statutorily fixed. See Generally Stephen C. Thaman (2007), `Plea bargaining, Negotiating Confessions and Consensual Resolution of Criminal cases` Electronic Journal of Comparative Law, Vol. 11.

2. Models of Plea Bargaining and Structures of Criminal Procedure

Plea bargaining has its roots in the adversarial systems.[29] Some even go further to make it adversarial by nature.[30] Researches indicate that it is perceived as `the ultimate expression' of 'adversarialism', giving parties maximum control over the case outcome.[31] An intriguing question which is often raised is why plea bargaining has long characterized the adversarial structures and not the inquisitorial? Although it is difficult to label plea bargaining as adversarial as some suggest, studies show that it derives its existence from this structure of criminal procedure.[32] Relatively, this structure is configured and works in such a way to lend itself for negotiation in the context of a criminal process that involves a dispute between autonomous parties.[33] This together with the fact that resolution of disputes naturally involves negotiation makes adversarial structures suitable for plea bargaining to flourish.

This can be contrasted with the inquisitorial system`s official inquiry of the truth and their conviction that truth cannot be negotiated.[34] Moreover, the guilty plea procedure, the passivity of the judge and the nearly unfettered charging power of the prosecutor, which are some of the features of adversarial systems but non-existent in inquisitorial systems, afford a fertile ground to negotiate on

[29] *See* Lawrence M. Friedman (1978-79), 'Plea bargaining in historical perspective', *Law & Soc'y Rev*. Vol. 13, p. 247; A. W. Alschuler (1979), 'Plea bargaining and its History', *Colum L. Rev.* Vol.79,p.1 ; Malcolm M. Feeley (1997), `Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining`, *Isr. L. Rev*., Vol. 13, pp. 202-05.

[30] Some argue that the fact that plea bargaining places the adversarial trait of leaving the criminal proceeding to the party`s control than to the judge, makes it adversarial. On the other hand, others claim to the contrary –they maintain that plea bargaining collapses the power of investigation, charging, sentencing into the hands of one actor, the prosecutor– and relies on written evidence (the plea agreement instead of tested oral evidence). In this sense, it resembles inquisitorial structures. On these debates, *see* generally Gerard E. Lynch (1998), 'Our Administrative System of Criminal Justice', *Fordham L. Rev.*,Vol. 66, p. 2117 ; Maximo Langer (2005-06), 'Rethinking plea bargaining: the practice and reform of prosecutorial adjudication in the American Criminal Procedure', *Am. J. Crim. L*. Vol.33, p. 223.

[31] Jacqueline Hodgson and Andrew Roberts (2010), 'An Agenda for Empirical Research in Criminal Justice: Criminal process and prosecution', *Legal Studies Research Paper* No 2010-13, p. 25. (Showing their reservations on such labeling of plea bargaining).

[32] *Supra* note 29.

[33] *See* Mirjan Damaska (1975), 'Structures of Authority and Comparative Criminal Procedure', *Yale L.J*., Vol. 84, p. 480.

[34] Ibid.

guilty pleas and thus for plea bargaining to function.[35] What is more, unlike inquisitorial systems, the principle of discretionary prosecution forms an important source of discretion for prosecutors in the adversarial structures to choose whom to charge, what to charge, how much to reduce, and even to drop charges altogether. All these flexibilities, which are prerequisites for plea bargaining, are present in adversarial structures.[36]

In contrast, the continental rule of compulsory prosecution[37] seems to contradict the adversarial style of plea bargaining. So long as sufficient evidence exists, prosecutors must proceed to trial and defendants cannot abort the trial by just confessing or pleading guilty. Also, the guilty plea which is the subject of negotiation in plea bargaining is generally unknown in inquisitorial systems.[38] Confession by the accused may not exempt the prosecution from proving its case, and still the court may find the accused not guilty. It is also suggested that plea bargaining is ill-suited with the inquisitorial version of truth –substantive truth.[39] All these mixed with the negative stance of inquisitorial jurisdictions to plea bargaining[40] evoke the query as to how plea bargaining works in these jurisdictions.

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[35] Ibid. *See* also Thomas Weigend (2008), 'the decay of the Inquisitorial Ideal: plea bargaining evades German Criminal procedure'*[in* John Jackson *et al* editors, (2008), *Crime, Procedure and Evidence in a Comparative and international context*, (Hart Publishing), p. 63.

[36] Yet it does not mean that plea bargaining is something alien to the inquisitorial systems. Maintaining their inquisitorial nature to some extent, inquisitorial countries have been incorporating some adversarial elements including jury trials and plea bargaining. See generally Stephen C. Thaman, *supra* note 28; Mirjan Damaska, *supra* note 33.

[37] This is not to suggest that all continental systems adhere to this rule horizontally. Variations exist depending on whether a country follows 'the expediency principle' or 'the legality principle'. *See* Yue Ma (2002), `Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective` *International Criminal Justice Review,* Vol. 12, p.30.

[38] Stefano Maffei (2004), "Negotiations on 'evidence' and Negotiations on 'sentence` in Italy: Adversarial Experiments in Italian Criminal Procedure", *Journal of International Criminal Justice,* Vol. 2, pp. 1050-1069.

[39] *See* Thomas Weigend (2003) 'Is the Criminal Process about Truth? A German Perspective', *Harvard Journal of Law & Public Policy*, Vol. 26, p. 171 (`plea bargaining cannot be reconciled with the inquisitorial version of truth-seeking`).

[40] For instance in Russia, plea bargaining was met with strong opposition: 'In the Russian criminal justice an agreement (in Russian sdelka) –is an immoral, reprehensible, dishonest phenomenon; it is a bargain demeaning the government (vlast) suggesting its helplessness, its inability to solve crimes ... . Negotiations will demean the investigator, the prosecutor and the judge since they will have to bargain with the criminal...` *See* S Pomorski (2007) 'Modern Russian Criminal Procedure: The Adversarial Principle and Guilty plea' *Criminal Law Forum* Vol.17, p.129 [citing I. Petrukhin, 'Agreements Regarding Confession of Guilt Are Alien to Russian Mentality']. Here it is important to

Nonetheless, with an increasing demand for efficiency, the principle of compulsory prosecution has become liberalized in inquisitorial systems to accommodate some trial alternatives. The practice which once was described as typical of adversarial systems has become increasingly common in inquisitorial systems, although, in a different shape. The inquisitorial variant of plea bargaining exhibits marked differences from its counterpart in the adversarial system. Perhaps the difference starts from naming: most inquisitorial systems that introduced plea bargaining did not prefer to use the term plea bargaining.[41]

The inquisitorial variant of plea bargaining is very limited in scope.[42] It is applied to a limited range of relatively less serious crimes; it passes through strict court scrutiny;[43] the amount of sentence discount is usually statutorily fixed; and charge and fact bargains are outlawed.[44] In so doing, inquisitorial jurisdictions have tried to adopt plea bargaining in a controlled and cautious way so that the propensity of using wide sentencing differentials to induce a plea of guilty becomes minimal.[45] Conversely, plea bargaining in adversarial structures is generally wider in scope. It applies to all crimes and it involves all forms/types of plea bargaining (charge, sentence, and fact). Moreover, a

note that all the literature in inquisitorial structures is not repugnant to plea bargaining. Some argue that plea bargaining which provides defendants a new role of influencing the outcome of the case to their advantage, is preferable over the traditional inquisitorial systems which are dominated by a judge whose purpose is to get confession. For the presentation of some detailed accounts, *see* Markus D. Dubber and Mark G. Kelman (2009), *American Criminal Law, Cases, Statutes, and Comments,* 2nd ed., Foundation Press, p. 99.

[41] For instance, while Italy calls it 'application of sentence at the request of parties'; Russia and Germany use 'agreement with the field charges' and 'negotiated agreement' respectively. More than the naming, however, what is important is the content of plea bargaining.

[42] Civil law traditions such as France, Italy, Germany, Spain, Estonia, Poland, Colombia, and Russia all adopt the limited form of plea bargaining, though the scope of its application varies among them.

[43] In Italy for instance, the judge must supervise the Italian equivalent of plea bargaining – *patteggiamento* or party– agreed sentence and must give reasons for such settlements including the congruity of sentence with the crime. See Jeffrey J. Miller (1990),` Plea Bargaining and Its Analogues Under the New Italian Criminal Procedure Code and in the United States: Toward a New Understanding of Comparative Criminal Procedure`, *N.Y.U. J. INT'L L. & POL.* Vol. 22, p. 215.

[44] The most common discount in such countries is one-third reduction of the normal sentence which would have been imposed after trial. Such is the case for example in France, Italy, Columbia, Spain and Lithuania. See Stephen C. Thaman , *supra* note 28.

[45] These coupled with the nature of the public prosecutor in inquisitorial systems –the fact that s/he is not a party to criminal proceedings and thus would not strive to obtain convictions like its counterpart in adversarial systems, could serve as an important check on the prosecutor's discretion in plea bargaining.

statutorily fixed sentence discount is unknown in adversarial structures. A typical example is the USA`s model which takes an extreme form where prosecutors are often accused of threatening defendants with huge sentence differentials so that they plead guilty.[46]

From the foregoing discussions in general and based on its scope of application and the range of discretion it vests in the prosecution in particular, one can identify two models of plea bargaining: the unrestricted/ unlimited model and the restricted/limited model. The first model refers to the unlimited form of plea bargaining which is common in most adversarial systems. It usually involves broader prosecutorial discretion –unlimited sentencing concessions, all types of plea bargaining– sentence, charge, fact bargains, etc. On the other hand, the restricted model denotes a more restrained form of plea bargaining where the prosecutor`s discretion in plea bargains is limited. Under the restricted model, concessions are regulated (usually plea bargaining applies to limited range of relatively less serious crimes with a statutorily fixed discount and rigorous judicial scrutiny), charge and fact bargains are outlawed. This form of plea bargaining is quintessential to inquisitorial/mixed structures. Throughout this article, such distinctions will be used in the course of making reference to the models.

3. Policy Justifications and the Targeted Model in Ethiopia

3.1 Policy justifications of plea bargaining[47]

The FDRE Criminal Justice Policy embodies reforms aimed at:[48] (1) introducing plea bargaining and compensation for miscarriage of justice (2) strengthening alternative dispute resolution mechanisms (ADR), legal representation and the capacity of investigative organs, among others. Of these, the introduction of plea bargaining represents an unprecedented development in the Ethiopian criminal justice system. The Policy tries to justify the reasons that motivate Ethiopia to introduce plea bargaining. The policy tries to justify plea bargaining from diverse perspectives. The policy justifications that motivate Ethiopia to introduce plea bargaining include: efficiency for the justice system, remorse and

[46] *See* for example. Ronald F. Wright (2005), 'Trial Distortion and the End of Innocence in Federal Criminal Justice', *U. PA. L. REV*. Vol. 154 ,p. 79; Maximo Langer, *supra* note 30.

[47] Here the purpose is to briefly mention the policy justifications of plea bargaining as stated in the criminal justice policy. For an appraisal of the justifications. *See* Alemu Meheretu , *supra* note 3. *See* also Alemu M., *An appraisal of plea bargaining policy and purposes in Ethiopia*, forthcoming.

[48] The Criminal Justice Policy section 14, *supra* note 14, p. 30.

rehabilitation of offenders, and protecting victims and defendants from the trauma of trials.

a) Efficiency:

It is often submitted that plea bargaining offers efficiency advantage to the justice system. With the sophistication of criminal law, trials have become extremely complex and resource intensive. Plea bargaining by cutting short resources, time and energy consumed in the criminal process, expedites justice. The Criminal Justice Policy subscribes to this justification in providing that plea bargaining cuts costs and time spent in full scale trials; it also relies on the caseload management justification –that plea bargaining helps reduce case backlog and workload.[49]

b) Remorse:

The policy validates plea bargaining from remorse perspective –that by encouraging remorse, plea bargaining facilitates the rehabilitation of offenders.[50] Here the assumption is that a remorseful defendant will take lessons from his/her past wrong and is less likely to commit another crime, and hence deserves less moral condemnation than defendants who insist on challenging the prosecution`s case.

c) Avoiding the trauma of trials:

The Policy further tries to justify plea bargaining from the perspective of victims and defendants, claiming that it benefits both by shielding them from the trauma of public trials.[51] It is suggested that in addition to minimizing trial inconvenience, plea bargaining has the benefit of avoiding the stigma and embarrassment of going public in a trial both for the defendant and the victim. While the defendant, by pleading guilty to a lesser crime, avoids the high public sigma associated with serious crimes, victims are spared from facing the offender at the examination stage.

3.2 The Model targeted by Ethiopia

Although plea bargaining originated from common law legal systems (like the USA and the UK) that are adversarial systems, it has now been transplanted in varying degrees to other systems of criminal procedure including the classical inquisitorial systems. While most of these jurisdictions have adopted plea bargaining in its limited form, some have preferred to have it in its unlimited form. Ethiopia is not an exception to this. Enticed with such developments, Ethiopia has adopted plea bargaining at a policy level. The Draft Criminal

[49] Id., p. 36.
[50] Ibid.
[51] Ibid.

Procedure Code which is underway, at a very slow pace, has also incorporated plea bargaining. The reading of the provisions of the Draft Criminal Procedure Code and the Criminal Justice Policy[52] suggests that the targeted version of plea bargaining has the following general features:

First, it is broader in scope, covering any crime across the board and all the commonly known types of plea bargaining –charge bargaining, sentence bargaining and fact bargaining.[53] Unlike, most countries (especially those from the inquisitorial structure) that transplant plea bargaining in its restricted model, Ethiopia seems to prefer emulating plea bargaining nearly as applied in adversarial systems.

Second, the power to plea bargain vests in the public prosecutor, excluding the police and the courts. The Draft Code expressly reserves this power to the prosecutor.

Third, the Policy and the Draft Code provide legal conditions for plea bargaining. These include the voluntariness requirement, the duty of disclosure, the requirement of sufficient evidence, and in principle mandatory legal representation.[54] To the extent they are translated into action, these guarantees can influence plea bargaining positively, although they hardly ensure the fairness and accuracy of the system.[55] Here it is important to note that the `Ethiopian variant` though framed along the unlimited model, exhibits some variations on legal conditions. A case in point is the requirement of sufficient evidence. This requirement which apparently has no parallel in those jurisdictions that uphold the unlimited model, requires that plea bargaining can be validly made only after the investigation has produced sufficient evidence of guilt. If the enforceability of this requirement is ensured, [56] it could enhance but not guarantee the integrity of plea bargaining.

Fourth, as it stands now, the amount of concessions in plea bargains is left for the discretion of the prosecutor. In contrast to most inquisitorial jurisdictions

[52] *See* for example Article 219, 221 and 230 of the FDRE Draft Code, *supra* note 15 and section 4.5.4 of the Criminal Justice Policy, *supra* note 14, p. 36.

[53] The Criminal Justice Policy p. 37; *see* also Article 230 of the Draft code, *supra* note 15.

[54] Article 221 of the Draft Code, *supra* note 15.

[55] *See* section 4 below.

[56] As it stands now the requirement suffers from serious limitations that can reduce it to a mere formality. It is not clear whether the requirement is subject to *ex ante* judicial review. The standard used to measure sufficiency and reliability of evidence is not clear, either (it makes little sense if a standard higher than the one used to press for a charge is not used). Most importantly, pre-charge bargaining which is permissible under the Ethiopian variant of plea bargaining can be effectively used to circumvent the requirement of sufficient evidence and negotiate on weak cases.

which put a fixed discount of one-third,[57] the Ethiopian variant does not fix the amount of concessions. Yet, the possibility of having fixed discounts is not totally closed because the draft law or subsequent guidelines can still provide for fixed discounts.

From the above, it is plain that Ethiopia has, at least at a policy level, adopted the unrestrained model with minor modifications. This chiefly relates to the preconditions attached to the model under consideration: the requirement of sufficient evidence being the main one. The following section investigates the compatibility of this model with fundamental principles of criminal procedure enshrined in the FDRE Constitution and other Ethiopian laws.

4. Fundamental Principles of Criminal Law and Procedure at Stake

This section does not claim to discuss principles of Ethiopian criminal law and procedure in detail. Rather, it tries to briefly sketch those fundamental principles and rights which are likely to be affected by the introduction of plea bargaining and investigate how the proposed `Ethiopian version` of plea bargaining fares with them.

4.1 The presumption of innocence

The presupmtion of innocence forms one of the cardinal constitutional principles in many jurisdictions. The FDRE Constitution unconditionally guarantees the right of an accused person to be presumed innocent until guilt is established by a court of law.[58] Yet, the Criminal Justice Policy[59], the Draft Criminal Procedure Code[60] and some statutory laws such as the Anti-corruption law limit the scope of the right by shifting the burden of proof to the accused. The Policy envisions further limtations of the right by law. Such limitations, in addition to the doubts with regard to their constitutionalty, could pose a serious threat to the right.[61] This is not to suggest that the presumption should remain

[57] This refers to the maximum amount of sentence concession the prosecutor may grant to a defendant in exchange for pleading guilty.

[58] Article 20, The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995.

[59] The policy allows onus reversal in some serious crimes such as terrorism , corruption, organized crimes and crimes against constitutional order. There is one precondition for this –the prosecutor needs to establish basic facts first. *See* the Criminal Justice Policy, *supra* note 14, section 4.4 at 33.

[60] Article 5(3), the Draft Criminal Procedure Code, *supra* note 15.

[61] In particular, the permission of further limitations of the right by law could provide the executive impetus to further erode the right.

absolute. It can be limited in exceptional cases as is the case elsewhere,[62] provided that such limitations do not violate the Constitution. Apart from questions of constitutionality, the permissibility of further limitations, limitations of the presumption in serious crimes[63] and its propensity to wider interpretation and abuse evoke concerns.

Proponents argue that plea bargaining is in tandem with the presumption of innocence and serves as an effective tool to single out the guilty from the innocent.[64] The assumption for this argument is that innocent defendants would choose trial over plea bargaining and only the guilty would be targeted by plea bargaining. Yet, there is no conclusive evidence to support this; quite to the contrary empirical evidence elsewhere suggests that both the innocent and the guilty are indiscriminately targeted, if not the reverse.[65] With increasing

[62] Generally, for modalities of putting limitations to the presumption/onus reversal in Europe (presumption of intent in some crimes which requires the defendant to rebut this, defences and justifications, reversal of onus in specific minor crimes), *see* J.R Spencer (2005), 'Evidence' [in Mireillie Delmas–Marthy and J.R Spencer, editors (2005), *European Criminal Procedures* (Cambridge University Press), pp.597-99].

[63] As shown above, the limitation concerns serious crimes as terrorism, organized crimes, corruption and crimes against constitutional order. This seems worrying in Ethiopia for two reasons. First, unlike most jurisdictions where reversal of onus applies to less serious infractions of law (Example France), it works for serious crimes which carry capital or life punishments. In fact, in Italy there were attempts to introduce by law the reversal of onus in serious crimes (organized crimes and corruption). Nevertheless, it was soon rejected as unconstitutional. *See* Ibid. Secondly, our weak political culture means the limitations are susceptible to abuse by the executive. Indeed, there are reports of politically motivated prosecutions and convictions involving the above crimes. *See* for example, Country Report on Human Rights Practice for 2012, United States Department of State available at http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm,visited on 14/3/13. The report claims that there are about 400 political prisoners in Ethiopia. Recently following the Supreme Court`s upholding of 18 years and life sentences of one journalist and one opposition leader respectively, the US Government openly slammed Ethiopia of its politically motivated prosecutions of government critics; *See* also Assefa Fiseha (2011) , 'Separation of Powers and Its Implication for the Judiciary in Ethiopia`, *Journal of Eastern African Studies*,Vol.5, No.4, pp.702-715; *See* Linn A. Hammergren (2012), 'Justice Sector corruption in Ethiopia', [in Janelle Plummer, editors(2012), *Diagnosing Corruption in Ethiopia: Perception, realities and the way forward for key sectors*, p. 215.] (reporting concerns that: *Political authorities or higher-level officers* direct police to ignore complaints, undertake investigations, or arrest "suspects" without probable cause.)

[64] *See* Andrew Hessick and Reshma M. Saujani (2001-2002), 'Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defence Counsel and the Judge', *Byu J. Pub. L.*, Vol. 16, pp. 232. (Raising the argument and critiquing it).

[65] *See* John Baldwin & Michael McConville (1978), 'Plea Bargaining and Plea Negotiation in England', *Law & Soc'y Rev.*,Vol.13, pp.296–98 (discussing the innocence problem of plea bargaining in England)**;** Samuel R. Gross et al (2005)., 'Exonerations in the United

concessions tailored against the chance of acquittal[66] along with strong risk aversion desire of innocent persons (than the guilty)[67] and their mistrust of the system[68], innocents are likely to choose plea bargaining and plead guilty simply because they believe it is rational to do so. Most importantly, the argument seems to ignore the implicit presumption of guilt underlying the plea bargaining system without which the latter does not 'procedurally function'.[69]

Some proponents further argue that the onus of reversal involved in plea bargaining can be taken as an exception to the presumption: 'the presumption provides for interferences such as plea bargaining'.[70] However, it is unrealistic to label plea bargaining an exception –a dominant system in many jurisdictions (adversarial structures in particular) which induces every defendant, including the innocent, to plead guilty with attractive concessions on the assumption that they might be guilty. There is no support that plea bargaining forms one of the commonly recognised exceptions to the presumption.[71] The FDRE Constitution accommodates no exception to the presumption that it guarantees, and, in effect, the possibility of making such caveats seems closed at least for now.

Plea bargaining in general and the proposed 'Ethiopian version' in particular operates in disregard of the principle of presumption of innocence in two

States*:* 1989 through 2003', *J. crim. L. & Criminology* , Vol. 95, p.536 (finding 6 % (20 out of 340) of exonerated defendants pled guilty); Albert W. Alschuler (1981), 'The Changing Plea Bargaining Debate', *Cal. L. Rev*. Vol. 69, p.714.

[66] Studies in some jurisdictions document such trends and some argue that this is 'well-designed to produce the conviction of innocents'. *See* Albert W. Alschuler, *supra* note 65, pp. 714-15.

[67] Studies show that the innocent is inherently more risk averse than the criminal because the latter willingly assumes risk while breaking the law in the first place. Innocents mistrust the criminal process for charging them for a crime they did not commit. Unlike the guilty, they are not psychologically prepared to face the repercussions of public trials. Prosecutors offer innocents similar concessions as the guilty. However, because of difference in evaluating risk, the innocent attaches higher value for it and may choose the lesser evil –plea bargaining. *See* Andrew Hessick and Reshma M. Saujani, *supra* note 59, p.201; *See* also Michael K. Block & Vernon E. Gerrety (1995), 'Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk'*, J. Legal Stud.*, Vol. 24, p.138.

[68] Some innocent defendants are so mistrustful of the system that they believe their guilt is a foregone conclusion if they stand trial, and so they readily accept any inducement to plead. These feelings of mistrust are sometimes nourished by defence counsel who begin with a presumption of client guilt, and both begin and end the representation by looking for the best available bargain`. *See* Andrew D. Leipold (2005), 'How the Pre-trial Process Contributes to Wrongful Convictions', *Am. Crim. L. Rev*. Vol. 42, p. 1154.

[69] *See* Elizabeth T. Lear (1993), Is Conviction Irrelevant?, *UCLA L. REV.* Vol. 40, p.1222.

[70] *See* Samantha J. Cheesman (2014), A comparative Analysis of Plea Bargaining and the Subsequent Tension with an Effective and Fair Legal Defence, (PhD thesis), p. 231.

[71] For some notes on such exceptions, *supra* note 63.

respects. *First*, the plea bargaining offer from the prosecution presupposes an implicit presumption of guilt; i.e., in making offers to negotiate, the prosecutor assumes that the defendant is guilty.[72] This is plain in particular in pre-charge bargaining (which is permissible in Ethiopia) at which point the prosecution has no sufficient evidence to press for a charge. This clearly contradicts with the principle. Second, plea bargaining lowers the standard of proof. It relies not on evidence as such[73] rather on the admission of guilt which is likely to be tailored based on the strength of evidence –the probability of prevailing at trial and the weight of concessions.

Procedural requirements like presumption of innocence and heightened standard of proof are 'intended to prevent inaccurate convictions even at the expense of inaccurate acquittals'.[74] Plea bargaining defies this by trading-off the reliability of convictions to efficiency and economic gains. It permits the prosecution to evade rigorous standards of due process and proof.[75] This is alarming in jurisdictions like Ethiopia whose criminal process exhibits serious limitations in upholding due process and ensuring the reliability of convictions.

Apparently, the requirement of sufficient evidence, a legal condition put to the 'Ethiopian version' of plea bargaining, could enhance the standard of proof and thus outcome accuracy. Yet, this appears to be unrealistic. This is a determination made by the prosecutor based on untested evidence with little or no pre-trial safeguards to ensure its reliability –no lawyer present, little prosecutorial supervision, no defined standard to measure sufficiency,[76] no *ex ante* judicial review; even *ex post* review and its effects remains equivocal.[77]

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[72] *See* generally Sanders, Andrew *et al* (2010), *Criminal Justice* , Oxford University Press, p. 496.

[73] When one counts out the guilty plea as unreliable, at best a lower standard of proof which is required for pressing of criminal charges is used to convict the accused and at worst this requirement could be circumvented. Indeed, this possibility is very high in particular with pre-charge plea bargaining permissible. For more discussion on the standard of proof used in plea bargaining, *see* Gregory M. Gilchrist, Gregory M. Gilchrist (2011), 'Plea Bargains, Convictions and Legitimacy', *Am. Crim. L. Rev.* Vol.48, p.153 ('Where trials are avoided, the standard of proof required for a conviction can be reduced to mere probable cause'). On the other hand, some suggest that *beyond reasonable doubt* or even a higher standard of *beyond all doubt* can be comfortably met if defendants 'candidly' admit their guilt (plea bargaining). *See* Richard L. Lippke (2011), *The Ethics of Plea Bargaining*, Oxford University Press, p. 221. But, this is hardly ensured in plea bargains.

[74] George E. Dix (1977), 'Waiver in Criminal Procedure: A Brief for More Careful Analysis', *Tax. L. Rev*. Vol.55, p. 240.

[75] Douglas D. Guidorizzi, *supra* note 9 at 768.

[76] The standard is yet to be determined by the prosecutor general. *See* The Criminal Justice Policy, *supra* note 14, section 3.10 at 13 (which demands that the Prosecutor General issues directives that provide standards on this). Yet, such approach has its own limitations: First, given the policy's focus on efficiency, the office of the prosecution is

Nor is the possibility of using illegally or improperly obtained evidence ruled out. Indeed, the criminal justice policy envisages such possibility as an exception.[78] Thus, the likelihood of inducing guilty pleas with a prosecution having no prospect of success cannot be dismissed; if not highly probable. In fact, this is not mere speculation at least in trials because empirical evidence shows that prosecutors often institute charges without sufficient evidence and preparation.[79] Plea bargaining is conducive for this since prosecutors have little incentive to weed out weak cases.[80]

Specifically, pre-charge bargaining which is permissible under the proposed variant of plea bargaining can be effectively used to circumvent the requirement of sufficient evidence and negotiate on weak cases. All these coupled with institutional pressure to raise efficiency and own interest to maximize performance could provide prosecutors with good incentives to circumvent the requirement of sufficient evidence. In the circumstances, the requirement of sufficient evidence is likely to remain a mere formalism.

4.2 The principle of equality

Both the FDRE Constitution and the Criminal Code embody the principle of equality and proscribe discrimination among defendants 'on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status'.[81] However, by treating

less likely to restrain itself meaningfully using its own guidelines. Second, effective enforcement mechanisms of the rules may presuppose external review. But weak culture of judicial review would mean that the guidelines are rarely challenged before courts of law.

[77] It is not clear whether the court must review prosecution evidence before it approves the plea agreement. In fact, it is required to check the consistency of the agreement with the law and morals (Article 232 of the Draft Code). Agreements contrary to the law, code of ethics, morality, and rights and interests of defendants are inadmissible (*see* Article 229(3) and (5) of the Draft Code). From this, one may imply that the court is obliged to review the requirement of sufficient evidence –a requirement which is provided for by the law. And if the agreement is found contrary to the law, the court must reject it. But this depends on the court`s appreciation.

[78] The Criminal Justice policy, *supra* note 14 at 17.

[79] This practice is ironically labelled as 'charging to fail'. *See* World Bank (2010), *Uses and Users of Justice in Africa: the Case of Ethiopia's Federal Courts*. (Washington DC: World Bank,) <http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-case-ethiopias-federal-courts> (7/10/14) ,p. xxi.

[80] *See* Oren Gazal-Ayal (2006), 'Partial Ban on Plea Bargains', *Cardozo L. Rev*., Vol. 27, p. 2299 (by diminishing the cost to the prosecutor of bringing weak cases, plea bargaining decreases the incentive to properly screen out weak cases through prosecutorial discretion at the outset).

[81] *See* Article 25, the FDRE Constitution and Article 4 of FDRE Criminal Code, 2004.

similarly situated defendants differently without any principled justification, plea bargaining collides starkly with the equality principle. This problem takes two forms: differential treatments inherent in plea bargaining and those based on invidious grounds.

4.2.1 Differential treatments inherent in plea bargaining

Differential treatments, inherent in plea bargaining, take two dimensions, namely between plea and trial defendants,[82] and differential treatments among plea defendants. Defendants accused of the same crime may be treated quite differently simply depending on their choice of plea. While those who waive trial for plea negotiation are privileged enough to benefit from the generous concessions of prosecutors and receive lesser punishments, those who insist on exercising their right to trial get harsh penalties thereby creating dual sentencing structures. In literature, this is known as *trial penalty*[83] –a notion which captures the fact that trial defendants receive severe punishment compared with plea defendants, simply for exercising their right to trial.

Even among those defendants who plea bargain, the result of the negotiation appears to be uneven and may perpetuate inequalities. The outcome of the negotiation depends on several extraneous factors of sentencing calculation as opposed to the degree of guilt –notably, the bargaining power of the defendant, the strength of the prosecution evidence, and other subjective considerations. In both cases, plea bargaining sustains differential treatment among similarly situated defendants, and this violates the equality principle and culminates in discrimination.[84]

It can be argued that so long as both options (the option to bargain and the option to go to trial) are readily available to defendants, one cannot speak of discrimination. Yet, this argument holds little water as the options are not comparable to enable one make a free choice. In light of compelling sentence differentials, possible pressure from the prosecutor and the attorney to plead guilty, disproportionate interests at stake and huge power disparity between the

[82] While the notion plea defendants refers to those defendants who plea bargaining, trial defendants connotes those who exercise their trial rights.

[83] For more on this, *see* Russell D. Covey (2008), 'Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings` *Tul. L. Rev*. VOL.82,P.1237 ("The ubiquity of plea bargaining creates real concern that innocent defendants are occasionally, or perhaps even routinely, pleading guilty to avoid coercive trial sentences."); Albert W. Alschuler (1983), 'Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System', *U. Chi. L. Rev.* Vol. 50. pp. 657-59.

[84] For more, *see* for example Stephen Bibas (2004), 'Plea bargaining Outside the Shadow of a Trial'.117 *Harvard Law Review,* Vol.117, p. 2468.

adversaries,[85] defendants would find it hard to go for the trial. As Gifford rightly observes[86]: '[t]he reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining.'

Some proponents of plea bargaining justify the differential treatment by making a distinction between rewarding waiver of a right and penalizing its exercise.[87] Thus, while defendants who waive their right and plead guilty are rewarded, those who prefer to stand trial fail to receive such rewards. However, it seems off the mark to make a distinction between the two notions: if pleading guilty is rewarded generously, the converse –pleading not guilty– is in effect penalized severely.[88] Besides, the distinction erroneously assumes that justice can be attained in isolation of the principle of equality,[89] while equal treatment is apparently an essential facet of procedural justice.

4.2.2 Differential treatments based on invidious grounds

Even though the conventional criminal justice system (trial) is not immune from this problem –at least in a different version than plea bargaining–, the concern is quite pronounced in plea bargains. The proposed version of plea bargaining which permits all sorts of non-transparent deals to drop or reduce charges, reduce sentence and manipulate facts, is prone to abuses and discriminations based on such invidious grounds as wealth, ethnicity, sex, religion, and political outlook, among others. This is not mere speculation.

For instance, the informal practice of dropping of charges and conversion of custodial sentence to fine indicate the fact that plea bargaining discriminates against poor defendants.[90] Though in a slightly different context, the informal 'plea bargaining' made with real estate developers accused of crimes relating to land abuse can illustrate this problem. In this case, while government employees

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[85] While the prosecutor risks losing its case, the defendant risks his liberty, if not his life. For debates on this problem, *see* Blumberg (1967), *Criminal Justice* (Where it has been argued that plea bargaining generates unequal treatment of defendants and that plea bargaining is unconscionable, Id., at 55); Note (1972), 'Plea Bargaining: the Case for Reform'*, U. Rici. L. Rev.* Vol.6, p. 334.

[86] *See* Donald G. Gifford (1983), 'Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion', *U. ILL. L. REV*., p.49.

[87] *See* for example Richard L. Lippke, *supra* note 73.

[88] *See* Albert W. Alschuler, *supra* note 83 at 657-59 (1983), (arguing that :

> If the concepts of reward and penalty are relative –if these concepts derive their meaning only from each other– the assertion that some defendants are rewarded and none penalized is simply schizophrenic. As Judge David L. Bazelon, referring to the implausibility of a system in which there are winners but no losers, once observed, "If we are 'lenient' toward [defendants who plead guilty], we are by precisely the same token 'more severe' toward [those who plead not guilty]."

[89] Ibid.

[90] *See* Alemu Meheretu, *supra* note 3.

who took part in the crime have been formally prosecuted, the affluent real estate developers benefited from the dropping of charges in favour of administrative measure of a payment of money. These differential treatments, though said to be justified in the public`s interest, [91] seem to enable wealth to buy justice.

What is more, it would be troubling if plea bargaining includes negotiation on fines which is increasingly used in Ethiopia thereby enabling the rich to easily avoid imprisonment and 'purchase freedom' while the poor desolately face imprisonment. Even worse, the rich could comfortably use plea agreements to cover up their criminal liability in exchange for a payment made to an innocent person who pleads guilty for their crimes.

4.3 The search for the truth/accuracy

Although the weight attached to the search for the truth in relation to other values varies across jurisdictions,[92] any system of criminal procedure targets truth seeking as its major objective. Ethiopia is not an exception. The search for the truth is one of the fundamental principles of Ethiopian criminal procedure law. It is expressly mentioned in the reform that the criminal process needs to be guided by this principle. The Draft Criminal Procedure Code specifically entrusts the judiciary with the duty to uncover the truth so that the criminal accounts for his wrong and the innocent faces no conviction. To this end, the court is allowed to go beyond the facts and arguments forwarded by the parties and call witnesses.[93] While guilty pleas may dispose of cases, the court is mandated, at its own motion, to conduct a full-scale trial.[94] In this sense, what is sought seems to be material truth as opposed to procedural truth.[95]

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[91] The notion of public interest is a fluid concept. Unless carefully construed based on defined standards, which is not the case in Ethiopia, it is open to abuses and discriminations. Perhaps, in the case at hand, one may invoke public interest. Yet, it does not seem consistent with public interest when one considers the seriousness of the crimes; the real estate business has been accused of an entrenched problem the governments vows to address. The concessions exchanged between the government and the suspects can erode public confidence in the justice system.

[92] The difference is visible in adversarial and inquisitorial conceptions of the truth. *See* generally, Weigend, *supra* note 39 at 157.

[93] *See* Art 369 of the Draft Code, *supra* note 15.

[94] *See* Art 334 of the Draft Code, *supra* note 15. This echoes Article 135 of existing criminal procedure code.

[95] While material truth is understood to mean an objective truth, procedural truth represents –truth obtained in a contest that involves opposing views of reality in a procedure which ensures the fairness of the process. *See* Rachel A, Van Cleave (1997), 'An offer you cannot refuse? Punishment without trial in Italy and the United States: The search for truth and an efficient Criminal Justice System`, *Emory Int'l L.* Rev.Vol.11, p.142; Maximo Langer (2004), 'From Legal Transplants to Legal Translations: the Globalization

It is interesting to see how the principle of search for the truth fares with the proposed 'Ethiopian version' of plea bargaining which involves exchange of concessions and negotiations on facts. Generally, some try to align plea bargaining with the search for the truth. For instance, one writer argues that plea bargaining can get at the truth: (1) where genuine guilty pleas are tendered; (2) in the inquisitorial versions of plea bargaining.[96] However, it is difficult, if not impossible, to link plea bargaining with the search for the truth for it inherently subverts the latter. While plea bargaining is about compromise and exchange of concessions, the truth is about fact finding regardless of the interest of the parties to strike a deal.

Plea bargaining in general and the proposed 'Ethiopian version' in particular undermine the truth. Trial and pre-trial procedures in any structure of criminal procedure target truth discovery as one major objective, albeit with variations in the conception of truth and methods of establishing it. In the inquisitorial systems, the procedures from investigation all the way to trial and post trial stages are designed in such a way that material truth can be established.[97] Unilateral and impartial investigation by the state (through the examination of evidence in support and against the conviction of a defendant), active judge, strict reviews, strong standard of proof, etc are designed to promote the truth finding exercise. Likewise, in adversarial systems, it is believed that the fight between adversaries in a structure that ensures fairness is the best way to unearth the procedural truth.[98] Cross-examination, strong standard of proof, the privilege against self-incrimination and extended exclusionary rules are all believed to be structured to this end.

By requiring a waiver of pre-trial and trial procedures designed to promote outcome accuracy at both criminal procedure systems (above) and substituting it with the haggling of the parties on the bargaining table, plea bargaining obscures the truth,[99] and it involves "a compromise between adversaries, reached when the parties each independently calculate the terms of the agreement to be preferable to the uncertainty of trial." Indeed, the primary concern of plea bargaining is not fact finding as such.[100] It is rather about case resolution through compromise and negotiation of facts at the expense of the truth.

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of Plea Bargaining and the Americanization Thesis in Criminal Procedure`, *Harvard International Law Journal*, Vol. 45, p.10.

[96] *See* R. L. Lippke, *supra* note 73, p. 233-34.

[97] *See* Rachel A, Van Cleave, *supra* note 95.

[98] Ibid.

[99] *See* DK Brown (2005), 'The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication' *California Law Review,* Vol. 93, p.1610. *See* also Gregory M. Gilchrist, *supra* note 73, p. 171); R. L. Lippke, *supra* note 73, p. 218.

[100] Ibid

In particular, this is for the most part true of the unlimited form of the proposed plea bargaining in Ethiopia where charge bargaining and fact bargaining are tailored to this end. The downgrading or dropping of charges and negotiation of facts, which are tenets of the unlimited model, are simply inconsistent with the truth-seeking objective of the system. In this sense, plea bargaining fails to not only accurately reflect the actual crime committed but may not also make offenders accountable to their crimes with the deserved punishment. The same holds true for sentence bargaining because the huge and uncertain sentence reductions involved in sentence bargains distort truth about what offenders have done.[101]

What is more, the structural problems surrounding the plea bargaining process include factors such as attorney competence, workloads, resources, sentencing and bail rules, information deficits, and defendants' preference to risk; and all these factors impinge on the outcome of plea bargaining.[102] Moreover, coercive sentencing differentials are issues of concern. In the circumstances, guilty pleas tendered following a bargain are less likely to be genuine.[103] This is particularly true of jurisdictions like Ethiopia where the above structural problems are quite pronounced while procedural safeguards remain scant.[104]

The clash between truth and plea bargaining is even more apparent where a criminal procedure, as is the case with Ethiopia, is designed to unveil the material truth. Research indicates that plea bargaining fundamentally subverts this version of the truth, in particular.[105] As shown above, the Ethiopian criminal procedure arguably targets the material truth, which necessitates the presentation of all necessary evidence at the trial. The court is required to examine the factual basis of every guilty plea, go beyond the facts and arguments forwarded by the parties and consider additional evidence. In the circumstances, it is questionable whether plea agreements, which naturally aim to avoid the complete presentation of evidence at trial and which involve exchange of concessions and compromises on facts, can go with the material truth.

A procedure can achieve the truth when it (a) singles out the offender from the innocent, and (b) punishes the former with a sentence proportionate to the degree of guilt. However, the proposed 'Ethiopian version' of plea bargaining (which adopts the unrestrained variant of plea bargaining) involves negotiation and misrepresentation of facts, massive sentence reductions and dropping of

[101] R.L. Lippke, *supra* note 73, p. 233-34.
[102] Stephanos Bibas (2004), 'Plea bargaining Outside the Shadow of Trial', *Harvard Law Review*, Vol.117, pp. 2468-69.
[103] For details see the literature on *the innocence problem*, *supra* note 9.
[104] Alemu Meheretu, *supra* note 3, pp. 172-83
[105] *See* for example, Weigend, *supra* note 39, p. 171.

charges meant to induce guilty pleas and thus promote efficiency, fails on both fronts. i.e., it is incapable of offering a reliable fact finding mechanism to arrive at the truth. Here a question remains[106]: Where is justice if truth is sacrificed to efficiency and legal expediency contrary to its core aspects of fairness?

4.4 The principle of equality of arms

Equality of arms, a fundamental principle of fair trial, involves giving each party a reasonable opportunity to present and defend its case, in those conditions that will not put any party at a disadvantage against its opponent.[107] This, among others, could relate to access to evidence and the right to review adversary evidence, opportunity to examine witnesses, time to prepare for defence, legal representation, rights of appeal.

Developed by the European Court of Human rights, the principle has now won international acceptance.[108] In Ethiopia, its components can be discerned from the relevant laws and the Constitution. The proposed Criminal Procedure Code has expressly embraced the principle of equality of arms in its latest version.[109] This principle aims at ensuring that both parties enjoy comparable opportunities so that the balance in the criminal process is enhanced. This is all the more important in criminal cases where the balance of power skews towards the prosecution.

The power disparity between the adversaries is quite pronounced in the Ethiopian criminal process. While the prosecution enjoys state resources and powers, the defence has none of these and remains very weak. Structural problems such as absence of defence investigation, inadequate public defender's services and the particular circumstances of defendants (who are mostly poor, uneducated, unrepresented and uninformed) exacerbate the situation. This creates an unbridgeable rift of institutional bargaining power. In the circumstances, plea bargaining, which involves disproportionate interests at stake,[110] aggravates the power imbalance and puts the defendant at serious disadvantage in relation to the prosecutor.

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[106] Ken Strutin (2013), 'Truth, Justice, and the American Style Plea bargain', *Albany Law Review,*Vol.77, No. 3, p. 834.

[107] Kaufman v. Belgium, App. No. 10938/84, 50 Eur. Comm'n H.R. Dec. & Rep. 98, 115 (1986) (establishing the principle of equality of arms standard).

[108] *See* for example *Human Rights Committee, General Comment No. 32***,** Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007); Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of Appeals Chamber (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[109] Art.15, the draft code, s*upra* note 15.

[110] While the defendant is under a threat of severe sanctions, the prosecutor runs the risk of losing at trial. The two are not comparable by any stretch of imagination.

In some cases, plea agreements can be inevitable consequences/ manifestations of the inequality of the parties. This may be the case where pre-charge plea agreements, which are allowed under the proposed 'Ethiopian version', are struck. In such cases, the defendant unaware of both the nature of the charge prepared and evidence marshalled against him, is simply in a disadvantageous position to make an informed decision. This leaves the defendant vulnerable to the manoeuvres of the prosecution and ultimately militates against fairness and outcome accuracy. The exclusive rights that the prosecution enjoys under the reform (the Policy and the Draft Code) on such matters as the right to appeal, the right to have the plea agreement approved by the court, the right to plea bargain anew or resubmit the agreement in case of rejection by the court, exacerbate the problem.

Apparently, the legal conditions to plea bargaining such as the duty of disclosure and the requirement of legal representation are meant to address the above concerns. But in reality, this seems unrealistic. *First,* these guarantees fall short of narrowing down the inherent power asymmetry that is created by plea bargaining. The coercive environment under which plea bargaining operates (i.e., high sentencing differentials, incomparable stakes involved –threat of severe punishment vis-à-vis losing at trial, unequal institutional bargaining power of the parties, among others) remains as a concern. This is particularly true of unlimited plea bargaining where the above safeguards are less likely to be effective.[111]

Secondly and most importantly, material and legal conditions specific to Ethiopia would render the guarantees less effective. For example, legal representation is not always mandatory; in less serious crimes bargaining with unrepresented defendants is allowed. Even in those mandatory cases, the quality and availability of legal service is severely constrained.[112] Legal aid is poorly organized and remains neglected. This means defendants are likely to negotiate without a lawyer or receive ineffective representation. Similarly, the duty of disclosure would be marred by the absence of effective defence investigation (it is unclear whether parallel defence investigation is recognized), and other

[111] *See* A. Alschuler (1986), 'Personal Failure, Institutional Failure and the Sixth Amendment', *N.Y.U. Rev. L. & Soc. Change,* Vol.14, p.149; Stephanos Bibas (2003), 'The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel', UTAH L. Rev., p.1.

[112] *See* for example 'UNODC Assessment of the Criminal Justice system in Ethiopia; in Support of the Government`s Reform efforts towards an Effective and Efficient Criminal Justice System' at 69*;* Access to Legal Aid in Criminal Justice Systems in Africa Survey Report`, UNODC, April 2011; *See* Abebe Asamere (2011) , "**የጠበቆች ሥነምግባር ችግሮችን በተመለከተ ለውይይት የቀረበ ጥናት**" (Concept paper on problems of ethics of advocates), *Wonber*, Alemayehu Haile Memorial Foundation Periodical.

problems include the timing of disclosure (which is apparently late during plea negotiation), absence of effective enforcement mechanism (no clear sanction on prosecution`s failure to disclose evidence), and the permissibility of pre-charge plea bargaining.

4.5 The right to silence and the privilege against self-incrimination

Both the privilege against self-incrimination and the right to silence are envisaged under the FDRE Constitution (Article19 (2) and 20(3)). The privilege as recognized under the Constitution appears to be limited in scope in two ways: *Firs*t, the Constitution mentions of the accused, leaving unaddressed, for instance, whether the privilege applies to witnesses. However, the 1961 Criminal Procedure Code allows witnesses under police examination to refuse to answer any question where they believe that it may expose them to criminal liability.[113] *Second*, the Constitution protects an accused person from any compulsion to testify against himself/herself, hence arguably limiting the scope of the privilege to testimonial communications as against any real or physical evidence.[114]

One dimension of the right to silence and the privilege against self-incrimination protects suspects from being their own accuser and from undue pressures meant to solicit self-incriminating statements. This is linked to the presumption of innocence. This principle requires the prosecution to prove guilt independent of the accused person's active participation so that defendants are

[113] *See* the 1961 Ethiopian Criminal Procedure Code, Article 30(2).

[114] Generally the privilege is understood in two senses: narrow and broad. In the USA it is understood in a limited sense to apply only to testimonial communications. While in UK (as well as in the eyes of the ECHR) the broader sense applies- it protects persons from producing documents (real or physical evidence) as well as testifying against themselves (testimonial communications). *See* generally Ian Dennis (2013), the Law of Evidence (London: Sweet and Maxwell).

Arguably Ethiopia seems to emulate the US approach. The Constitution under Article 19(5) provides :

> Persons arrested shall not be compelled to make *confessions or admissions* which could be used in evidence against them. *Any evidence* obtained under coercion shall not be admissible. (Emphasis added)

To be sure, the expression *confession or admission* refers to communications as opposed to real evidence. In this sense, *the narrower* version of the privilege seems to apply. Yet, one could also argue by emphasizing the phrase *any evidence* in the second limb of the provision that the privilege implies the protection of any evidence obtained under coercion, *real evidence* included.

protected from assisting their own prosecution,[115] and it protects the accused from coercion or compulsion.[116]

The existence of these rights requires the state to prove its case without the help of the defendant so that its superior power and resources remain counterbalanced. Nonetheless, plea bargaining undermines the right of silence and the privilege against self-incrimination.[117] Threats and rewards aimed at having a defendant waive his/her right to silence are generally prohibited so that the latter is protected from compulsion. Yet, plea bargaining by inducing, if not coercing defendants to plead guilty on the pain of severe punishment at trial, appears to negate the purpose of the right to silence and the privilege against self- incrimination. In particular, it tends to oppose the essence of the privilege – protection against compulsion from providing self-incriminating information.

The requirement of voluntariness, a pre-condition to plea bargaining, seems to offset the above concern. However, since the very concept of plea bargaining operates in sentencing differentials which could be threatening, if not coercive, the problem remains. The inherent coercions involved in plea bargains are beyond the reach of judicial scrutiny.[118] The coercive environment under which plea bargaining functions (i.e., high sentencing differentials, incomparable stakes involved –threat of severe punishment vis-à-vis losing at trial, unequal institutional bargaining power of the parties, among others) remains beyond their reach. This is especially true of their efforts to ascertain the voluntariness of the guilty pleas. Courts normally check if the guilty plea is free of physical coercion leaving the above coercive conditions (which may taint the outcome) unattended.

One may suggest that the defence counsel could play a role to enhance the fairness and integrity of the plea agreement. Nonetheless, that is not promising for three reasons: *First*, legal representation is not always mandatory –as indicated earlier, bargaining with unrepresented defendants is permissible in less serious crimes where the defendant consents to it.[119] *Second*, even in those

[115] This accommodates exceptions to the privilege/scope such as blood test, figure prints etc.

[116] S. Greer (1994), 'The Right to Silence, Defence Disclosure, and Confession Evidence' *J. Law & Soc.,* Vol.21, pp.107–9; Mike Redmayne (2007), `Rethinking the Privilege against Self-incrimination', *Oxford Journal of Legal Studies* , Vol. 27,No.2, pp.218-20.

[117] *See* for eg. Sanders, Andrew *et al*, *supra* note 72, p. 496.

[118] All the evidence and information remains at the hands of the parties. The judge is presented with the agreement. Although he may inquire information from the parties, the latter may have little/no incentive to provide him. Nor is the judge allowed to hear victims' account. The requirement of sufficient evidence as shown above is not promising either.

[119] *See* the Draft Code, *supra* note 15, article 224. Nonetheless, bargaining with unrepresented defendants is unreliable for: (a) it distorts the power imbalance further; (b) it is not properly sanctioned; (c) any guarantee to it is prone to circumventions.

mandatory cases, the quality[120] and availability of legal service is constrained by the limited recognition and respect of defence rights.[121] Above all, effective counsel is likely to be hampered in an unlimited plea bargains.[122] Thus, it is probable that many defendants go unrepresented or receive ineffective counsel.

4.6 The right to appeal

While the prosecutor is allowed to have appeal rights where the plea agreement is rejected, the defence has no appeal right at all.[123] One rationale for this seems that once the defendant is convicted based on his admission of guilt while concluding the plea agreement, there is nothing that he can challenge at the appeal stage.[124] A related rationale goes with the main terms/concessions of the plea agreement. In plea bargaining, a defendant enjoys the benefits of the agreement in exchange for waiving his right to challenge the prosecution evidence in the future, including appeal right. Nonetheless, waiver of the trial does not imply waiver of review by appeal. That is why express bans of appeal are often included by law or inserted in the plea agreement itself.

Perhaps another rationale could relate to the outcome of the rejection of the agreement in that where the agreement is rejected, parties are prompted to go to full-scale trials, in which case the defendant stands to enjoy his/her trial rights-including the right to appeal. Surely, this rationale would justify the ban only if full-scale trials were automatic to the rejection of the agreement. Nonetheless, that is not the case. The outcome of rejection of the plea agreement could be to prompt the prosecution to rectify the problem that caused the rejection, to plea bargain anew or to proceed to trial. Thus, to the extent that the outcome is other than going to the trial, the justification is less relevant. The need to appeal may arise where the plea agreement is accepted with modifications or erroneously approved by the court. In this case, the rationale is irrelevant. Some also suggest that the ban on appeal can be justified in the interest of finality and thus

[120] There are concerns as to the quality of legal representation defendants receive. See for example Abebe Asamere, *supra* note 112.

[121] The defence has no/little room to effectively participate in the pre-trial process. Interrogations are conducted in the absence of a lawyer, no parallel defence investigation as such exists, and there is limited defence access to resources and unparallel power between the prosecution and defence.

[122] *See* A. Alschuler (1986), *supra* note 111, p.149; Stephanos Bibas (2003), *supra* note 111.

[123] Art 234, the Draft Code, *supra* note 15.

[124] This rationale is commonly invoked to ban appeal in full-scale trials where a defendant is convicted based on his/her own guilty plea. As plea bargaining is a self-conviction method (i.e., a method which involves conviction based on admission of guilt), this justification is also valid to the ban of appeal in plea bargaining.

efficiency.[125] Yet, efficiency cannot be pursued at all costs in disregard of accuracy and fairness. Thus, there should be some room for appeal.

The ban of appeal leaves defendants with no opportunity to have their guilty pleas reviewed against any irregularity or unfairness in the process that are overlooked by lower courts.[126] Besides, it is inconsistent not only with the defendant's constitutional right of appeal but also with the principle of equality of arms.

In the foregoing discussion, it is shown that plea bargaining exhibits numerous inconsistencies and clashes with many of the fundamental values and principles of criminal procedure. This is primarily detrimental to defendants. Where a defendant is induced to forgo his/her right to trial and submit to plea negotiations, he/she surrenders several fair trial guarantees. As Professor William Stuntz states:[127] 'in criminal trials the constitution is omnipresent, in guilty pleas [plea bargaining] it is nearly invisible.'

However, due to its managerial and efficiency advantages, plea bargaining permeates many procedural systems pushing full-scale trials to the margin and making traditional values of fair trial give way for the new value of 'process economy'[128] – i.e., efficiency. As Damaska observes "the full adjudicative process is everywhere in decline", and he notes that "the novel mode is for authorities to offer concessions to defendants in exchange for an act of self condemnation which permits avoidance of the adjudicative process or at least its facilitation" and thus efficiency. [129]

Conclusion

Plea bargaining not only occupies a central position in many adversarial jurisdictions but also permeates diverse justice structures including the classical inquisitorial systems. Inspired by adversarial jurisdictions, Ethiopia has adopted the unrestricted or unlimited variant of plea bargaining, at least at policy level in addition to which a draft law is underway.

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[125] Juliet Horne (2013), Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales (Warwick School of Law Research Paper No. 2013/10 (Special Plea Bargaining Edition). Available at SSRN: http://ssrn.com/abstract=2286681 or <http://dx.doi.org/10.2139/ssrn.2286681>

[126] Perhaps the exception would be review by cassation. However, it is plain that review by cassation is very limited to fundamental errors of law and not facts erred by lower courts.

[127] William J. Stuntz (2006), 'The Political Constitution of Criminal Justice', *Harv. L. Rev*, Vol. 119, p. 791.

[128] *See* Regina Rauxloh (2010-110), 'Formalisation of Plea Bargaining in Germany- Will the New Legislation Be Able to Square the Circle?', *Fordham Int'l L.J.* Vol.34, p. 329.

[129] Mirjan Damaska (2004),'Negotiated Justice in International Criminal Courts', *International Journal of Criminal Justice* , Vol. 2, p 1019.

Although this variant of plea bargaining helps reduce case backlog to the extent that the problem correlates with full-scale trials, it is bound to pose its own tribulations which are either inherent to the institution, or typical to the version adopted by Ethiopia, or to the Ethiopian context. This author takes up one dimension of such issues: its relationship with fundamental principles of criminal law and procedure and argues that plea bargaining in general and the proposed Ethiopian variant, in particular is not consistent with such principles which are designed to ensure the integrity of the criminal process. The principles and rights that would be adversely affected include the presumption of innocence, the principle of equality, the principle of equality of arms, the privilege against self-incrimination and the right to silence. Nor is it compatible with one of the main purposes of any criminal procedure –uncovering the truth with the ultimate objective of making guilty defendants account for their wrong.

The magnitude of the problem is not similar in all models of plea bargaining. The problem exists in a mitigated form where plea bargaining is applied in the restricted or limited model which is characterized by statutorily fixed discounts, the ban of charge and fact bargains, and rigorous judicial scrutiny. That is why many inquisitorial/mixed jurisdictions such as Italy, Germany and Russia prefer this model over the unrestrained model, albeit with variations among them. However, this should not suggest that the limited model is capable of remedying the inherent flaws of plea bargaining, such as its inconsistency with fundamental principles and rights. Yet, sentencing differentials can be regulated by law under the limited model of plea bargaining thereby narrowing the gap between trial sentences and plea sentences. This model could also considerably mitigate the flaws of plea bargaining with regard to charge and fact bargains (which lack consistency and utterly defy the truth-finding endeavour). Moreover, rigorous review of the plea agreement applies under the limited model, and this enhances prosecutorial accountability. In this sense, should it be inevitable that Ethiopia uphold plea bargaining, this limited model could be a lesser evil. ■

Interactive Problem-Solving Interventions as Instrument of Conflict Transformation: Prospects and Challenges

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Abstract

Even though wars between states were historically the major forms of conflict, civil strife based on questions of identity, ethnicity, religion and other similar grounds has become the order of the day after the end of the Second World War. The complexity of mostly overlapping, social, economic, cultural, political and religious factors in these conflicts makes them difficult to deal with. This structural and conceptual metamorphosis in the international conflict paradigm has required the international community to rethink the traditional and formal conflict management and third party intervention techniques and instruments such as negotiation and mediation. In the course of achieving these goals, conflict scholars have focused on multiple but concurrent multi-track diplomacy instruments. Track II of this multi-track diplomacy and its conflict transformation instruments are based on the concerted efforts of unofficial actors to establish unofficial communication channels and facilitate the relations between the conflicting parties. One of the most commonly used instruments of Track II diplomacy is *interactive problem-solving*. The primary (but not the only) instrument of interactive problem-solving is a problem-solving workshop. This interdisciplinary comment deals with pertinent issues of relevance with regard to the nature and effectiveness of this conflict transformation instrument. In doing so, it makes a practical effectiveness assessment test against one of such methods, i.e., the *Kumi* method.

Key terms

Conflict, conflict transformation, multi-track diplomacy, Track II diplomacy, interactive problem-solving, problem-solving workshop, Kumi Method

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Introduction

The face of international conflicts has significantly changed after the Second World War and this has forced the international community to revisit the *status quo* of conflict management approaches. The traditional conflict management mechanisms that need revisiting include legal methods, peacekeeping, mediation and negotiation. Given the prevalence of inter-state, intra-ethnic and identity based conflicts, it has become an imperative to adopt a more comprehensive and robust third-party conflict intervention techniques.[1] These mechanisms are designed in a way that enables the international community to deal with the root causes of the prevailing intra-state, ethnic and identity based conflicts by putting the domestic actors at the center of the conflict resolution process.[2] One of such mechanisms is *interactive problem-solving* intervention which emphasizes on the close interaction of the conflicting parties through a bottom-up approach.

Some argue that this instrument of conflict intervention is a very effective tool in addressing the root causes of a conflict through facilitating a forum of open and honest dialogue among the members of the different conflicting parties, while others contend that the real impact of such effort is limited to the doors of the conference venue as it involves only a limited number of participants who cannot guarantee the dissemination of the outcomes to the rest of the society. Furthermore, the critiques point to the difficulty of measuring the impact of such efforts in the community and the temporal longevity of impact as the major drawbacks of this intervention method. Hence, this comment evaluates the relevance and effectiveness of this conflict resolution method in solving inter-group conflicts by referring to a modern case study where such method was used.

The first section of the comment is a brief elaboration on the evolution of third-party intervention. The second section briefly discusses Track-II diplomacy in light of interactive problem-solving method, and it highlights the theoretical basis of problem-solving method. The third section deals with problem-solving workshop as a specific method of interactive problem-solving, followed by the last section which briefly presents the Kumi method of interactive problem-solving as an empirical case study.

[1] Jacob Bercovitch and Richard Jackson (2012), *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches*, (University of Michigan Press), p. 8.
[2] Ibid.

1. The Evolution of Third Party Intervention: Emergence of Multi-Track Conflict Resolution Approach

Similar to other social discourse, the regime of third party intervention in conflict has undergone major stages of metamorphosis. The major transformative step to the discourse took place since the end of the Cold War. The main reason for this change in the framework is the change in the nature of conflicts following that era. Upon the unexpected collapse of the Soviet Union and the end of the bipolar world, there were high hopes for a peaceful world. These hopes mainly emanated from the minimized probability of a third nuclear World War. Expectations were also partially fulfilled through more coordinated international security policies, a sharp decrease in the frequency of interstate wars, and the emergence of the concept of state responsibility towards its citizens and the international community as a whole—as opposed to the traditional conception of strict state sovereignty.[3] Nevertheless, these hopes for a peaceful world have been shattered by the new faces of conflict.[4] At present, internal armed conflicts are the major threats to international peace and security.

1.1 The traditional state-centric approach

The original approach, which has dominated the regime of third party intervention since its inception, is the state centric Westphalian approach that emphasizes on the concept of state sovereignty.[5] This regime approached all activities and problems, including conflicts, in the international system from the sole perspective of power politics, i.e., with absolute exclusion of other actors and issues that were not the central concern of states.[6] This approach seems to have been well-suited for the period before the end of the Cold War as most of the conflicts during this time, including the First and Second World Wars as well as the proxy wars during the Cold War, were characterized by the involvement of formal actors, i.e. states or well defined non-state actors. Hence, the regime of conflict management was greatly influenced or informed by the traditional conflict management mechanisms such as legal methods, peace keeping, mediation and negotiation which put emphasis on maintaining the *status quo* and state security, rather than justice and human security.[7] During this era, the actors that were called to the table of conflict management were only states and well-defined insurgents as represented by diplomatic staff, head of states or the military.

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[3] Bercovitch and Jackson, *supra note* 1, p. 1.
[4] Ibid.
[5] Ibid. p.4.
[6] Ibid.
[7] Dalia Dassa Kaye (2007), *Talkingto the Enemy: Track Two Diplomacy in the Middle East and South Asia*, (RAND Corporation).

1.2 The changing faces of conflict and the paradigm shift in the notion of third party intervention

The changing nature of international conflicts from inter-state to intra-state wars and the resultant structural and conceptual metamorphosis has forced the international community to rethink the existing conflict management and third party intervention techniques and instruments. In the post-Cold War era intra-state conflicts are mainly characterized by a deeply rooted ethnic, religious, communal identity, cultural and resource-driven conflicts.[8] A majority of these conflicts mainly result from devastating poverty and weak or corrupt governance system, among others.[9] The complexity of these deadly conflicts that are mostly caused by overlapping social, economic, cultural, political and religious factors make them difficult to deal with.[10] This has led to the redefinition of international conflict with a view to embracing both intra-state and inter-state wars, thereby resulting in a paradigm shift from conflict management to conflict resolution and conflict transformation[11]

These mechanisms are designed to enable the international community to deal with the root causes of the prevailing intra-state ethnic and identity conflicts. Furthermore, these approaches, unlike the previous one, focus, not only on state security, but also on human security and justice. In doing so, conflict scholars have come up with new goals and approaches that suit the contextual flux in the conflict paradigm. These include the establishment of a just and democratic political order, the promotion of human rights, the creation of an emancipatory political system, reconciliation and truth commissions, international tribunals, and preventive diplomacy and early warning.[12] In the course of achieving these goals, conflict scholars have focused on multiple but coexisting multi-track diplomacy instruments. This has been found a very sound approach given the opportunity it provides to combine conflict resolution efforts at official and unofficial levels as well as traditional and modern approaches, where appropriate.[13] Hence, the new concept of multi-track diplomacy can be

[8] Rodney L. Petersen (2010), '*Religion and Multi Tuck Diplomacy'*, (Boston Theological Institute and Boston University School of Theology), p. 528.
[9] Bercovitch and Jackson, *supra* note 1, p. 2.
[10] Ibid.
[11] Ibid; Though the concrete distinctive meaning of these three phrases is far from agreement in the academia, Ramsbotham, *et al* have tried to make a fairly agreeable distinction among them as follows; Conflict management refers to the limited settlement and containment of conflict while conflict resolution implies that the deep-rooted sources of conflict are addressed and transformed, and conflict transformation indicates to the deeper level of conflict resolution. For further explanation *see,* Ramsbotham, *et al* (2011), *The prevention, management and transformation of deadly conflicts* (Polity Press).
[12] Id.p.6
[13] Ibid.

taken as a more robust and comprehensive extension of existing state-diplomacy (*First Track Diplomacy*) rather than a counter concept.[14]

It has to be noted that conflict management is a complex process that encompasses much more than negotiating an end to violence. It includes the prevention of new disagreement and reinstitution of relationships.[15] Richmond emphasizes this fact, noting that "[T]he new current approaches to conflict resolution have as their goal not just the cessation of violent behaviour but the establishment of new forms of interactions that can reflect the basic tenets of justice, human needs, legitimacy, and equality".[16] This can only be achieved through the involvement of all stakeholders in the process of dealing with conflict, which needs multiple avenues. The regime of conflict management has thus transformed itself into multi-track arena to respond to this need.

2. Track II Diplomacy: Interactive Problem-Solving

2.1 Core features of interactive problem solving

As mentioned above, Track II diplomacy is based on the concerted efforts of unofficial actors to establish unofficial communication channels and contribute to the resolution of the conflict. It provides an opportunity to explore opportunities for confidence-building measures and de-escalation of conflict.[17] Furthermore, it opens a window of opportunity for empowering citizens to participate in decision making processes.[18] Joseph Montville defines Track II diplomacy as: "unofficial, informal interaction between members of adversary groups or nations which aims to develop strategies, influence public opinion and organize human and material resources in a way that might help resolve their

[14] Daniel Wehrenfennig (2008), 'Multi-Track Diplomacy and Human Security', 7 *Human Security Journal*, p.81.;To give a brief description of the actors and elements of multi-truck diplomacy; Track I Diplomacy implies the effort of conflict management at state or official level; which usually relay on the traditional instruments of conflict management such as negotiation and mediation. Track II Diplomacy refers to the work done by non-elite actors representing non-governmental organizations, mostly with the ultimate purpose of creating an environment of receptivity for Track I activity. This embraces various interactive problem solving methods. Track III Diplomacy refers to "people to people" search for common ground undertaken by individuals or private groups. This type of activity may involve organizing meetings and conferences, generating media exposure, and political and legal advocacy.

[15] Wehrenfennig, Id., p. 82

[16] As cited in Bercovitch and Jackson, *supra* note 1, p. 9.

[17] Ibid.

[18] Ibid.

conflict".[19] The major input of this perspective is its objective to influence social constituencies and changing public opinion.

One of the most commonly used instruments of Track II diplomacy is *interactive problem-solving*. As stated above, the development of interactive problem-solving as an instrument of conflict resolution is part of the evolutionary process in the field after the end of the Cold War. These new instruments focus on addressing deep-rooted and structural issues.[20] This approach seeks to identify the root-causes of conflict relying on studies of human nature, human behaviour, and social structures.[21] It employs an inter-subjective approach of conflict which includes politics, especially in relation to representation and identity.[22] Hence, it has brought to light a new approach on human security and the role of states and individuals in world politics.[23] Accordingly, individuals matter, as do states, and human security is as important as state sovereignty.

2.2 The theoretical basis of interactive problem solving method

The theoretical foundation of the *interactive problem-solving* conflict resolution method was initially laid by John Burton. In developing his theoretical framework, Burton was guided by the principle that the best intervention is mainly about bringing together thoughtful action and reflection, so that action might be continually fine-tuned.[24] He traced the roots of persistent intergroup conflicts to the frustration of basic human needs.[25] He emphasized that a conflict analyst shall distinguish, both at the theoretical and empirical levels, between *interests*, which are open to negotiation, and *needs*, which are non-negotiable.[26] According to Burton, unless identity needs are addressed effectively, the recurrence of intractable conflicts is inevitable. Hence, the role of third-party interactive-problem solving is to channel the parties to a process in which they might come up with creative solutions to address their respective underlying needs and meet them in an interdependent relationship.[27]

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[19] Joseph Montville (1987), *"The Arrow and the Olive Branch: A Case for Track Two Diplomacy in Conflict Resolution: Track Two Diplomacy",* (Washington, DC: U.S. Government Printing Office.

[20] Bercovitch and Jackson, *supra* note 1, p. 8.

[21] Id., p. 9.

[22] Ibid.

[23] Ibid.

[24] Tamra Pearson d'Estrée (2009), "Problem-Solving Approaches", (in *The SAGE Handbook of Conflict Resolution*, ed. Jacob Bercovitch et al, Thousand Oaks, CA: Sage) p.13.

[25] John Burton (1969), "*Conflict and communication: The Use of Controlled Communication in International Relations" (*London: Macmillan,).

[26] Tamra Pearson d'Estrée, *supra* note 24, p.13.

[27] Ibid.

Burton's Basic Human Needs Theory was much influenced by Abraham Maslow's 'hierarchy of needs' –which states that human motivation is based on a hierarchy of needs, ordered from basic physical needs to psychological requirements such as recognition, achievement and fulfillment that are depicted as biologically innate.[28] Burton applied Maslow's hierarchy of needs theory to a conflict context. According to Burton, the list of basic human needs includes not only material needs such as food, shelter, physical safety and well-being, but also psychological needs such as identity, security, autonomy, recognition, self-esteem and a sense of justice.[29]

Burton contends that these psychological needs are even more fundamental than basic physical needs like that of food and shelter, hence people pursue them in one way or another.[30] He tells us that "[h]uman needs in individuals and identity groups who are engaged in ethnic and identity struggles are of this fundamental character".[31] Failure of recognition and denial of identity by a society would certainly lead to alternative behavior designed to pursue and satisfy those needs by all means available, be it ethnic war or any other type of violence.[32] Burton underscores that "deep-rooted conflicts cannot be contained or suppressed in the long term, but can be prevented or resolved only by the satisfaction of basic needs through conflict resolution".[33] Hence, Burton's theory indicates that although traditional power theory is correct in hypothesizing conflict over scarce resources, it had the erroneous conclusion that human behavior was determined primarily and solely by material benefits, and that the root causes of conflicts was over competition for scarce resources.[34] Burton rather points out that human behavior is mostly shaped by deeper concerns of identity and autonomy.[35]

Burton further notes: "A conflict is not resolved merely by reaching agreement between those who appear to be the parties to the dispute. There is a wider social dimension to be taken into account: the establishment of an environment that promotes and institutionalizes value relationships".[36] Hence, the role of conflict resolution and third-party involvement is to provide an

[28] Ülkü D. Demirdöğen (2011) 'A Social-Psychological Approach to Conflict Resolution: Interactive Problem Solving', 4:1 *International Journal of Social Inquiry*, p. 220.
[29] John Burton (1990), "*Conflict: Resolution and Prevention*" (London: Macmillan)
[30] Demirdöğen, *supra* note 28, p.220.
[31] Burton, supra note 29, p.36.
[32] Demirdöğen, *supra* note 28, p.220.
[33] R. Fisher. (1997), '*Interactive Conflict Resolution*', (New York: Syracuse University Press) p.6.
[34] Burton, *supra* note 29, p. 46.
[35] Tamra Pearson d'Estrée, *supra* note 24, p.14.
[36] Burton, *supra* note 29, p. 47.

opportunity for analysis and the use of this conscious and creative resource.[37] Methodologically, this theory relies on analytical problem-solving workshops and analytic dialogues in which the roots of conflict and the suppressed human needs of the conflicting parties can be analytically understood.[38] After the relationships of the parties have been well analyzed and each side is accurately informed of the perception of the other, alternative means of attaining values and goals that might be acceptable to all parties are revealed.[39]

This theme is further stated in the writings of subsequent theorists (Crocker *et al.,* 1999; Kelman, 1999, 2005; Lederach, 1997; Saunders, 2001). In particular, Kelman has further developed Burton's basic human needs approach to conflict resolution by injecting a social–psychological dimension to it. In agreement with Burton, Kelman reiterated that "identity, security and similarly powerful collective needs and the fears and concerns about survival associated with them, are often important causal factors in intergroup and inter-communal conflict".[40] He further identified the causes of conflict in general to be subjective and objective, which are interrelated.[41] Conflicts over objective factors, such as territory and/resources imply subjective fear or concern about security and identity.[42] And mostly conflicts are further fueled by other subjective psychological factors such as misunderstanding and distrust.[43] In this context Kelman contends that the main parameter for a successful conflict resolution is satisfaction of fundamental needs of the parties concerned.[44]

Extrapolating his social-psychological approach to international conflict, Kelman states that international conflict is not solely about intergovernmental or interstate relations; it is rather an inter-societal process.[45] Since conflict is inevitable, psychological, cultural and social-structural approaches must be embraced in the analysis and intervention in harmony with military, strategic and diplomatic paradigms.[46] Kelman gives due emphasis to the importance of multidimensional conflict intervention, including a psycho-social approach:

> Overcoming barriers requires the promotion of a different kind of interaction, one that is capable of reversing the conflict dynamics. At the micro-level,

[37] Tamra Pearson d'Estrée, *supra* note 24, p.14.
[38] Demirdöğen, supra note 28, p.220.
[39] Ibid.
[40] H. Kelman. "Social-Psychological Dimensions of International Conflict" In I.W. Zartman & J.L. Rasmussen (Eds.), (1997) '*Peacemaking in International Conflict: Methodsand Techniques'* (Washington, D.C.: United States Institute of Peace Press,) p. 195.
[41] Demirdöğen, *supra* note 28, p. 221.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.

> problem-solving workshops […] can contribute to this objective by encouraging the parties to penetrate each other's perspective, to differentiate their image of the enemy, to develop a de-escalatory language and ideas for mutual reassurance, and to engage in joint problem solving designed to generate ideas for resolving the conflict that are responsive to the fundamental needs and fears of both sides. At the macro-level, reversal of the conflict dynamic depends on the establishment of a new discourse among the parties, characterized by a shift in emphasis from power politics and threat of coercion to mutual responsiveness, reciprocity, and openness to a new relationship. [47]

3. Problem-Solving Workshops

The primary (but not the only) instrument of interactive problem-solving is problem-solving workshop.[48] It is with the development of this concept that scholars such as Burton and Kelman introduced the idea of 'conflict transformation'.[49] The major points of divergence between problem-solving workshops and the traditional conflict management methods of official diplomacy, including negotiation and mediation relate to (a) the emphasis by the former on addressing poor relationships between parties; and (b) the latter's assertion that conflict can only be resolved through mutually accepted solutions; and (c) the unofficial small group discussion nature in problem-solving workshops.[50] Authors such as Ropers labelled this mechanism of dispute resolution as the most ambitious approach, in which the disputants organize their communication in such a way that they are able to systematically work through the substance of their differences.[51]

The typical workshop brings together unofficial representatives of conflicting groups in a private setting for them to engage in face-to-face communication.[52] This forum of discussion about the conflict is informal, off-the-record and low-

[47] Kelman, *supra* note 40, p. 233.

[48] Herbert C. Kelman, 'Interactive Problem Solving in Israeli- Palestinian Case: the Past Contribution and Present Challenges'. In R Fischer (2005), *Paving the way: Contributions of Interactive Conflict Resolution to Peace Making,* (Lamham, MD, Lexington Books) p.5.

[49] Bercovitch and Jackson, *supra* note 1, p. 9.

[50] Lisa J. Freeman & Ronald J. Fisher (2012), 'Comparing a Problem-Solving Workshop to a Conflict Assessment Framework: Conflict Analysis Versus Conflict Assessment in Practice', 7:1 *Journal of Peace building & Development*, p.68.

[51] Norbert Ropers (2003), '*From Resolution to Transformation: The Role of Dialogue Projects'*, (Berghof Research Center for Constructive Conflict Management) p. 3.

[52] Freeman & Fisher, *supra* note 50.

risk.[53] The objectives of the workshop include: attitude change, the generation of innovative solutions, and improvement of intergroup relationships. However, these rationales are not taken as the primary and sole end of the conflict resolution process in a given conflict; they are rather intended to provide an alternative but complimentary form of interaction to official peace process that focus on agreements and their implementation.[54] It is presumed that the betterment of the relationship amongst the unofficial parties will contribute to the resolution of the objective elements of the conflict.[55] Hence, the ultimate goal is to create an atmosphere for positive interaction between unofficial representatives of opposing parties that enable attitudinal change, and creative problem solving, which serve as an input in the official process and contribute to de-escalation.[56]

Kelman identified three basic rules for the workshop. It must be primarily intended to facilitate the free participation, privacy and confidentiality of the proceedings without the expectation that agreement will be reached. Balanced and equitable interaction among the parties is required. Moreover, participants of the workshop must come as private individuals rather than official representatives.[57] However, they must be politically involved or must be influential enough, so that they can easily disseminate the results of the workshop to the policy-making machineries of their respective sides.[58]

It is mostly facilitated by skilled and acknowledged third-party academicians, who are knowledgeable about conflict-resolution theories and the region in question.[59] However, the third party cannot propose a solution or employ leverage, rather only facilitates analysis of the conflict and the creation of possible solutions by creating a spirit of motivation for problem solving.[60] S/he also regulates the interaction between parties.

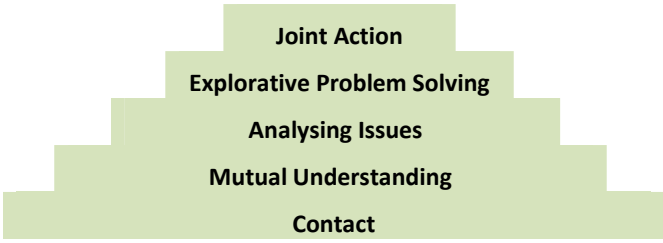
3.1 Steps in Problem-Solving Workshops

Most workshops generally last for three to five days, and although the agenda is not fixed, a general procedure has emerged.[61] In most cases the workshop starts

[53] Ibid.
[54] Freeman & Fisher, *supra* note 50, p.69.
[55] Ibid.
[56] Ibid.
[57] Kelman, *supra* note 40, p. 214.
[58] Ibid; Kelman states that in the Israeli- Palestinian workshops the participants have included Parliamentarians, leading figures in political parties or former movements, former military officers or government officials, and journalists or editors specialized on the Middle East.
[59] Demirdöğen, *supra* note 28, p. 222.
[60] Freeman & Fisher, *supra* note 50, p. 69.
[61] Ibid.

with the exchange of views and experiences of the conflict among the participants. This phase is concerned with the formulation of the different point of views of the various parties as clearly as possible and the identification of the substance of the conflict.[62] Rouhana (1995) calls this phase '*cognitive empathy'* –the process by which each party moves from expression of its own needs to comprehension of the needs of the other.[63] The second phase is called '*responsivity to the needs of others*'. This stage involves each party looking for an assurance that the other party does not only understand its needs but also recognizes its legitimacy and takes it into account in the course of developing solutions.[64] The third phase is about the identification of shared interests and similar needs and fears.[65] Furthermore, participants build a new group identity and mode of interaction that has the potential to develop ideas thereby contributing to a resolution.[66] The fourth and final stage is called phase of *'working together.'* In this stage, the group discusses ways of implementation of the ideas and also thinks about overcoming the obstacles to possible solutions while identifying the constraints on each side.[67]

Figure 1: Levels of Cooperation in Dialogue Process



Source: McCarteny 1986

These phases might be completed in a single workshop or may need several consecutive meetings.[68] This has to be decided by the third party after carefully assessing the readiness of the participants to move from one phase to another.[69]

[62] Ropers, *supra* note 51.
[63] Rouhana (1995), '*The Dynamics of Joint Thinking between Adversaries in International Conflict: Phases of the Continuing Problem-solving Workshop'* (16:2 Journal of Political Psychology) p. 325.
[64] Freeman & Fisher, *supra* note 50, p. 69.
[65] Norbert Ropers, *supra* note 61, p.4.
[66] Lisa J. Freeman & Ronald J. Fisher, *supra* note 50, p. 69.
[67] Ibid.
[68] Ibid.
[69] Ibid.

3.2 The limitations of problem-solving workshop

From the very beginning, this instrument of conflict intervention has been controversial. The primary limitations that have been raised by many scholars are the issues of relevance and effectiveness.[70] One of the earliest criticisms in this respect came from Ronald Yalem, who doubted the effectiveness of this methodology given the lack of assurance for transfer of the positive results gained in the workshop room to the society and the absence of concrete criteria of measurement in order to evaluate the actual impact of a given intervention.[71] He argued that, although such intervention might serve to build trust, it can only be a supplement to traditional methods of conflict resolution. These criticisms have been sustained for long by various scholars and have not yet been effectively addressed by the proponents of the methodology.[72]

Fischer, in his study on evaluation efforts of Interactive Conflict Resolution, found that few systematic and comparative analyses exist although several practitioners claim to have an impact on creating peace in different conflicts around the world.[73] In their effort to address the limitation of measurability of impact, d'Estrée *et al* underline that putting in place a framework for evaluation that allows tailoring to the specific emphasis of a process can help in identifying the actual achievement of a conflict resolution scheme.[74] In this regard, they pointed out two primary challenges that can be encountered in the evaluation of this specific intervention methodology.[75]

The *first* challenge has to do with the selection of the criteria. The concerns here are: who chooses the criteria for evaluation and on what ground; how can the criteria be contextualized based on actor, purpose and context? The selection of criteria might also be challenging as interventions might have multiple and mostly vague or unstated goals. The *second* and mostly cited challenge is the issue of linking the micro-changes to the wider and structural, macro-changes inherent in peace-making. The complicated nature of conflicts makes it difficult to pin-point the casual effect of one micro-level intervention on a macro-level. These challenges imply the fact that the theoretical investigation of interactive problem-solving or inter-group conflict management is still poorly developed.

To illustrate these challenges, d'Estrée *et al* have provided a practical example from the Israel-Palestinian dialogues, which have been considered as

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[70] Tamra Pearson d'Estrée, *supra* note 24, p. 18.
[71] R. Yalem, "*Controlled communications an conflict resolution",(8:3 Journal of Peace Research, 1971*) p. 266.
[72] Tamra Pearson d'Estrée, *supra* note 24, p. 18.
[73] Fisher, *supra* note 33, p.10.
[74] Tamra Pearson d'Estré et al (2001), 'Changing the Debate about "Success" in Conflict Resolution Efforts', *Negotiation Journal*, p. 102.
[75] Ibid.

intervention under the broader definition of interactive-problem solving.[76] Some considered these venues as important milestones to set the stage for peace-making through creating common understanding of the conflict among the people, while others criticized them for their limited focus.[77] Practitioners and others intended to come up with criteria to measure the success rate of the dialogue, which has brought to light the difference in perspective on this subject. This lack of agreement on the set of criteria to be used led to confusion and doubt over the entire relevance of the process.[78]

The Israeli-Palestinian dialogues are also good examples of the second limitation, i.e., linking immediate or short term micro-changes to long term, structural, macro-changes. The dialogues mostly took place in informal and closed environments and were structured in ways that they could establish trust and encourage new reflections and learning. Though it is probable that the participants developed a significant amount of trust within the group, the trust between the communities they come from might not be altered at all. In this context, d'Estrée *et al* ask: what kind of change can one expect as a result of the dialogue? How can the individual or mini-group change be effectively translated into a change in relations at inter-group level? Hence, as many other interactive problem-solving interventions, the Israeli-Palestinian conflict resolution evaluation is also stranded in the usual challenges of definition and criteria for success and the linkage between micro-and macro-level changes.[79]

4. Case Study: The Kumi Method

The meaning of the word Kumi is 'rise up' in both Arabic and Hebrew.[80] It is one method of interactive problem-solving in a workshop setting. Kumi is a method of conflict intervention enabling innovative social change through conflict transformation.[81] In other words, it is a mechanism that can be adopted by individuals and groups who work towards social and political reengineering so that they can reflect upon the root causes of the conflicts they are involved in and collectively march towards creative alternative solutions.[82]

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[76] Fisher, *supra* note 43.
[77] Tamra Pearson d'Estré et al, *supra* note 90.
[78] Ibid.
[79] Ibid.
[80] A Hand Book for practitioners, *'Building Networks of Kumi Learners in Europe: Working across geographic and cultural boundaries on issues of Islamophobia and migration'*, (Education and Culture Lifelong Learning Program, 2013), p. 6.
[81] Ibid.
[82] Transform, *'The Kumi Method: An Introduction'* (2013), The Interdisciplinary Center for Conflict Analysis, Political Development and World Society Research), p. 1.

4.1 The Metamorphosis of Kumi

The Kumi method was developed by a group of diverse scholars who shared a common sense of frustration over the sluggish progress and impact of Israeli-Palestine people-to-people programs.[83] After a long period of research on the way in which such programs were carried out, it was concluded that there were important flaws in the basic architecture and implementation of most of the programs which could be linked with their general understanding of conflict.[84] Since these programs primarily focused on staging dialogue between the conflicting parties, sometimes they presumed that the causes of the conflict mainly lay in the perception of individuals which could be solved by facilitating contact for people from both sides.[85] What this approach mainly missed was the recognition of the deeply-rooted social structures which were fuelling the Israeli-Palestine conflict. These range from power asymmetry between the two societies to the bigger geopolitical picture.[86] This had led to the superficial remedy of issues of identity.[87]

From the findings of the researches, it was deduced that for such initiatives to be fruitful, a new approach that would empower grassroots organizations and mid-level political leaders was needed for them to effectively challenge the bigger social structure perpetuating conflict.[88]A method was needed to put this approach on the ground. In order to achieve this goal, a coalition was created between three organizations: Transform (the Interdisciplinary Centre for Conflict Analysis, Political Development and World Society Research), IICP (Institute for Integrative Conflict Transformation and Peace building) and ICA (Institute for Cultural Affairs).[89] Each of them has its own approach of addressing conflict resolution and political organization.[90] The purpose of the coalition was to formulate a hybrid of these different methods and perspectives, so that it can be utilized to harness the efforts of grassroots organizations and mid-level societal leadership working in a conflict situation.[91] The final product of this effort was Kumi which has been further developed while it was put to use in years 2009-2010 in the context of the Israeli-Palestinian conflict.[92]

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[83] People-to-people program refers to a series of dialogue and encounter activities organized as a part of the Oslo peace process in the 1990s.
[84] Transform, *supra* note 82.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] This approach is referring to the theoretical basis of Kumi; which indicates that Kumi method operate simultaneously as Track II and Track III diplomacy instrument.
[89] A Handbook for practitioners, *supra* note 80, p. 6.
[90] Ibid.
[91] Ibid.
[92] Ibid.

4.2 Fundamentals of the Kumi Method

Unlike other problem-solving instruments emphasizing on mere face to face dialogue, Kumi targets the transformation of notions of identity based on exclusion through systematic streaming of the societies' thinking and action towards a set of goals extending beyond the end of the workshop. Hence, the fundamental goal of Kumi is to enable creative social change through conflict transformation or creative conflict transformation through social change.[93] Kumi pays great attention to the collective will of a group in order to make change happen. The Kumi process enables individuals and groups to work towards social and political change to reflect on the root causes and the social contexts of the conflicts in which they are involved.

Furthermore, unlike other mainstream people-to-people dialogue projects, this method emphasizes on the creative capacity of the grassroots and mid-level politicians, not just as accessories to official leaders, but as the main parties in demanding and creating socially-just peace.[94] This enables Kumi to simultaneously operate at different levels of the society.[95]

The method is usually applied in workshops settings that are organized by Kumi practitioners, who work with different conflicting groups over an extended period of time. The process involves a well-organized preparation and follow-up after re-entry.[96] The ideal transformative[97] end of the method is that participants will agree on a shared value reflected through concrete steps forward, collective action plans to which they commit themselves.

4.3 Structure of Kumi Workshop

Like any other interactive problem-solving workshop, participants in a Kumi workshop pass through different steps. These steps allow participants to engage in conflict analysis in order to (a) explore social and political failures that are inherent to intractable social conflicts; and (b) develop new awareness of reality to be attained in which negative stereotypes and antagonism are replaced by analytical empathy which facilitates transformative politics in which power over

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[93] Ibid.

[94] Transform, *supra* note 82, p. 4.

[95] This is one of the primary purpose of the method; which has been elaborated in the Kumi Hand Book as follows; "Kumi endorses a multi-track approach in order to contribute to the potentials of significant change across all dimensions of societal structures, cultures and politics in a complementary manner. Working in parallel on the level of grassroots and on the level of mid-level leadership in society increases the potential for creating impact on the ongoing conflict discourse and broadens the awareness of creative new approaches to the conflict that address the needs of all sides involved." P. 10.

[96] Ibid.

[97] According to the developers of this method, true transformation of conflict means distributing power more broadly within society.

is replaced by power with/for.[98] These steps enable the participants to effectively deal with different aspects of the conflict in a sequential manner in which each step builds on the results obtained in the previous one. These steps are:

i. *Preparation:* This involves identification of the target group and establishing contact; researching divisive issues and together with the target group, determining where, how and on what issues the workshop shall focus.[99]
ii. *Developing focus, context check and identification of contradictions:* In this stage, the issues of focus are identified and the facilitator makes sure that all the participants have general understanding of the issues to be raised in the workshop.[100] This enables the participants to put their goals on the discussion table and identify the contradictory goals.[101]
iii. *Dealing with the conflict in depth: conflict analysis, antagonism and resonance, transcendence:* After the identification of contradictory goals, the group directly deals with the central themes of the conflict. Participants deal with identities, and bring to light grievances and antagonisms.[102] They then deal with the conflict in a more analytical manner. After establishing a common understanding through critical analysis, they reframe the initial goals so that they can open a new avenue for transcending contradictions.[103]
iv. *Participatory strategic planning:* After achieving a common goal, participants identify a common practical vision depicting the ideal environment they would like to see in 5-8 years.[104] In this process, obstacles are identified, strategies are developed and detailed action plans are prepared on how to work together for conflict transformation.[105]
v. *Supporting implementation upon re-entry:* After the workshop, the facilitators continue tracking the progress made by the group and offer practical help while the group begins implementing its action.[106]

What has to be noted in the implementation of these steps is that it might not be a smooth process. Sometimes, facilitators might be bound to repeat steps or interrupt and proceed some other time in a situation where people are not yet ready. Furthermore, there is no guarantee of success, and people might fail to come up with a solution.

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[98] A Handbook for practitioners, *supra* note 80, p. 11.
[99] Transform, *supra* note 82, p. 5.
[100] Ibid
[101] Ibid.
[102] Ibid
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Id., p. 6.

4.4 Evaluation of the Kumi Method

As already mentioned, Kumi does not end the conflict transformation effort inside the workshop room; it rather tries to extend the achievements obtained to the real world through action oriented planning and networking the participants. Hence, this makes Kumi a bit different from other dialogue projects. However, even though the developers of this method claim that it has remedied the weak sides of other interactive problem-solving mechanisms, it still suffers from the same problem of evaluation and micro-macro change linkage in addition to lack of clear criteria for selection of workshop participants, especially at grassroots levels.

Evaluation of result is a very difficult task in Kumi because we cannot see the actual changes that are brought about in a given community as this may take years or even a decade. Moreover, there is uncertainty as to who chooses the criteria for evaluation and on what ground and how the criteria can be contextualized based on actor, purpose and context. Moreover, the issue of linking the micro-changes to (the wider and structural) macro-changes inherent in peacemaking arises in Kumi context. It is also difficult to establish causal link between the action and the results/changes.

Although Kumi seems to be different (in that it continues tracking the progress made by the group and offers practical help while the group begins implementing its action), given the very weak community networking system in developing countries, especially in conflict areas, it may not be feasible to track down and work with the participants after re-entry. Given the budget constraints and the probable lack of interest on the part of the donors to finance such projects, a question arises whether planning to support implementation after re-entry is attainable.

Conclusion

The nature and cause of conflicts have been dramatically transformed from the mid-1950s'. Civil strife based on questions of identity, ethnicity, religion and other similar grounds –strongly tied to the emotions and the person of individuals and communities– have become the order of the day. Unlike the 'old conflicts' grounded on questions such as sovereignty, territory or political economy, these 'new conflicts' need creative solutions that can address the root causes for a sustainable peace to happen. It is with this view that the regime of third party intervention has undergone a complete evolution from the traditional peace-making mechanisms such as negotiation and mediation, to the multi-track and multidimensional third-party conflict intervention techniques. One of the by-products of this evolution is *interactive problem-solving* instrument, mostly categorized as Track II diplomacy.

Scholars such as Burton and Kelman have applauded this mechanism as an efficient and effective method of intervention to address the root causes of protracted identity conflicts. This method is firmly grounded on the human security and basic needs approaches; and these questions mostly lie behind conflicts of identity, ethnicity and culture. Hence, the channel of face-to-face communication facilitated by these interactive problem-solving techniques will open an opportunity for the parties to communicate with each other, and to analyze and work out their conflicts by clearly exposing the grounds of contradiction.

However, other scholars doubt the effectiveness and relevance of this methodology –and rightly so, given its inherent nature and the related difficulty of evaluating impact, and the lack of efficient mechanisms to link the micro-results obtained at group level to macro-level outcomes. Hence, as long as these problems are not addressed properly, it will be difficult to use this methodology as effective third-party conflict intervention instrument.

Yet, the discourse on interactive problem-solving interventions has validly revealed that current conflicts are mostly attributable to questions of identity, ethnicity, religion and other similar grounds, and have greater complexity than the traditional wars between states. Conflicts that involve sense of identity, belief and emotions of individuals and communities should thus be addressed through means that accompany (and go beyond) traditional conflict management schemes. Unfortunately however, we are at a juncture whereby the traditional methods seem to be limited in scope in addressing current conflicts, while the new modalities of conflict transformation are yet in the making. This calls for enhanced empathy, creativity, critical thinking and reason on the part of communities, political actors and parties in conflict. ■

COMMENT

Some Remarks on Ethiopia's New Cybercrime Legislation

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Abstract

Ethiopia has been enacting various pieces of legislation, since recently, to regulate some aspects of the digital environment. The Cybercrime Proclamation of 2016 (Computer Crime Proclamation No.958/2016) is the most recent addition to the legal regime that criminalizes a range of cybercrimes. It has also introduced a number of novel evidentiary and procedural rules that will assist in the investigation and prosecution of cybercrimes. The law has, however, attracted criticisms from various corners mainly owing to some of its human rights unfriendly provisions. This piece provides brief comments on the cybercrime legislation and highlights some of the challenges that lie ahead in the course of implementing the law.

Key terms

Cybercrime, computer crime, the right to privacy, illegal online content, procedural justice, Ethiopia

Introduction: Ethiopia's new cybercrime legislation

Ethiopia introduced the first set of cybercrime rules with the enactment of the Criminal Code in 2004. The Code criminalizes a set of three cybercrimes namely 'hacking', 'dissemination of malware' and 'denial of service attacks (DoS)'.[1] Several cybercrimes have been perpetrated against the Ethiopian cyberspace since the enactment of the computer crimes rules, but there currently are only a few reported court cases.[2] In 2013, Ethiopia's cyber command –

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[1] *See* Criminal Code of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, Proclamation No. 414/2004, Arts 706-711.

[2] For a discussion on major cybercrime incidents in Ethiopia until mid-2014, *see* Kinfe Micheal Yilma (2014), 'Developments in Cybercrime Law and Practice in Ethiopia', 30

Information Network Security Agency (INSA)– released a draft comprehensive cybercrime legislation that not only extended the range of outlawed cybercrimes but also introduced crucial evidentiary and procedural rules for the investigation and prosecution of cybercrimes.[3]

After three years of hiatus –and new drafting (or redrafting) by the Ministry of Justice (currently Office of the Federal Attorney General), the second version of the bill has been adopted by the Council of Ministers in March 2016. The bill was subsequently submitted to the Ethiopian Parliament where it was discussed for unusually long duration.[4] The second version of the bill was, by and large, similar in content –in terms of both substantive and procedural provisions– with the initial version save some new provisions and minor structural as well as linguistic changes.

The Legal and Governance Affairs Standing Committee of the Parliament held a public consultation with stakeholders including relevant government agencies, academic institutions and members of the general public. The Ethiopian Parliament finally adopted the law in early June 2016 and has since been published in the official law gazette.[5] Despite reform suggestions put forward on the initial drafts, some provisions identified to be worrisome particularly those that encroach on constitutionally guaranteed rights are regrettably maintained.

It has, as a result, attracted widespread attention from various corners after the second version was unveiled. Numerous news reports, commentaries and editorials have been written about the law, most of which highlight its impact on human rights such as privacy and freedom of expression.[6] Global civil society

Computer Law and Security Review 720, 725-729. On a recent cybercrime case adjudged by Ethiopian courts, see Kinfe Micheal Yima and Halefom Hailu Abraha (2015), 'The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce and the New Media', 9 *Mizan Law Review* 108, 110-111.

[3] *See* A Proclamation to Legislate, Prevent and Control Computer Crime (Draft), Version 1.0, 2013 (On file with author).

[4] *See* A Proclamation to Provide for Computer Crime (Draft), Version 2.0, 2016 (On file with author).

[5] *See* Computer Crime Proclamation, *Federal Negarit Gazeta*, Proclamation No. 958/2016.

[6] *See*, for instance, Yonas Abiye, 'Controversial cybercrime draft proclamation tabled for approval', *The Reporter*, (Addis Ababa, 16 April 2016); New computer crime law hinders vibrant online discourse, *Addis Fortune* (Addis Ababa, 24 April 2016); Kinfe Micheal Yilma, 'Troubling aspects of Ethiopia's cybercrime bill' *The Reporter*, (Addis Ababa, 16 April 2016); Alemayehu Gebremariam, 'State terrorism and computer crime in Ethiopia', *Ethiopian Review* (California, 30 May 2016); Solomon Goshu, 'The computer crime law: another inroad on human rights?', *The Reporter* (30 April 2016);; Kinfe Micheal Yilma, 'Ethiopia's new cybercrime legislation: Government heard but only partially', (*The Reporter*, 11 June 2016).

organizations have also released reports regarding the law before and after its enactment highlighting its impact on human rights.[7] This comment is an overview on the new cybercrime legislation and highlights its major limitations as well as practical challenges that lie ahead in the course of putting the law into action.

1. Salient Features of the New Cybercrime Law

The cybercrime law recently enacted by the Ethiopian parliament has emerged with some changes to the initial versions of the law. It has made, for instance, provisions of the law notably detailed unlike the truncated nature of the initial draft, which generally works against requirements of precision in legislative drafting. Precision is a desirable virtue of legal provisions as it mitigates problems in judicial interpretation of the rules. In this sense, the present cybercrime law seems to have sacrificed precision for the sake of ensuring clarity by framing provisions in an excessively detailed manner.

A major shift in the new law concerns the reshuffling of the institutional arrangement in the investigation and prosecution of cybercrimes. Perhaps following change of hands in the drafting exercise from INSA to the Federal Attorney General, the law now puts the latter as the principal implementing body.[8] Unlike a leading enforcement role assumed by INSA and the Federal Police under the initial draft, the Federal Attorney General (that has drafted the second version of the law) has now come to be the principal enforcer of the law. And, INSA's role has largely been relegated to sheer provision of technical support in the course of cybercrime investigation and prosecution by the Federal Attorney General.[9] The only scenario where INSA would have some investigatory power, as shall be seen below, is with regard to sudden searches and digital forensic investigations for preventive purposes.

In terms of substantive criminal rules, the law maintains almost all items of cybercrimes incorporated both in the initial and second versions. One, however, notes some replication of crimes within the law. An example, in this regard, is the crime of 'causing damage to computer data' –or commonly referred to as 'spreading malware'.[10] A crime of almost identical sort is provided in Art 7(1) of the law which is captioned as 'criminal acts related to usage of computer

[7] *See*, for instance, 'Ethiopia: Computer Crime Proclamation – A Legal Analysis' (*Article 19*, July 2016) available at <https://goo.gl/azy3BP>; Kimberly Larcson, 'Ethiopia's new cybercrime law allows for more efficient and systematic prosecution of online speech' (*Electronic Frontier Foundation*, 9 June 2016), available at <https://goo.gl/RJaAfq> (Las accessed on 15 October 2016).

[8] *See Computer Crime Proclamation*, supra n 5, Arts 22-25, 30-31, 38.

[9] Id., Arts 23 and 39.

[10] Id., Art 6.

devices and data'. All the remaining sub-articles of Art 7 deal with what are normally called 'acts committed to facilitate the commission of cybercrimes'.[11] The same problem of unnecessary replication is discernible with respect to the 'crime against liberty and reputation of persons' where the first two sub-articles are essentially redundant.[12]

Redundancies are also present if one looks across other pieces of legislation. A case in point is 'cyber-terrorism' which Ethiopia's controversial Anti-terrorism law already outlaws, but again Article 14 of the Computer Crime Proclamation[13] essentially replicates it under the caption of 'crime against public security'. The provision reads:

> ... Whosoever intentionally disseminates through a computer system any written, video, audio or any other picture that incites violence, chaos or conflict among people shall be punishable with rigorous imprisonment not exceeding three years.

The only difference between this provision and that of the anti-terror legislation is that terrorist acts must be guided by a certain political, religious or ideological cause. But the crime against publicity is still couched in such neutral terms that it might very well embrace cyber-terrorist acts. That is, all acts that incite violence, chaos or conflict with or without some political, religious or ideological cause are potentially punishable under the cybercrime legislation.

The law also creates a new cybercrime scenario of 'aggravated cases' when cybercrimes are committed against 'top secret' military or foreign policy computer data, system or network at a time when the nation is in a state of emergency or threat.[14] In such cases, the punishment could go up to 25 years of rigorous imprisonment. Concerns are likely to arise here regarding the excessive length of the punishment. The provision states:

> Where the crime stipulated under Article 3 to 6 of this Proclamation is committed:
>
> a) against a computer data or a computer system or network which is designated as top secret by the concerned body for military interest or international relation, or
>
> b) while the country is at a state of emergency or threat,
>
> the punishment shall be rigorous imprisonment from 15 to 25 years.

When it comes to procedural and evidentiary matters, the law has incorporated provisions dealing with the preservation and production of computer data by

[11] Id., Art 7(2-4).
[12] Id., Art 13.
[13] Id., Art 14; *Cf*, Anti-terrorism Proclamation, *Federal Negarit Gazeta*, Proclamation No. 652/2009, Art 3(6) cum Art 2(7).
[14] Id., Art 8.

service providers, rules by which computer data or systems could be searched, accessed and seized by investigators, rules on the admissibility of electronic evidence and related authentication procedures.[15] The law also pays due attention to the importance of cooperation with law enforcement bodies of other countries and organizations, and requires the Federal Attorney General to facilitate such international cooperation.[16]

2. Problematic Provisions in the Proclamation

The Computer Crime Proclamation incorporates provisions that present potential threat to the right to privacy and age-old principles of procedural justice. The right to privacy is guaranteed under Article 26 of the Ethiopian Constitution and international treaties such as Art 17 of the International Covenant on Civil and Political Rights to which Ethiopia is a state party.[17] The initial versions of the law had some problematic provisions that potentially trample these constitutionally guaranteed rights. The second version of the draft, for instance, had authorized INSA to conduct digital forensic investigations against computers suspected to be sources or targets of cyber-attacks without judicial warrant where there are reasonable grounds to believe that computer crimes are likely to be committed.[18]

Moreover, it had empowered INSA investigators to conduct warrantless 'sudden searches' against suspected computers for preventive purposes.[19] Following criticisms against these rules, the final version of the law has mandated prior judicial warrant before such far-reaching measures are taken by INSA.[20] INSA, however, still wields the power to conduct warrantless virtual – not physical– digital forensic investigation under its reestablishment proclamation of 2013.[21]

It is to be noted that a recent subordinate legislation that furthers the 2013 reestablishment proclamation has included the requirement of judicial warrant for purposes of conducting forensic investigation by INSA.[22] According to the

[15] Id., Part IV, Arts 29-35.
[16] Id., Art 42.
[17] On sources of Ethiopian privacy law, *see* Kinfe Micheal Yilma (2015), 'Data Privacy Law and Privacy in Ethiopia', 5 *International Data Privacy Law* 177, 179-180.
[18] *See* Art 25, *The Draft Computer Crime Law*, Version 2.0, *supra* note 4.
[19] Ibid.
[20] *See* Computer Crime Proclamation, *supra* note 5, Art. 26.
[21] *See* Information Network Security Agency Re-establishment Proclamation, *Federal Negarit Gazeta*, Proclamation No. 808/2013, Art 6(8).
[22] *See* Council of Ministers Regulation to Provide for Execution of Information Network Security Agency Reestablishment Proclamation, *Federal Negarit Gazeta*, Regulation No. 320/2014, Art. 10(1).

Regulation, "the Agency shall carry out digital forensic digital investigation in cooperation with relevant investigating bodies pursuant with Article 6(8) of the (INSA Reestablishment) Proclamation and by the order of a court." The contradiction between the two laws is rather confusing in view of the fact that regulations are subsidiary pieces of legislation in Ethiopia's hierarchy of laws. This means that the Proclamation prevails at all times in cases of contradiction but the sheer desire to rectify a limitation of the Proclamation by a subordinate legislation leaves one wondering why. In any case, there is the need to attach the requirement of judicial oversight to the Proclamation's provision.

What makes such power of sudden searches and virtual forensic investigation chilling to privacy rights is the absence of any oversight mechanism by courts. The power of sudden search under the law would have been far more intrusive even when compared with other Ethiopian laws that envisage sudden search. The infamous Anti-terrorism proclamation, for instance, allows the Federal Police to conduct 'physical' sudden searches but only upon obtaining the approval of the Commissioner of the Federal Police or his delegate.[23] This form of oversight, although not as independent as judicial oversight, is preferable to random sudden searches without any form of oversight.

Another problematic provision of the Computer Crime Proclamation relates to the newly inserted 'duty to report' obligation on communication service providers, and government organs.[24] It further requires INSA to determine in a Directive the form and procedure by which the reporting will be carried out. Service providers are required to report to INSA and the Police when they come to know of the commission of cybercrimes or circulation of illegal content (such as child pornography) on their computer systems. The concern with such an obligation is that it has the potential to prompt service providers to preemptively monitor communications on their networks under the pain of facing penalties for non-cooperation.

Under such technically onerous statutory obligation –and under the pain of possible penalties, service providers could be prompted to employ algorithmic bots to automatically detect illegality which, as we know, could impact not just the right to privacy but also free expression online.[25] Countries with robust privacy regimes do not impose a general obligation to monitor communications by service providers.[26] It, however, remains unclear what penalties would follow when service providers disregard their 'duty to report'. One might envisage the

[23] *See* Anti-terrorism Proclamation, *supra* note 13, Art. 16.
[24] *See* Computer Crime Proclamation, *supra* note 5, Art. 27.
[25] *See* Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion Expression, Frank La Rue, UN Doc. A/HRC/17/27, 16 May 2017, para. 40.
[26] *See*, for instance, EU E-commerce Directive, *Directive 2000/31/EC*, 2000, Art 15.

possibility of applying penalties prescribed under the Criminal Code since the cybercrime legislation does not forbid this. But how government agencies would be held responsible for failure to report under the above rule is more puzzling. Perhaps, INSA might shed light on these points once it enacts the Directive that will regulate the manner and procedure of reporting.

What further compounds our concern is that the law also permits the use of a single judicial warrant issued with respect to a specific computer system to be used in conducting investigation into another computer system.[27] Art 32(2) of the Proclamation envisages a scenario of accessing computer data stored in computer systems that could be accessed through a computer system for which warrant has been obtained. This provision is borrowed from the Council of Europe (CoE) and AU Cybercrime Conventions but invites legitimate concerns, one being that such a vague and general warrant erodes individual rights of people whose computer systems would be accessed even without their awareness. Allowing extension of virtual or physical search warrant (initially granted to a specific computer system to another system) appears, therefore, to be a legislative overreach.

The cybercrime law also entails rules that negate crucial principles of procedural justice such as 'due process of law'. The law, for instance, allows courts to rule *ex parte* upon request by investigators for a production order against a person thought to be in possession of computer data needed for investigation.[28] Granting a production order even without the presence of the person concerned that could have legitimate reasons to protest an otherwise unreasonable request erodes due process rights. Disclosure of personal computer data in the course of enforcing such order also implicates data privacy rights.

Another important principle of procedural justice apparently abrogated by the law relates to burden of proof in cybercrime proceedings. The law states that where the Prosecutor has proved 'basic facts', the court may on its own motion shift the burden of proof to the accused.[29] This provision violates a long established principle of criminal justice which imposes on the government the burden to prove beyond any reasonable doubt. It also denies the right of the accused to be presumed innocent until proven guilty as the mere decision by the court to shift the burden sends the wrong message that a *prima facie* case has been established by the prosecutor.

What also lurks behind this provision is that given the little cybercrime investigation and prosecution experience in Ethiopia, prosecutors might often resort to such provision in the face of thin evidence against suspected

[27] *See* Computer Crime Proclamation, *supra* note 5, Art 32(2).
[28] Id., Art 31(2).
[29] Id., Art 37(2).

individuals. A prosecutor might plead the court to shift the burden of proof by simply adducing rather inconclusive evidence like appearance of a person's face in an illegal content or other criminal venture with which the suspect has nothing or little to do. This is more likely to occur when computers of innocent individuals are compromised and turned into 'zombies' by hackers remotely, and later used to commit cybercrimes like DDoS (Distributed Denial of Service) attacks. In such technically complex cases, ordinary individuals suspected of committing a cybercrime will, therefore, find it too cumbersome to refute the presumption of evidence once the burden is shifted.

3. The Challenges Ahead

The Computer Crime Proclamation is by and large modern and comprehensive. Compared to the initial draft versions, the law is relatively better particularly in eliminating some human rights-unfriendly rules –and adding some that uphold these rights. An example is that the new law carves a provision –captioned 'principle'– that requires provisions of the law to be implemented without contravening human and democratic rights enshrined in the Ethiopian Constitution and international human rights instruments ratified by Ethiopia.[30] Such a guiding principle, if properly complied with by our cybercrime investigators, would serve as an important safeguard to the rights of individuals suspected of being involved in computer crimes. But some areas of concern on the initial versions of the law, as alluded to above, are regrettably maintained.

The law has missed the opportunity to criminalize, among others, racist and xenophobic content, intellectual property related crimes, revenge, pornography and large-scale cyber-attacks through botnets. The Computer Crime Proclamation would have been the pertinent legal instrument to criminalizing these emerging cybercrimes that are regulated in many international instruments such as the African Union Convention on Cyber Security and Personal Data Protection, European Union (EU) Directive on Attacks against Information Systems and the Council of Europe (CoE) Cybercrime Convention and its additional protocol. Overall, the law as it currently stands has a lot to be rectified. One cannot but hope that the government considers ways to amend the law in due time. The Ethiopian Ministry of Communication and Information Technology has completed a study on the protection of intellectual property rights in the context of ICTs.[31] An upcoming law informed by this study might perhaps address IP related cybercrimes.

[30] Id., Art 21.

[31] *See* Ministry of Communication and Information Technology, *Development of Information and Communication Technology Intellectual Property Right Legal*

Ethiopian authorities will have to tackle two major challenges as they now move to implement the law. *First*, owing to the technical nature of cybercrime prevention, investigation and adjudication, capacity building must be taken as a matter of priority. Cybercrime units in the police forces, investigators and judges must be properly acquainted with the nature, scope and purposes of the law. Courses that introduce students to the new realities presented by the Internet including cybercrimes are not offered in any of Ethiopia's law schools.[32] In the absence of such formal education, the most feasible approach both in the long and short-term is to launch continuous capacity building programs in concert with partners.

International organizations such as the United Nations Office on Drug and Crime (UNODC) could be crucial partners in this regard particularly given UNODC's previous technical assistance to a number of developing countries. Such capacity building programs could also be useful in restructuring bodies involved in the field such as the cybercrime unit at the Federal Police, INSA and the Office of the Federal Attorney General. The government must also allocate sufficient resources towards raising public awareness about the law. This is not only to allow victims of cybercrimes to be vindicated by the law but also to avoid commission of cybercrimes due to lack of awareness. In a country, like Ethiopia, where the Internet is a recent phenomenon, unwary users are likely to engage in acts that might amount to crime under the cybercrime legislation. Recent awareness campaigners by INSA through radio broadcasts could very well be strengthened to introduce the law to the public.[33]

Secondly, the enactment of the law would mean little unless the government takes international cooperation seriously. This is because most cybercrime threats posed to Ethiopia are from abroad, at least at this point in time. A good illustrative example is the potentially criminal behaviour that can be transmitted through social media platforms. Potentially racist and extremist content in the social media can indeed provoke protesters to destroy property, incite ethnic-based violence and displace of a large number of people.[34] Before the United General Assembly, Ethiopia's Prime Minister Hailemariam Dessalegn noted

Framework for Ethiopia: A Situational Analysis Report, November 2015 (On file with author).

[32] For more on this, *see* Kinfe Micheal Yilma and Halefom Hailu Abraha (2015), 'The Internet and Ethiopia's IP law, Internet governance and legal education: An overview', 9 *Mizan Law Review* 154, 169-173.

[33] INSA runs a weekly radio show called 'cybergna' (literal rendition of the Amharic term would mean 'in the language of cyber') to educate the public about various aspects of ICTs. See details at <https://goo.gl/3CaAdS> (Last accessed on 15 October 2016).

[34] *See*, for instance, Samrawit Tassew, 'Destruction, Looting Mare Popular Oromia Protests', (*Addis Fortune,* 11 October 2016), available at <https://goo.gl/vrouUI> (Last accessed on 15 October).

that "social media has certainly empowered populists and other extremists to exploit people's genuine concerns and spread their message of hate and bigotry without any inhibition." [35]

Short of other means to tackle the problem, the Ethiopian government has increasingly been blocking access to social media platforms and had completely shut down mobile data services. Such drastic measures, it goes without saying, result in considerable economic losses. A recent report by the Brookings Institution, for instance, has indicated that Ethiopia has lost about 9 million US dollars due to frequent Internet shut downs.[36] This is also playing out in international relations fora where the UN is slowly moving to regard internet shutdowns as violation of international human rights law, a good case in point being the recent Human Rights Council Resolution.[37] Ethiopia had abstained from this Resolution.[38]

Concluding Remarks

Ethiopia does not have a full-fledged law that governs the regulation of problematic content on the Internet. Content regulation rules are scattered in various pieces of legislation including the cybercrime legislation, and these are hardly fit for purpose. There is, for instance, no known procedural law that governs the manner by which illegal, offensive and harmful content could be blocked, filtered or taken down. Where the government believes that certain content is problematic, it normally instructs the state-owned sole telecom provider –Ethio-telecom– to block access to content or block the website altogether.

The absence of clear legislative guidelines and oversight mechanism might, in some cases mean blocking of an otherwise innocuous website or content. And, there is no mechanism by which producers of the content or website administrators could challenge the measures. Recently, the Ethiopian Ministry of Communication and Information Technology has commissioned a comprehensive study on the development of online content regulatory framework. The Consultant, to which this author has been a lead investigator,

[35] 'Ethiopian leader at UN Assembly decries use of social media to spread messages of hate and bigotry', (*UN News Center*, 21 September 2016), available at < https://goo.gl/408Acs > (Last accessed on 15 October 2016).

[36] *See* Internet shut downs cost $2,4 billion last year, *The Brookings Institution*, 6 October 2016, p. 8 available at < https://goo.gl/dYq89i > (Last accessed on 15 October).

[37] 'The promotion, protection and enjoyment of human rights on the Internet', *Human Rights Council Resolution*, UN Doc. A/HRC/32/L.20, 27 June 2016, Para 10.

[38] *See* Yohannes Anberbir, 'Ethiopia abstains UN online freedom resolution', (*The Reporter*, 23 July 2016), available at < https://goo.gl/eqlIo0> (Last accessed on 15 October).

has presented a comprehensive report to the Ministry for further action.[39] A future law on the regulation of problematic content is expected to provide the manners through which problematic content will be classified and taken down.

But this would still require a robust international cooperation framework. The law, as noted above, rightly mandates the Federal Attorney General to facilitate international cooperation to successfully prevent and prosecute cybercrimes. Efforts of building cooperation could easily start with regional bodies such as the various economic communities in Africa that are increasingly building alliance in dealing with cyber criminality. The Federal Attorney General could also draw useful lessons from the European Commission which has recently joined hands with big tech firms such as Facebook to jointly deal with extremist and hate speech in online platforms through a sort of co-regulatory mechanism.[40]

Some form of working relationships with social media platforms especially those with huge consumer base in Ethiopia such as Facebook could be very crucial in tacking dissemination of potentially criminal content in the Ethiopian cyberspace. Another promising channel of cooperation is acceding to the CoE Cybercrime Convention, which is open for accession by any country. Given that the Convention envisages a robust cooperation regime, Ethiopia could benefit by acceding to the treaty.[41] Ratifying the AU Convention is also worth considering.

While many questioned the desirability of the Prime Minister's recent speech about problematic online content before the UN General Assembly, it might perhaps signal his government's determination to deal with the matter head on in the near future. We hope to see soon the establishment of the requisite institutional bodies envisaged in the law including investigators within INSA, prosecutors in the Office of the Federal Attorney General and a special bench within the Federal High Court. Also important is to set out the channel through which the efforts of these organs of the government could be coordinated and directed towards the same goal. ■

[39] Ministry of Information and Communication Technology, *Development of Online Content Regulatory Legal Framework for Ethiopia: Situational Analysis Report*, June 2016 (On file with author).

[40] *See* European Commission and IT Companies announce Code of Conduct on illegal online hate speech, Press Release, 31 May 2016, available at <https://goo.gl/FV9ARf> (Last accessed on 15 October).

[41] Council of Europe Cybercrime Convention, 23.XI, 2001, Arts 23-35 cum Art 37.