Challenges in Ethiopia's Post-1991 Ethnic Federalism Entwined with Ethnic-based Political Parties

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Abstract

For about two and a half decades (1991-2018) it was propagated that Ethiopia's ethno-linguistic federalism was primarily meant to unify the state and build the nation. However, competing perspectives on whether ethnic-based federalism would preserve unity in diversity in the country as a whole and in regional states in particular have proliferated. This article examines the outcome of post-1995 Ethiopian federalism in ethnic conflict management. It focuses on why Ethiopia has remained deeply divided and prone to ethno-cultural conflicts despite the ethno-linguistic federal political system, which was adopted as a mechanism for building unity in diversity in the context of peaceful coexistence among various ethno-linguistic groups. Although ethnic-federalism alone may not exacerbate ethnic conflicts, ethnic-federalism entwined with the existence of ethnic-based political parties and the rapid proliferation of narrow ethno-nationalist politics constitute major impediments to peaceful co-existence among the country's ethnic groups. Furthermore, the land ownership questions raised by various ethno-linguistic political elites are among the causes of violent ethnic conflicts in contemporary Ethiopia. Mistreatment of ethnic minorities in all regional states is also a source of ethnic conflict. I argue that the current government at the federal and regional levels should work hard to ensure that identity-based politics will incrementally dissolve like salt in water.

Key terms:

Ethnic Federalism · Political Parties · Ethnic Conflict · Ethiopia

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Contents

Abstract

1. Introduction

2. Ethnic and Territorial Federalism: Conceptual Clarifications
   2.1 Salient features of ethnic federalism and the need for moral standards and reason
   2.2 Geographic Federalism

3. The Evolution of Ethnic Federalism in Ethiopia

4. Competing Claims for Ethnic and Territorial Federalism in Ethiopia
   4.1 The arguments against and in favour of Ethiopia's ethnic federalism
   4.2 The need for synthesis in perspectives

5. Federalism and Ethnic Party Politics in Ethiopia: Some Observations

6. Inter-Regional Boundary Disputes and Contentious Land–Ownership Claims
   6.1 Metekel, Raya, and Wolkait
   6.2 The boundary dispute between BGRS and the Oromia regional state

7. Examining the Experience of Ethnic Minority Management at the State Level: A Brief Overview

8. Concluding Remarks

1. Introduction

Ethiopia is Africa's second largest and second most populated country, located in the Horn of Africa. Ethiopia's population is estimated to be about 110 million, and comprises more than 85 ethno-linguistic groups. The post-1991 period has witnessed a new political arrangement in the history of Ethiopia. The Ethiopian federal constitution, which was adopted in December 1994 and put into effect in August 1995, introduced an ethno-linguistic federal political arrangement. The current federal state structure comprises eleven regional states (Tigray, Afar, Amhara, Oromia, Somali, Benishangul Gumuz, SNNP (Southern Nations, Nationalities, and Peoples), Gambella, Sidama, South Western Ethiopia Peoples and Harari) with two city administrations such as Addis Ababa and Dire Dawa.

It is obvious that diversity is one of the most contested issues in domestic and international politics.[1] Questions concerning how diversities should be recognized and accommodated in ethno-linguistically and culturally heterogeneous states are currently among the most important political agenda for democratic and democratizing societies.[2] Currently, accommodation of diversity has been a salient issue in developed and developing states. In this respect, the Tigray People's Liberation Front (TPLF)-dominated Ethiopian People Revolutionary Democratic Front (EPRDF) propagated that the overarching aim of ethno-linguistic federalism, which has been adopted in Ethiopia since 1991, was primarily to unify the state and build the nation.

Unfortunately, however, in its founding manifesto, the TPLF had expressed its objectives of independence from Ethiopia and establishing the greater republic of Tigray. This manifesto can be considered as the foundation for the recognition of the constitutional guarantee for self-administration up to the point of secession. As John Markakis indicated, the EPRDF was established in 1989 under the dominating influence of the TPLF and its ally, the Ethiopian People's Democratic Movement (EPDM).[3]

Indeed, in post-1991 Ethiopia, competing views have been forwarded on whether ethnic-based federalism would maintain unity in diversity in the country as a whole, and in regional states in particular. The major objective of this article is to critically investigate the pathologies and triumphs of federalism in Ethiopia. With this in mind, the article examines the factors behind internecine ethno-cultural conflicts despite having an ethno-linguistic federal political system in place, which was adopted as a mechanism for building unity in diversity and endorsing peaceful coexistence among various ethno-linguistic groups.

This article is organized into six sections. The next section provides a conceptual clarification of ethnic and territorial federalism. Section 3 discusses the evolution of ethnic federalism in Ethiopia**.** The fourth section examines the competing claims for ethnic and territorial federalism in

[1] L. Moreno, and C. Colino in Moreno, L. and Colino, C. eds., (2010), *A global dialogue on federalism, diversity and unity in federal countries. Vol. 7*, McGill –Queen's University.

[2] A. Gutmann (1994), *Multiculturalism: Examining the Politics of Recognition.* 41 William Street: Princeton University. And also *see* Assefa Fiseha (2007), *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study, Revised Edition,* Addis Ababa: Artistic Printing Enterprise.

[3] M. John (2011), *Ethiopia: The Last Two Frontiers*, Oxford, England: James Currey.

contemporary Ethiopia. Section 5 attempts to review federalism and ethnic-based party politics in fomenting ethnic conflicts in contemporary Ethiopia. The sixth section examines inter-regional boundary disputes and contentious land-ownership claims in the country. Section 7 attempts to examine the management of ethnic minorities at a regional state level. The final section provides concluding remarks.

2. Ethnic and Territorial Federalism: Conceptual Clarifications

2.1 Salient features of ethnic federalism and the need for moral standards and reason

The term ethnic federalism is a descriptively accurate term for a federation in which subunits are specifically drawn to coincide with the geographic distribution of ethnic groups.[4] It refers to a federation based on geographically separated ethno-linguistic and religious groups. Ethnic federalism legitimizes the autonomous self-government of ethno-cultural communities, implying that the states are territorially organized along ethnic lines. Ethnic federalism is defined by Hale as "a federal state in which at least one constituent territorial governance unit is intentionally associated with a specific ethnic category".[5] According to Roeder, ethnic federalism is a type of federalism "in which at least some, if not all, of the constituent units of the federation are homelands controlled by their respective ethnic groups".[6] This indicates that ethnicity is a major defining feature of the system. Nevertheless, the definition of ethnic federalism proposed by Roeder and Hale seems to refer to a mixed (ethnic and geographic) form of federal arrangement rather than pure ethnic federalism. They noted that some, if not all, of the federation's constituent units are ethnically controlled homelands.

Ethno-linguistic federalism is a preferred system of government in some countries. The reason for this is to accommodate the interests of various ethnic groups. It is one important tool of conflict management, typically in an ethno-linguistically divided society. However, scholars have claimed that ethnically defined federal arrangements are prone to a variety of pathologies; they harden, rather than alleviate, ethnic identities; they empower extremist

[4] D. Anderson (2012), *Federal Solutions to Ethnic Problems: Accommodating Diversity,* Routledge

[5] H. Hale (2004), 'Divided We Stand: Institutional Sources of Ethno federal State Survival and Collapse', *World Politics*, 56, pp. 165–193.

[6] P. Roeder (2009), 'Ethno federalism and the Mismanagement of Conflicting Nationalisms', *Regional and Federal Studies*, 19(2), pp. 203-219.

ethnic leaders; they foster a zero-sum political dynamic at the center; they elevate a 'primitive' form of identity over more elevated, progressive identities; they generate periodic state crises because they are unable to achieve equilibrium; and, ultimately, they equip ethnic groups with the resources needed to challenge the territorial integrity of the common-state.[7]

Several scholars acknowledge that a federal system based solely on ethnicity fragments a country by creating new problems rather than resolving the majority of the problems. In support of this argument, various scholars on this field have presented evidence in the cases of the defunct federations of the USSR, Yugoslavia, Czechoslovakia, Pakistan, and Malaya-Singapore. On the contrary, by resolving their differences, a few countries (that have adopted ethno-linguistic federalism) have been able to strengthen their national unity. India, Belgium, and Canada can be mentioned as examples.

In this respect, it might be noted that proper administration of the ethnic-based federal system necessitates the utmost care and wisdom of leaders. It is also essential not to overlook the importance of people's well-being. If the majority of governmental action is taken for the right reasons, it can play a significant positive role in resolving ethnic disputes rather than creating new problems. Another vital consideration while implementing an ethnic-based federal system is that leaders and people must have a strong culture of pursuit towards enhanced awareness, rational thinking and higher values of respect for the intrinsic worth of human dignity, equality, fraternity and moral standards. These virtues of reason and morality are needed to the system's proper functioning. They are manifested by informed cognition and positive volition among the people and leaders in the context of shared aspirations.

One of the major questions that arises at this juncture relates to the issue of corruption and good governance that challenged the proper functioning of federalism and national unity during the TPLF-led EPRDF's regime. The problem of ethnically orchestrated rampant governmental corruption and a lack of good governance were widespread. In reality, ethnic conflicts are bolstered primarily by self-interest under the guise of his or her own group while on the contrary leaders must uphold and properly enforce the laws.

[7] *See* for instance, Roeder (2009), Bunce (1999), Bunce and Watts (2005), Aitken (2007), Hale (2004), Snyder (2000), and Horowitz (2002) in Anderson, *supra* note 4.

According to Kant, "an action can have moral worth if and only when it is done as a duty".[8] His argument should be considered in at least every government action. As Grotius observed, humans are endowed with the ability to judge whether something is or will be pleasant or harmful.[9] It is obvious that people in a divided society should not only respect but also value one another's cultures and languages. The idea is that respecting and valuing diversity has been identified as a component of morality. It is important to underscore at this point that strong morality and rationality are not only necessary within the framework of an ethnically structured federal system, but they also demonstrate that morality and rationality are indispensable in ethnically structured political systems. Indeed, morality and reasonableness among the leaders and the people are essential for any country that strives to build a strong democratic system.

It should be noted that strong morality and rationalism among leaders at various levels of government are important to recognize that the federal system based on ethnicity is far more complex and sensitive than other non-ethno-linguistic federal systems. The multifaceted needs and questions raised by various ethno-linguistic groups are at the root of the complications. It is widely visible in contemporary Ethiopia that some groups or individuals assume that their own ethnic group members are not the source of the problems and, as a result, they perceive that the problems are not theirs.

Furthermore, the 'oppressor and oppressed' narrative that is disseminated by several political elites has disrupted the peaceful coexistence of various ethnic groups. Hence, in order to strengthen national unity and strengthen the peaceful coexistence of nations, it is argued that due recognition to past political achievements and restraint from fixations on past political injustices as a political culture among the ethno-linguistic groups is indispensable thereby enabling societies to focus on current positive pursuits and shared aspirations.

2.2 Geographic Federalism

Geographic federalism is a government system that poses a direct and significant challenge to the fundamental idea of defining subunits in a federation based on ethnicity. The geographic model of federalism does not embrace ethnicity as the system's defining principle; nor are boundary lines drawn with the specific intent of denying ethnically homogeneous

[8] S. Philip (2000), *Kant, Duty and Moral Worth*, London, Routledge.

[9] Peter Judson Richards (2008), 'Hugo Grotius, Hosti Humani Generis, and the Natural Law in Time of War,' *Liberty University Law Review*, Vol. 2, pp. 881-908.

constituent units and sub–units. The logical implication is that ethnicity is largely ignored in the design of the federal system. According to Gordon, in the territorial model of federalism, "there is no coincidence between ethnic groups and state [or sub-state] boundaries".[10] The central idea is that ethnicity has no bearing on the definition of the federation's units and sub–units. Geographical locations demarcate the boundaries of constituent units and subunits. Its main goal is to keep the state neutral in terms of different ethno-linguistic groups.

Geographic federalism divides large ethnic concentrations into smaller constituent units and sub-units in an effort to realize the integration of various ethno-linguistic groups.[11] Geographic federalism was primarily designed not to address ethno-linguistic challenges but rather to produce a more efficient form of government. Geographic federalism focuses of convenience and efficiency that may divide up the power of a dominant ethnic group.[12] This model of federalism targets the universal protection of individual rights rather than group rights. Examples of this model include the United States, Australia, Pakistan, and post-1967 Nigeria. The Malaysian federal system is also categorized under territorial federalism.

The structure of Nigeria's federal system evokes a number of controversies. Several scholars argue that the structure of Nigerian federalism is not entirely geographical. According to this argument, Nigeria's federal state structure is geographical as per the constitution, but in practice, it is difficult to consider it as an entirely geographic federal state structure because some of the regions are subordinate to the same ethnic group as in the case of Bayelsa that is dominated by Ijaw, Borno by Kanuri, Edo by Edo, and so on.[13] Furthermore, in support of this argument, Anderson[14] and Ejobowah[15] have indicated that, in practice, there is a high degree of interplay between ethnic groups and state boundaries in the Nigerian federation. However, the Nigerian government claims that the country's federal system is geographical.

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[10] Brendan O'Leary (2004), 'Building Inclusive States,' *Human Development Occasional Papers* (1992-2007) HDOCPA-2004-09, Human Development Report Office (HDRO), United Nations Development Programme (UNDP).

[11] Anderson, *supra* note 4.

[12] Ibid.

[13] Sklar, 2004 in Ibid

[14] Anderson, *supra* note 4.

[15] J. Ejobowah (2001), *Competing Claims to Recognition in the Nigerian Public Sphere: A Liberal Argument about Justice in Plural Societies*, Lanham: Lexington Books.

Investigation of comparative experience of federal state structures in various countries clearly shows that geographical federalism is more successful than ethno-linguistically based federalism. The hallmark of this notion is that the federal systems based on ethno-linguistic identity have disintegrated. As indicated above, the Soviet Union, Yugoslavia, and the Czech Republic are examples in this regard.

Yet, it is incorrect to consider geographical federalism as an ideal state structure for all countries. Empirical evidence reveals that various groups are challenging the structure of geographical federalism, which is being implemented in multicultural countries. Moreover, it is not possible to regard geographical federalism as a completely independent structure. As previously stated, the structure of Nigeria's federal system, for example, is not purely geographical. It is being tested by self-governance issues. Yonatan states:

> The major criticism of this type of internal unit demarcation is that it denies ethnic groups territorial autonomy. By failing to provide a homeland for geographically concentrated ethnic groups, it denies them the territorial space necessary to promote their identity. In addition to this, it also makes cultural groups continuously vulnerable to the majority group's dominant position or, in some cases, to the historically dominant group.[16]

3. The Evolution of Ethnic Federalism in Ethiopia

Scholars have different justifications pertaining to why different states have adopted federalism. Riker argued that the two major reasons why states adopted federalism were expansion and military conditions.[17] Riker explained that the two main issues were always present and necessary for the creation of federalism:

> [First] the politicians who offer the bargain desire to expand their territorial control, usually either to meet an internal military or diplomatic threat or to prepare for military or diplomatic aggression and aggrandizement. But, though they desire to expand, they are not able to do so by conquest, because of either military incapacity or ideological distaste. Second, politicians who accept the bargain, giving up some independence for the sake of the union, are motivated by

[16] Yonatan Tesfaye (2010), *Ethnic Diversity and* Federalism *Constitution Making in South Africa and Ethiopia*, England: Ashgate Publishing Company.

[17] W. Riker (1964), *Federalism: Origin, Operation, and Significance*. Boston; Toronto: Little Brown and Company.

> some external military-diplomatic threat or opportunity. Either they desire protection from an external threat or they desire to participate in the potential aggression of the federation.[18]

Riker's main assumption is that federalism is an outcome of institutional bargaining among politicians.[19] Kenneth Wheare holds a similar view and states that an external threat and economic advantages induce the creation of any federalism. [20] However, the reason why Ethiopia designed and adopted ethno-linguistic federalism was primarily to address the 'national question', a popular motto (since the 1960s) during the struggle against Ethno-linguistic domination. [21]

Although the majority of the political parties in power during the formative stage of the federal state structure (since 1991) advocated for the recognition and preservation of ethnic rights, some political parties were Pan-Ethiopinists during the formative stage. For example, the Ethiopian Democratic Coalition, Ethiopian Democratic Union, and Ethiopian National Democratic Organization were some of the Pan-Ethiopianist political parties during the formative stage of the federal arrangement in Ethiopia. However, their participation was extremely limited.

As Nicole Stremlau notes, there was a lack of participation by those who were not EPRDF supporters or members during the drafting of the FDRE Constitution.[22] Due to the limited participation of Pan–Ethiopianist political parties at the time, the federal system merely focused on ethnic differences. It is discernible that the TPLF-dominated EPRDF opened the door for a federal arrangement with a focus on differences alone. Therefore, it can be argued that this type of administrative political approach has been a major problem in the country and is one of the main reasons for its negative impact on national unity.

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[18] William Riker in Craig Volden (2004), 'Origin, Operation, and Significance: The Federalism of William H. Riker', Publius: *The Journal of Federalism*, 34 (4), pp. 89–108.

[19] M. Filippov (2005), 'Riker and Federalism', Constitutional Political Economy, vol. 16, pp. 93–111. Doi: 10.1007/s10602–005–2230–x.

[20] K. Wheare (1963), *Federal Government,* 4th edition, London: Oxford University Press.

[21] J. Markakis (2003), *'Conflict in pre federal Ethiopia'*, First national conference on federalism, conflict and peace building Addis Ababa: Ministry of Federal Affairs, pp. 11–24.

[22] Nicole Stremlau (2014), Media, Participation and Constitution-Making in Ethiopia. Journal of African Law, 58, pp. 231-249. Doi: 10.1017/S0021855314000138

The other extreme of undermining diversity (that prevailed during most of Ethiopia's history) was problematic. Before the EPRDF came to power, ethno-linguistic diversity was not reflected in government policy. Diversity was seen as a threat or burden to political stability in Ethiopia. As a result, to minimize the threats, successive governments applied policies that aimed at transforming heterogeneous groups into a homogeneous Ethiopian nation.[23] However, with over 85 ethnic groups, nation-state building was a daunting task, in spite of various efforts such as Emperor Haile Selassie's pursuits to bring together these multiethnic, multilingual, and multicultural groups.

As a reaction to this, the post-1991 federal arrangement in Ethiopia recognized Ethiopia's ethnic diversity. Although the FDRE Constitution aims to promote unity in diversity, the reality in contemporary Ethiopia depicts the opposite direction of aggravating ethnic tension and hostilities thereby jeopardizing the constitutional aims and promises. Currently, there is a growing fear concerning national unity and the question of recognition of new ethnic groups in different parts of the country.

The critical question then is how to achieve national integration in Ethiopia and therefore create a sense of shared national (Ethiopian) identity amongst the various groups that make up the Ethiopian state. The ideas of federalism have been suggested and also implemented after the demise of the Derg régime. Many Ethiopians have now come to the conclusion that in order to promote unity at different levels of government, there is the need to forge and recognize the existing diversities at different levels of government. All ethnic groups should be represented equitably in Ethiopia in general and in regional states in particular. Thus, the issue of how best to resolve the question of promoting unity in diversity requires utmost attention.

4. Competing Claims for Ethnic and Territorial Federalism in Ethiopia

4.1 The arguments against and in favour of Ethiopia's ethnic federalism

Elazar defines federalism as the advocacy of multi-tiered government combining elements of 'shared-rule' and 'self-rule'.[24] It is based on the presumed value of achieving both unity and diversity by accommodating,

[23] C. V. Beken (2012), *Unity in Diversity-Federalism as a Mechanism to Accommodate Ethnic Diversity: the case of Ethiopia,* Berlin: Deutsche Nationalbibiliothek.

[24] D. Elazar (1987), *Exploring Federalism*, Tuscaloosa, AL: University of Alabama Press.

preserving and promoting distinct identities within a larger political union.[25] In this context, federalism as a political concept has grown in importance as a means of peacefully reconciling the principles of unity and diversity, which are typically found in multi-national federations. Anderson argued that "federalism seems suited to democracies with large populations or territories with highly diverse populations that are regionally concentrated".[26] Various politicians and political scientists claim that federalism is one of the most effective means to solve the ethnic conflicts in multinational societies.

According to Markakis, "Ethiopian ethnolinguistic federalism was designed to address the nationality question".[27] The ruling party (EPRDF) had publicly stated that ethnic federalism is the only way to address or eliminate the assimilationist or marginalization policies of previous regimes, as well as the unequal distribution of the country's economic and political resources and the denial of nations, nationalities, and peoples' rights to govern themselves through their own leaders and age-old political and legal institutions.

Alem and Tesfaye argue that multicultural federalism is a necessity and a positive innovation for Ethiopia in resolving conflicts by allowing various ethnic communities to control regions of the country where they are the majority while respecting basic minority rights.[28] Both Alem and Tesfaye believe that ethnic-federalism has preserved unity and the territorial integrity in Ethiopia while fully recognizing the principle of ethnic equality.

However, there are arguments against this view. For example, Aalen, Tesfaye, Abbink, Mohammed, Kymlicka, Ottaway, Vestal, Walle and Huntington argue that the introduction of ethnic federalism in Ethiopia is the main cause of ethnic conflicts and tensions.[29] They consider ethnic

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[25] Ibid.

[26] G. Anderson (2008), *Federalism: An Introduction*, Oxford: University Press.

[27] Markakis, *supra* note 21.

[28] Alem Habtu (2010), *Ethiopian Federalism: Principle, Process and Practice*, ed. Prepared for the 5th International Conference on Federalism. Addis Ababa: Addis Ababa University Press. *See* also Tesfaye Habisso (2010), 'Multiethnic (Multinational) Federalism in Plural Societies: Does It Make a Difference?' Retrieved from:
http://www.aigaforum.com/articles/Multiethnic_federalism.pdf
Accessed on 03/18/2020.

[29] E. Keller (1998), 'Regime change and ethno-regionalism in Ethiopia: The case of Oromo' in Asafa Jalata (ed.), *Oromo nationalism and the Ethiopian discourse: The*

federalism as a recipe for the violent eruption of endless inter-communal conflicts that bears the risk of eventually leading to the disintegration or dissolution of the Ethiopian state.

In the current context, the discourse relates to which model of federalism is appropriate in Ethiopia. There are various arguments that suggest a geographical model of federalism in Ethiopia. They argue that the model of ethnically-based federalism is the source of the problem, rather than the solution. Keller, Aalen, Tesfaye, Abbink, Mohammed, Kymlicka, Ottaway, Vestal, Walle and Huntington argue that the introduction of ethnic federalism in Ethiopia is one of the main causes of ethnic conflicts or tensions.[30]

At regional level, one can clearly observe different positions. For example, various officials in the Amhara regional state, as well as some political parties, have called for constitutional reform, including a complete overhaul of the FDRE Constitution and a reorganization of the existing federal state structure. In this regard, the Amhara National Movement (ANM) on its official Facebook page forwarded a clear message that the

search for freedom and democracy, Lawrenceville New Jersey: The Red Sea Press, pp. 109–124.

Aalen (2002), *Ethnic-federalism in a Dominant Party State: The Ethiopian Experience 1991–2000*, Bergen: Chr. Michelsen Institute.

Tesfaye Habiso, *supra* note 28.

Abbink (1997), 'Ethnicity and Constitutionalism in Contemporary Ethiopia', *Journal of African Law*, 41:2, pp. 159–174.

Mohammed Hassen (1999), 'Ethiopia: Missed opportunities for peaceful democratic process' in Kidane Mengisteab and Daddieh, Cyril ed., State building and democratisation in Africa. Westport: Praeger.

Kymlicka in D. Turton (2006) ed., *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, James Currey Ltd. Oxford.

Ottaway (1994), *Democratization and ethnic nationalism: African and Eastern European* Experience, Washington DC: Overseas Development Council.

Ottaway (1995), 'The Ethiopian transition: democratization or new authoritarianism', *Northeast African Studies* 2, pp. 64–84.

Vestal (1999), *Ethiopia*: *a post–cold war African state,* Westport: Praeger.

Walle (1997), 'Ethiopia: the pitfalls of ethnic federalism' in Agbango, G. (ed.) Issues and trends in contemporary African politics, New York: Peter Lang.

Huntington (1993b), 'Political Development in Ethiopia: A Peasant–based Dominant–Party Democracy', Report to USAID/Ethiopia on consultation with the Constitutional Commission, March 28 to April 1, 1993, pp., 14–16.

[30] *See* the sources in note 29 above.

FDRE Constitution must be revised or amended.[31] ANM' slogan that reads 'it is not my constitution'[32] illustrates this view.

Mr. Yessuf Ibrahim, vice-chairman of ANM, stated that "We do not consider an ethnically constituted political organization to be an organization that has a philosophical foundation. We do not believe that ethnic and religious-based politics should be the ultimate goal for Ethiopia".[33] Yessuf's statement makes it apparent that, while the ANM is an ethnic-based party, ethnic and religious parties have been and continue to be a threat to national unity in the country.

Yessuf therefore called for a constitutional amendment to address this problem in a sustainable manner. Yessuf explicitly articulated that one of the main reasons for the establishment of the ANM was the continued action undertaken during the TPLF-led EPRDF regime against the Amhara ethnic groups in various parts of the country. He also underlined that although ANM was compelled to form a party based on ethnicity due to the problems that preceded its formation, ethnic-based parties are not long-lasting solutions to foster national unity.

Apart from identity-based political parties, most of the competing political parties in Ethiopia, such as the Ethiopian Citizens for Social Justice, the All Ethiopian Unity Organization, the Balderas for True Democracy, the Ethiopian Democratic Union, and the Ethiopian National Unity Party, etc., recognize that while the federalism system is important to Ethiopia, it needs to be improved because the current Ethiopian federalism is solely structured by ethno-linguistic criteria.[34] On the other hand, the TPLF in the Tigray regional state insists that amendment and revision of the FDRE Constitution and re-arrangement of the existing federal state structure is unnecessary.[35] Supporters of this view consider any attempt to amend or revise the current FDRE Constitution and promote national unity as a unitary (ahadawi) and anti-federalist.[36]

[31] Accessed on the Amhara National Movement official Facebook page on April 29, 2020.
[32] Ibid.
[33] Vice–chairman of ANM Ibrahim, Y. (2021, April 14). Walta TV free ideas discussion and debate program. (S. Bayedeferese, Interviewer).
[34] For further information, you can refer to each party's manifesto.
[35] *For example*, Dimtsi Weyane Television, 6 September (2019),
[36] *For example*, Dimtsi Weyane Television, 9 July (2020), TPLF statement.

Contrary to the verbal expressions of loyalty to the Constitution however, the 2020 regional election held in the Tigray regional state was conducted in an apparent violation of the FDRE Constitution. Article 102(1) of the FDRE Constitution states that "a National Election Board independent of any influence should be constituted to conduct, in an impartial manner, free and fair elections in federal and state constituencies." Such acts of violating the Constitution, and the claim of upholding the Constitution as its 'custodian' are clearly contradictory.

4.2 The need for synthesis in perspectives

Various scholars agree that federalism is a dynamic system that can be modified based on the existing circumstances of the particular state. In fact, the majority of the countries that have adopted the federal system have a mixed model of federalism. In the mixed model of federalism, some regions are organized geographically, while others are organized by language and ethnicity with due attention to their geographic adjacency and administrative efficiency. This type of federal system configuration is called a *mixed model* federal system. It combines geographic and ethno-linguistic elements.

Art 46(2) of the FDRE Constitution stipulates that "States shall be delimited on the basis of settlement patterns, language, identity, and consent of the concerned people." This provision embodies ethno-linguistic and geographical elements. For example, settlement patterns, as one of the criteria for delineating constituent units shows some parameters for demarcating constituent units based on geographic location.

However, the practical arrangement on the ground shows that the structure of the Ethiopian federal system is purely ethno-linguistic. Apparently, the nine regions were established solely on the basis of ethnicity, including the newly established additional regional states. Although the names of some regional state names are not associated with a specific ethnic group, all regional states in the country are structured based on ethnicity.

In the Ethiopian context, it is recognizable that ethnic federalism is one of the key causes of ethnic conflicts. As the current Ethiopian federal system has been structured solely on the basis of ethnicity, the realities clearly show that it creates ethnic conflicts rather than resolving conflicts in different parts of the country in general and in regional states in particular. At this point, it may be argued that creating constituent units solely along ethnic lines has exacerbated ethnic conflicts in the country.

This clearly proves the structural problem in the Ethiopian federal system which has the potential to exacerbate further ethnic tensions. This calls for the inclusion of geographic elements in the existing structure of Ethiopia's

federal system. I argue that the combination of ethnicity and geography can help to reduce some of the ethnic conflicts. Indeed, many scholars argue that federalism is not a universal solution to every human-made problem, and it certainly cannot be a problem in and of itself for every problem.

The assumption promoted by various groups and individuals as if the federal system enshrined in the FDRE Constitution cannot be reformed is incompatible with the nature of federalism. In fact, the cornerstone of this state of mind is that some groups consider themselves as the sole defenders of the country's federal system. It is vital to note that this notion is incorrect because federalism is a government structure that may be reformed depending on the circumstances. The other extreme of considering Ethiopia's federal system as completely flawed thereby suggesting the entire abrogation of the FDRE Constitution is also problematic.

Both extreme perspectives are currently contributing towards the exacerbation rather than a solution to Ethiopia's problems. In spite of its limitations, the post-1991 Ethiopian federal political system has –to some extent– brought ethno-cultural justice to historically marginalized minority ethnic groups in the country, particularly in the areas of language, culture, and local self-government. Hence, I argue that rather than completely dismantling the existing federal system's structure, it is essential to consider a synthesis that can reconcile the two perspectives.

Under Ethiopia's current realities, it would be naive to expect that entirely dismantling and restructuring the existing federal structure would permanently fix problems. To this effect, without completely dismantling the present federal system, it is vital to identify and fill gaps in the existing federal system. As Michael Stein noted, "federal governments and federal constitutions do not grow simply by accident." [37] And, his argument clearly demonstrates that federalism is a government system that can be modified based on the prevailing circumstances.

5. Federalism and Ethnic Party Politics in Ethiopia: Some Observations

Numerous scholars have proposed various definitions of the concept of a political party. For example, Appadorai defines a political party as a more or less organized group of citizens who act as a political unit, with distinct aims

[37] Michael B. Stein (1968), 'Federal Political Systems and Federal Societies', World Politics, 20, pp. 721-747 Doi:10.2307/2009691

and opinions on a state's political issues, and who seek to control the government as a political unit.[38] According to Adeyemi, political parties are associations formally organized with the explicit and declared purpose of acquiring or maintaining legal control over the personnel and policies of the government of a sovereign state, either individually or in coalition or in electoral competition with other similar associations.[39]

Sartori indicates that parties are the central, intermediate, and intermediary structures between society and government, and as such, they must strive to serve the 'public interest' or the common good and 'organize the chaotic public will.'[40] Similarly, Neumann stated that a political party is "the great intermediary that links social forces and ideologies to official governmental institutions and relates them to political action within the larger political community".[41]

Political parties, according to Burgess, are vehicles and instruments of organized, vested interests that express specific values, beliefs, and aspirations. They are partisans with particular cleavage patterns and vested interests.[42] Under such settings, the role of regional parties in expressing territorial diversities is part and parcel of an asymmetrical party system.[43] However, this does not imply that regional political parties always disregard the country's common values and interests. They could, of course, become vehicles of diversity and unity at the same time.

In light of the scholarly explanations provided above, a political party is a group whose members act in concert in the competitive struggle for political power with the primary goal of promoting the common public good. This power should ultimately be used to further the interests of the party's members as well as the public good. Thus, as one institutional entity, political parties promote, preserve, and protect existing diversity while also

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[38] Arjun Apparodai (1968), *The Substance of Politics*, OUP, London.

[39] Adeyemi in Ubani, C. (2014), 'Political Parties and National Integration: An Assessment of the Nigerian State since Independence', *Covenant University Journal of Politics and International Affairs*, Vol. 2, pp. 31-44.

[40] Giovanni Sartori (1994), *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, New York: New York University Press, Pp. xi, 219.

[41] Neumann in Horowitz, D. (1985), *Ethnic Groups in Conflict,* California: University of California Press.

[42] Michael Burgess (2006), *Comparative Federalism: Theory and Practice,* Abingdon, Oxon: Routledge.

[43] Rudolf Hrbek (Ed.) 2004, *Regional Parties and Party Systems in Federal States* (Baden-Baden: Nomos Verlag).

promoting a sense of unity, particularly in federations that were founded to accommodate or manage diversity.

It means that ideologies and policies that promote a sense of unity in diversity should be viewed audaciously, both ideally and practically, by each political party, based on their own country's specific context. Political parties are considered as one of the crucial actors in multiethnic federations, promoting unity in diversity. Moreover, in any democratic political system, opposition political parties should serve as unpaid researchers in their country's political environment in order to enhance the essence of democracy and peaceful coexistence between various cleavages.

In this respect, Duchacek states that democracy and federalism are inextricably linked; federalism is the territorial dimension of democracy; and genuine competition between parties is a prerequisite for federalism.[44] The structure of party systems and the role played by political parties are important determinants of functioning of federal systems.[45] Watts noted that political parties and the party structure affect the degree of decentralization within federations.[46] It is obvious that political parties in democratic states must serve as a guide to achieving national and subnational unity. Political parties are expected to be institutions capable of promoting regional and national unity in multiethnic states.

In the Ethiopian context, however, politicians have ignored this function although political parties are supposed to serve as a bridge between competing ethnic nationalities. This is predominantly attributable to *will* and *political culture* rather than lack of awareness. Actually, the parties and their officials are well aware that unity is supposed to serve as a channel through which the bitter and secret conspiracy thriving within the political scene can be reduced to a negligible level, if not completely eradicated from the country's political life.

It is evident that there is disagreement among scholars on the benefits and drawbacks of ethnic-based political parties. They have different perspectives on the advantages and disadvantages of ethnic-based political parties in divided societies. Several scholars, such as Reilly, Gunther and Diamond, Koeble, Becher and Basedau, Horowitz, Rabushka and Shepsle, Ishiyama,

[44] Ivo D. Duchacek (1970), *Comparative Federalism: The Territorial Dimension of Politics,* New York: Holt, Rinehart, & Winston.
[45] Riker, *supra* note 17, p. 129.
[46] Ronald Watts (2008), *Comparing Federal Systems*, 3rd edition, Montreal; Kingston; London; Ithaca: McGill-Queen's University Press.

and Hicken, have a negative view on ethnic-based political parties.[47] Their core argument is that ethnic based-political parties can aggravate ethnic strife and threaten the stability of fledgling democracies. In support of this perspective, Ugandan President Yoweri Museveni has stated the following caveat based on his experience and observations:

> I have been observing and participating in politics for the past 60 years. We have some observations. One of the problems in Uganda has been identity politics, which has caused a lot of problems. We addressed the issue, and moved from the politics of identity to the politics of interest.[48]

The important thing to understand from President Yoweri Museveni's speech is that ethnic-based politics contributes to the escalation of ethnic tensions by dividing party politics along ethno-cultural lines, which frequently leads to the outbreak of violent ethnic conflicts. Furthermore, ethnic-based parties can significantly raise the stakes of the political game by supporting identity-based politics, reinforcing group identities, and increasing the likelihood of ethnic conflicts. As John Ishiyama

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[47] Benjamin Reilly (2003), "Political Engineering of Parties and Party Systems." Paper presented at the Annual Meeting of the American Political Science Association, Philadelphia, PA.

Richard Gunther and Larry Diamond, (2003), "Types and Functions of Parties," in Larry Diamond and Richard Gunther (eds.), *Political Parties and Democracy*, Baltimore and London: Johns Hopkins University Press, pp. 23–4.

Thomas Koelble (1995), "Towards a Theory of Nationalism: Culture, Structure and Choice Analyses Revisited," *Nationalism and Ethnic Politics*, Vol. 1, No. 1, pp. 73-89.

Anika Becher and Matthias Basedau, (2008), "Promoting Peace and Democracy through Party Regulation? Ethnic Party Bans in Africa," GIGA working papers 66, Hamburg: German Institute of Global and Area Studies/Leibniz-Institut fur Globale und Regionale Studien.

Donald Horowitz (1985), *Ethnic Groups in Conflict* (Berkeley: University of California Press;

Alvin Rabushka and Kenneth Shepsle (1972), *Politics in Plural Societies: A Theory of Democratic Instability Columbus*, OH: Merrill.

John Ishiyama (2009), 'Do Ethnic Parties Promote Minority Ethnic Conflict?', *Nationalism and Ethnic Politics*, 15:1, 56-83, DOI: 10.1080/13537110802672388.

Allen Hicken (2008), 'Political engineering and party regulation in Southeast Asia' Benjamin Reilly and Per Nordlund (eds.), *Political Parties in Conflict Prone Societies: Regulation, Engineering and Democratic Development*, Tokyo: United Nations University Press, 2008: 69-94.

[48] Uganda's President Yoweri Museveni speech at Prime Minister Abiy Ahmed's swearing-in ceremony, October 04, 2021, Addis Ababa, Ethiopia.

demonstrated, in divided societies, ethnic parties may encourage ethnic minorities to resort to undemocratic or even violent means.[49] In this respect, the ongoing violent conflict between the federal government and the TPLF substantiates President Yoweri Museveni's experience and Ishiyama's arguments.

On the other hand, Arend Lijphart, Frank S. Cohen, Sherrill Stroschein, Lilia Petkova, and Daniel N. Posner contend that ethnic parties can play a constructive role in promoting intergroup accommodation.[50] They contend that the ethnification of politics does not necessarily translate into ethnic violence. They argue that ethnic parties do not produce ethnic conflict, but rather emerge as a result of it –that is, they reflect differences that already exist.

Indeed, it is an inevitable reality that in multi-ethnic federations, diversity must be recognized as a foundation for promoting unity in diversity. As a result, each of the regional political parties should do so in order to reflect their own differences, as this is important for promoting regional unity. Regional unity entails recognizing all of a nation's constituent parts, attending to their needs, and making sacrifices in the national interest. This means that political parties can achieve unity in diversity by recognizing and promoting the various ethnic nationalities found within their borders.

As stated above, national or regional unity in multiethnic federal states will be achieved only when different ethnic cleavages are recognized and fairly represented within various institutions. With this assumption, the FDRE Constitution aims to promote unity in diversity, but the reality on the ground in the contemporary Ethiopian context is not in tandem with the

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[49] John Ishiyama (2009), 'Do Ethnic Parties Promote Minority Ethnic Conflict?', *Nationalism and Ethnic Politics*, 15:1, 56-83, DOI: 10.1080/13537110802672388. p. 58.

[50] Arend Lijphart (1974), *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, 2nd ed., Berkeley: University of California Press.

Frank S. Cohen (1997), 'Proportional versus Majoritarian Ethnic Conflict Management in Democracies', *Comparative Political Studies*, Vol. 30, No. 5, pp. 607–30, p. 613.

Sherrill Stroschein (2001), 'Measuring Ethnic Party Success in Romania, Slovakia and Ukraine', *Problems of Post-Communism*, Vol. 4, No. 1, pp. 59–69.

Lilia Petkova (2002), 'The Ethnic Turks in Bulgaria: Social Integration and Impact on Bulgarian—Turkish Relations, 1947–2000', *Global Review of Ethnopolitics*, Vol. 1, No. 1, pp. 36–55, 52.

Daniel N. Posner (2004), 'Measuring Ethnic Fractionalization in Africa', *American Journal of Political Science*, Vol. 48, No. 4, pp. 849–63.

activities of various politicians, thereby jeopardizing the constitutionally entrenched spirit of promoting unity in diversity within the country in general and regional states in particular.

One important issue undermining the proper operation of contemporary Ethiopian federalism is the lack of a clear demarcation between the governmental structure and party activity. Various individuals or groups in Ethiopia have a tendency to align a federal system with a political party structure. However, it is incorrect to assume that federalism and political party organization in a democratic system are identical. This is because the federal system is a government structure, not a political party structure. Working as a mix of government and political party gives rise to the perception that whenever political parties are in danger, the federal system is also in jeopardy. This is not mere perception but can also entail adverse consequences. Thus, democratic systems separate the functions of political parties and the tasks of the government.

Another key factor that has shaped Ethiopia's federal system is that political parties in different regional states have been organized based on ethnicity. Ethnic identity plays an important role in the creation and differentiation of parties in post-1991 Ethiopia. For a variety of reasons, only a few Ethiopian parties have sought to distinguish themselves through policy platforms; and ethno-cultural identities have been a major, if not the only, factor in differentiating parties within the country. This contributes to the ethno-regional polarization in the country's political system. In the post-1991 Ethiopian political setting, debates about policy have been essentially non-existent. Election campaigns have been conducted almost entirely on the basis of ethno-cultural appeals for support from electoral constituencies.

Ethnic-based political parties have maintained power at the federal and regional state levels in Ethiopia since the country's adoption of the federal system. This scenario would gradually pave the way for nationalist extremism. In Ethiopia, ethnic-based political parties, rather than the federal system's structure, serve as the base for the rise of elevated ethnic nationalism. Political parties organized by ethnic groups in Ethiopia are clearly the major causes and sources of ethnic conflict. It is crucial to underline that the rise of ethnically based political parties is a greater source of ethnic conflict than the federal system *per se* (even if there is a reciprocal causal relationship between the two).

Indeed there is the need for focus on policies and the competence and integrity of individual candidates rather than fixations on the ethnic identity. In this regard, there is some improvement following the establishment of the Prosperity Party although much has yet to be done. Prosperity Party is now

accommodating various competing parties into the executive branch of government. Yet, it should not be underestimated that the ethnic mindset established over the last 27 years can disrupt upcoming smooth and peaceful democratic political transition.

The political vision in the country as a whole, and in the regional states in particular, is to strengthen unity. Unfortunately, however, elected officials usually sit back and focus solely on how to recoup political power. Political discussions and promises about national and regional unity usually die immediately after each election.[51] Hence, it appears that all of the positive promises and hopes made during elections are only intended to generate votes rather than promote ethnic unity. The key factor behind this challenge is overemphasis on ethnic identity. Therefore, it can be argued that ethnic–based political parties in Ethiopia are not appropriately promoting unity in diversity in various parts of the country.

6. Inter-Regional Boundary Disputes and Contentious Land-Ownership Claims

Boundary disputes have been a common problem in most regional states since the establishment of Ethiopia's current federal system. In this regard, Alene Agegnehu and Worku Dibu note that an artificial demarcation of regional state boundaries primarily based on ethnicity generates violent conflicts among ethnic groups in the country. Zerihun Berhane and Samuel Tefera, likewise noted that the system is enhancing conflicts.[52] Since the

[51] FGDs with various communities, 2020.

[52] Alene Agegnehu and Worku Dibu (2016), 'Does Ethnic-federalism Exacerbating or Reducing Conflicts? The Ethiopian Federal Experiences', *International Journal of Emerging Trends in Science and Technology*, 4838–4845.
Zerihun Berhane and Samuel Tefera. (2018), 'Does Federalism Reduce Ethnic Conflict? Evidence from the Ethiopian Experience', *Ethiopian Journal of the Social Sciences and Humanities*, pp. 105–131.
See also:
Yonatan Tesfaye (2016), *infra* note 80
Demissie F. (2019), *infra* note 80
Berhanu Gutema Balcha (2006), *infra* note 80
Fisseha Y. (2016), *Conceptualizations and Impacts of Multiculturalism in the Ethiopian Education System (PhD dissertation),*
Asnake K. (2013), *infra* note 58
Muhabie M. (2015), 'Ethnic Federalism: A Means for Managing or a Triggering Factor for Ethnic Conflicts in Ethiopia', *Social Sciences, pp.* 94-105.

establishment of the federal system, examples regarding the main sources of boundary and land-based disputes in Ethiopia are highlighted in Sections 6.1 and 6.2 below.

6.1 Metekel, Raya, and Wolkait

One of the major factors of boundary and land-based disputes is agitated by some political elites. These disputes are caused by the demands of communities that seek specific territories and due to the desire of ethnic groups to be incorporated into another regional state. Ethnic groups and areas that were not part of Tigray before 1991 were incorporated into Tigray Regional State while TPLF-dominated EPRDF was in power. In this regard, the ANM announced that areas, such as Metekel, Raya, and Wolkait, were part of administrative units that currently constitute the Amhara regional state.[53] It, in effect, demands that the aforementioned territories should be returned to and administered by the Amhara regional state.[54]

The central essence of this claim is that these specific territories do not belong to Benishangul Gumuz regional state and Tigray regional state historically or based on the pre–1991 administrative structure. For example, in the previous system, the Metekel Zone in the current Benishangul Gumuz region was organized into the Administrative Region of Gojjam in Amharic *Gojjam Kefel Hager*. There are views that the Amhara and other non-indigenous nationalities in the Benishangul Gumuz regional territories are migrant settlers who should not own or lay claim to land or political rights in any part of their communities, a claim that the non-indigenous nationalities disagree with. The resulting tension created by the opposing perceptions of land ownership among members of these groups is at the root of the violent conflicts experienced in the region, especially since 1991.

Although Metekel Zone was previously administered by *Gojjam* Administrative Region, it must be noted that *Gojjam* –in pre-1991 Ethiopia– represented a specific geographic area or location rather than a single ethnic group. The logical conclusion that emerges from this premise renders Metekel the homeland of all Metekel residents. Metekel Zone is thus the homeland of all Ethiopians who live in Metekel, including the Shinasha, Gumuz, Agew, Amhara, Oromo, and others. However, this is not reflected in ANM or other groups who make exclusive claims.

[53] Accessed on the Amhara National Movement official Facebook page on April 29, 2020.
[54] Ibid.

It should be argued at this point that Metekel's fate should be decided solely by its residents. Residents of Metekel have full constitutional right to relocate to the Amhara region or to continue in the Benishangul Gumuz region. If any group desires to join the Amhara region, the demand is constitutional. In this regard, in order to fulfill the request, the concerned authorities must arrange a referendum to determine Metekel's fate once and for all because the FDRE Constitution declares that nations, nationalities, and people have the right to self-government. Short of such perspectives, the claims of ANM and other groups becomes implausible as long as it excludes other indigenous ethnic groups.

These issues do not only relate to ethnic identity, but also involve claims on land. The land ownership questions raised by various political elites are among the major causes of violent ethnic conflicts. This includes the recent violent ethnic conflict between the Gumuz and other ethnic groups residing in the region in general and the Metekel Zone in particular.

Another case, in addition to Metekel of Benishangul Gumuz, is the question of Wolkait-Tsegede and Raya land ownership. According to historical sources, Welkait and Raya were part of Semien Wogera Awraja under the Gondar Administrative Region (*Gondar Kefel Hager*) and Wollo Administrative Region (*Wollo Kefel Hager*), respectively. It is evident that since 1991, the areas of Welkait, Tsegede, Tilimt, Humera, and Raya were delineated as part of the Tigray regional state.

However, currently, various bodies are claiming that Wolkait-Tsegede and Raya are Amhara. For instance, the 'Welkait Amhara identity question committee' that was organized in Amhara regional state demanded that their land and people should be included in the Amhara region, with whom they identify themselves culturally, ethnically, and linguistically. Therefore, the committee argues that the above-mentioned territories (i.e., Wolkait-Tsegede and Raya) should be returned to and be administered by the Amhara regional state.

The essence of this claim is that (based on the pre–1991 administrative structure) these specific territories do not belong to Tigray regional state. The Raya and Wolkait–Tsegede questions raised by various political elites, have become a playground for different political and social groups. This has fueled inter-regional boundary conflict between the Tigray and Amhara regions thereby undermining nation-building pursuits in Ethiopia.

6.2 The boundary dispute between BGRS and the Oromia regional state

Another major tension and competing claims between regional states relate to the constitutions of some regional states that claim boundary or land ownership that is incompatible with the reality on the ground. For example, under Art 2(1) of the first Oromia Regional State Constitution of 1995, there was no statement which indicated that Oromia's western part shares border with the Sudan. However, Art 2(1) of the revised 2001 Oromia Regional State Constitution, expressly stipulates that the region shares a border with Sudan to the west. However, Oromia rather shares a border with the Gambella regional state in the west, but this does not imply that the region has a border with Sudan. This constitutional controversy has contributed to the contention between the two regional states, particularly around their boundary areas.

Another challenge in the relationship between these two regional states in the Ethiopian federal state structure is the boundary dispute between BGRS and the Oromia regional state, which began in the formative years. For instance, during the 1991-1994 transitional government, a boundary dispute erupted between the BG and the Oromia regional state in the Beggi and Tongo areas. As indicated by Asnake by citing Atieb (1973) and Rasheed (1995), BGRS's claim to incorporate Beggi areas into BGRS is based on two fundamental grounds. First, the territory was previously ruled by Sheik Khojele of Assosa. Second, the Mao and Komo ethnic groups, who were assigned to BGRS, were the earlier inhabitants of the area.[55]

In this regard, the transitional government issued an official letter in December 1995, taking into account the unanimous agreement of both BGRS and Oromia regional state boundary demarcation committee representatives, and accordingly demarcating all 88 Kebeles of Beggi Woreda into the BGRS administration.[56] However, a few months later, in order to permanently resolve the boundary dispute between the Oromia regional state and the BGRS, particularly in Beggi Woreda, the transitional government organized a referendum. As a result, the majority of voters in Beggi Woreda decided to leave the BGRS administration and join the Oromia regional state administration. In this context, official evidence

[55] Asnake K., *infra* note 58.

[56] Muluneh Kassa (2021), *The Praxis of Unity in Diversity at Sub–National Governments in Ethiopia: An Empirical Analysis of Benishangul–Gumuz Regional State Practice*, Dodo Books Indian Ocean Ltd., member of OmniScriptum S.R.L Publishing group: Lap LAMBERT Academic Publishing.

indicates that the total number of Kebeles in Beggi Woreda during the referendum was 88.[57]

The referendum indisputably altered the administrative maps of both the BGRS and the Oromia regional state. Asnake notes that the referendum resulted in changes to the administrative map of BGRS, [58] but it has also resulted in changes to the administrative map of Oromia regional state. At this point, Asnake and others should have made a distinction between the BGRS map and their reference to the referendum held in Beggi Woreda in 1995.[59] Their statements that the BGRS no longer shares a border with the Gambella region contradict the facts on the ground.

All 88 Kebeles of Beggi Woreda do not share a boundary with the Gambella regional state, as one might expect. Oromia regional state shares a boundary with the Gambella regional state in other Woredas of the region rather than in Beggi Woreda Kebeles. Second, the BGRS shares boundary with the Etange Special Woreda of Gambella Regional State, specifically in Kusay, Laki, Myti, Shumty, and Shrma Kebeles of Mao Komo Special Woreda.[60] Based on this reality, Article 3 of both the 1996 Gambella regional state Constitution and the 2002 Revised Gambella Regional State Constitution explicitly states that Gambella regional state shares a boundary with BGRS in the north. Third, existing regional administrative maps issued by unknown organizations have not taken into account the reality on the ground in BGRS and other regional states of the country.[61]

Fourth, as stated above, there is no statement in Art 2(1) of the first Oromia Regional State Constitution of 1995 that describes the issues of Oromia's border sharing with Sudan in the region's western part although the revised 2001 Oromia Regional State Constitution explicitly stated that the region shares a border with Sudan to the west.[62]

Therefore, it is clear that the revised 2001 Oromia Regional State Constitution does not take the empirical reality on the ground into account, and as a result, this constitutional controversy has caused tension between both regional states, particularly near the regions' boundaries. An interview

[57] Ibid.
[58] Asnake Kefale (2013), *Federalism and Ethnic Conflict in Ethiopia: A Comparative Study of the Somali and Benishangul–Gumuz Regions,* New York: Routledge.
[59] Ibid.
[60] Muluneh Kassa, *supra* note 56.
[61] Ibid.
[62] Ibid.

with a higher official in the region indicates that the current Mao Komo special Woreda was established on this basis to strengthen the self-administration rights of Mao and Komo and the people in the region. Moreover, the respondent also stated that at the end of the referendum, many of the Mao people who identified themselves as black Oromo voted for Oromia and settled there.[63] In this regard, there are currently over 50,000 Mao ethnic group members in the Oromia region, particularly in Beggi, Anefilo, Konedala, and Gidami Woredas, who have been assimilated by the Oromo and are going to lose their identities.[64]

The source of the boundary dispute between these two regional states is essentially complicated by the territorial size conceived by the OLF, which is larger than the Oromia regional state's current territorial dimension.[65] Prior to the establishment of the current federal state structure, the Kamashi Gumuz, Mao, Komo, and Assosa areas were administratively organized under the Oromo-dominated former Wollega province due to their proximity and strong socioeconomic ties with the Oromos.[66] The continued migration of Oromo rural farmers to the fertile lowlands of BGRS had influenced the referendum result, because demography is important in winning the political game.[67]

According to the 2017 report by the BGRS Security and Administration Bureau, boundary demarcation issues between the BGRS and the Oromia regional state have been undermining the peaceful coexistence of both regional states around some neighborhoods of Kebeles.[68] For example, the demand of the Oromia regional state's Gidam Woreda for Kusaye and other Kebeles of BGRS's Mao Komo Special Woreda has recently affected the stability of the neighboring Kebeles of both regional states.[69] As a result, at the conference held in Dembi Dolo town in November 2017, both regional states agreed to form a joint committee to find a long-lasting solution to this problem.[70]

According to the (2017) report of the joint technical committee, there are three main issues concerning Gidam Woreda of Oromia regional state's

[63] Ibid.
[64] Ibid.
[65] Asnake K., *supra* note 58
[66] Ibid.
[67] Muluneh K., *supra* note 56.
[68] Ibid.
[69] Ibid.
[70] Ibid.

claim to incorporate Kusaye Kebele under the Oromia regional state administration. These issues are: (i) what is the ethnic identity of the Kusaye Kebele people? (ii) Which city, Woreda and the region of Kusaye Kebele, is the closest geographically? (iii) Where is the market center for the people of Kusaye Kebele? The two main counterclaims on the side of the BGRS Mao Komo Special Woreda are: (i) whether the people of Kusaye Kebele benefit under the administration of the Oromia regional state or the BGRS; and (ii) whether there are any current issues affecting the people of Kusaye Kebele under the administration of the BGRS.

Based on the claims indicated above, the Oromia regional state intends to hold a referendum to decide the fate of Kusaye Kebele. The BGRS, on the other hand, claims that during the transitional period, the federal government of Ethiopia has explicitly decided that Kusaye Kebele should be demarcated and administered by the BGRS.[71] In this regard, the argument of BGRS officials was that both regional states have agreed and signed (in Tahsas 1986 E.C/ December 1993) that Kusaye Kebele would be demarcated under BGRS administration during the transitional period of Ethiopia.[72]

Most BGRS higher officials relate the situation with the tacit continuation of the OLF's historical territorial aspiration and, as a result, some Oromia political actors aspire an international border with Sudan in the west.[73] In light of the current recurrent migration of Oromo to Kusaye and other areas of the BGRS, holding a referendum to decide the fate of Kusaye Kebele is considered (by the BGRS) as improper.

Territorial disputes between the BGRS and the Oromia regional state erupted around the Darro-Dimitu and Tolle localities, in addition to the Beggi area.[74] Empirical evidence indicates that the Oromo and the Gumuz coexisted in the Darro-Dimitu and Tolle localities. However, since the adoption of the current federal state structure, both the Oromo and Gumuz ethnic groups of the areas have expressed claims to incorporate these areas into their respective regional states.

For example, the core premise of Gumuz's claim was that they were earlier inhabitants of the areas. On the other hand, Oromo residents argue that the assignment of Darro-Dimtu and its environs to the Oromia region

[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Asnake K., *supra* note 58

was acceptable because the majority of the residents are Oromo.[75] They also state that the contested Kebeles were previously organized under the Oromo-dominated Wollega province.[76]

This shows that the situation has become more complicated as a result of the conflicting interests of the political elites in both regions in resolving the issue. For example, the Oromo political elites anticipate a referendum to solve the problem, whereas the Gumuz political elites seek a political decision by the federal government in light of their prior history rather than a referendum.[77] This is because indigenous people have historically been pushed out of their territories by neighboring ethnic groups.[78]

The earlier lopsided relationship established between the region's indigenous peoples and the ethnic groups of neighboring regional states (as represented by the actions of former political elites) was a major factor in the escalation of such friction and tension around the border areas of both regional states. For example, until the Derg regime, the indigenous ethnic groups of Benishangul Gumuz state were segregated by the neighboring dominant ethnic group's political elites.[79]

This friction and tension was exacerbated further by the widespread and continuous migration of neighboring ethnic groups within the BGRS. The Gumuz people's dispersed settlement pattern stretching from the former Wollega province in the south to the northwestern (Metema and Qwara) parts of the former Gonder province has exacerbated the friction and tension in the inter-regional boundary demarcation. It is to be noted that according to Article 46 of the FDRE Constitution, regional state boundaries are determined primarily on the basis of ethnic identity and ethnic groups' residential territories.

Indeed, as indicated above, numerous scholars contend that the institutionalization of federalism solely on the basis of ethno-linguistic criteria has resulted in the emergence of various boundary disputes among Ethiopia's regional states.[80] At the same time, this has an impact on the

[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] *See* for example, Mebratie (2005) & Pankhurst (1997), in Mesfin Gebremichael (2011), *Federalism and Conflict Management in Ethiopia: Case Study of Benishangul-Gumuz Regional State* (PhD thesis), Bradford: University of Bradford.
[79] Ibid.
[80] *See* for example,

relationships between different ethnic groups that have lived peacefully in ethnically mixed villages and localities for centuries.[81] Furthermore, as Asnake argues, the boundary dispute has become complicated when ethnic entrepreneurs seek to use intra-federal boundaries for the advancement of the 'interests' of their ethnic groups at the expense of their neighbors.[82] In this respect, the BGRS is one of the regions characterized by proxy ethnic political games played by the political actors of neighboring regional states.[83]

7. Examining the Experience of Ethnic Minority Management at the State Level: A Brief Overview

According to historical evidence, ethno-linguistic diversity is viewed as a burden in African countries. However, diversity as a social fact has always existed in the world-at-large, but it becomes a 'problem' mainly when it exists within the territory of a state.[84] There are two main reasons why diversity within the state territory becomes a problem. One, when social, cultural, or racial differences become the basis of group inequality.[85] Two, when different groups perceive one another as inferiors or superiors.[86] Hence, in the current political dynamics, managing diversity has emerged as the foremost overarching and urgent issue in ethnically heterogeneous states.

Yonatan T. (2016), 'The Original Sin of Ethiopian Federalism', *Ethno politics*, vol. 16, pp. 232-245, DOI: 10.1080/17449057.2016.1254410.

Zerihun B. and Samuel T. (2018), 'Does Federalism Reduce Ethnic Conflict? Evidence from the Ethiopian Experience', *Ethiopian Journal of the Social Sciences and Humanities*, pp. 105–131.

Demissie F. (2019), *Ethnic Decentralization and Negotiating Statehood in Urban Ethiopia: A Case Study of Adama and Hawassa Cities* (PhD dissertation),

Berhanu Gutema Balcha (2006), *Restructuring State and Society: Ethnic Federalism in Ethiopia*(PhD thesis)*,* Aalborg, Denmark: Aalborg University.

Fisseha Y. (2016), *Conceptualizations and Impacts of Multiculturalism in the Ethiopian Education System* (PhD dissertation)

[81] Asnake K., *supra* note 58

[82] Ibid.

[83] Muluneh K., *supra* note 56.

[84] A. Majeed, J. Isawa *et al* (2008), 'Building on and Accommodating Diversities', Ronald L. Watts and Rupak Chattopadhyay (eds.), *Unity in Diversity Learning from Each Other* (Volume 1) *Building on and Accommodating Diversities,* pp. 3-20, New Delhi: Forum of Federations.

[85] Ibid.

[86] Ibid.

There are different methods that can be used to manage ethnic diversity in ethnically heterogeneous states. For instance, the containment approach, the assimilationist strategy, power sharing, providing autonomy, representation, and recognition. In fact, both containment and assimilationist approaches are pernicious and awkward strategies to manage diversity, particularly in plural states.

In Ethiopia, ethnic-federalism as an institutional arrangement has been adopted primarily to address the challenges of ethnic diversity. The regional states are also responsible for recognizing and promoting the existing diversity based on their own local context. When seeking better constitutional accommodation within a multinational state, the aspirations of sub-state national societies touch upon both legal and political elements.[87] One example of the former is the amendment (or the re-interpretation) of the formal constitution, whereas the political elements can be identified in the refinement of constitutional conventions, practices, and principles, or in the political culture and value system informing the given constitution.[88]

There are various mechanisms that can be used to manage ethnic diversity. The major areas to which sub-state national societies aspire regarding minority management are providing regional autonomy or constitutional devolution of power, constitutional recognition of diversity, power sharing and consociationalism, and representation and participation in various political institutions.[89] It is obvious that in Ethiopia there is a problem of ethnic minority management at the regional level. In all regions, the extent of ethnic diversity varies from region to region. The problem of the treatment of regional ethnic minorities is evident in all regions. Of course, the degree of the problem may vary from region to region, but the problem is visible in most regional states.

Currently, each regional state in Ethiopia has its own separate constitution. However, almost all regional state constitutions have limitations on recognizing non-owner nationalities within each region. The constitutions of regional states are restrictive in terms of dealing with ethno-linguistic diversity. For example, this can be observed from the names of the

[87] S. Tierney (2004), *Constitutional Law and National Pluralism,* Oxford & New York: Oxford University Press.

[88] Ibid.

[89] Fathe M. and Muluneh K. (2021), 'Protection of indigenous minority voting rights in the Ethiopian electoral system: The case of Harari National Assembly', *Journal of Social and Administrative Sciences*, Vol. 8, pp. 91-110.
Doi: http://dx.doi.org/10.1453/jsas.v8i3.2236.

regions. In fact, the existing constitutions of the regions were developed by the federal government. Even though the federal constitution expressly grants regional states the right to draft state constitutions, the current state constitutions were drafted and adopted with the active participation of the federal government at the time.

In some regional states, the regional state constitution expressly divides Ethiopian citizens into indigenous and non-indigenous groups. In all regional states, the constitutions explicitly recognize some ethnic groups as the owners of the region by excluding other minority ethnic groups. This generally indicates that diversity management in contemporary Ethiopia is a serious problem in the regions. Some examples can be highlighted with regard to the treatment of ethnic minorities in some of the regions, such as Amhara, Oromia, Benishangul, Southern Nation, Nationalities and People, and Tigray Regional States.

The Amhara national regional state has attempted to recognize different people residing in the region better than other regions. In its preamble and Articles 8, 45 (2, 3) and 70(1), the Amhara National Regional State Constitution attempts to recognize the existence of minority ethnic groups in the region and it recognizes that all residents of the region are equal. Moreover, Article 39 gives constitutional recognition to the region's Oromo and Agew people. For instance, Article 39(6) of the Amhara Regional State Constitution declares that "the national rights stipulated under sub-article 1-5 of this Article hereof shall apply with respect to the peoples of Himra, Awi, and Oromo as well." To this effect, the two nationalities (i.e., Agew and Oromo) have been set up to establish their own nationality administrative zones.

Amhara National Regional State Constitution thus upholds the right to self-government of some ethnic minorities in the region. Beken noted that the Amhara regional state constitution in addition to the Amhara, explicitly refers to the Agew Himra, Awi, and Oromo ethnic groups.[90] Aside from the Agew and Oromo minority nationalities, the Amhara regional state has also passed legislation to establish Argoba Special Woreda in the region. In

[90] V. B. Christophe (2015), 'Federalism, Local Government and Minority Protection in Ethiopia: Opportunities and Challenges', *Journal of African Law*, 59, pp. 150-177. Doi: 10.1017/S0021855314000205

accordance with the law, the Argoba nationality Woreda was established for the Argoba minority in the Amhara region.[91]

However, apart from the above-mentioned minority nationalities, there are other ethnic minorities that have lived in the region for a long period of time. For example, the nationalities of Kemant, Gumuz, and Shinasha, among others, have lived in the region for many years. Nonetheless, the Amhara Regional State Constitution or other legislation does not recognize these ethnic minorities. It can also be stated that much effort was made in the region, for example, to replace the Kemant identity with Amhara. For instance, empirical information gathered by this author from some Kemant individuals indicates that the Kemant language is nearly extinct at the moment.

The total population of Kemant people was estimated to be 172,000 in the 1994 population and housing census. However the Kemant people were removed from the census document in the 2007 population and housing census. The Gumuz community also inhabits various Kebeles such as Afetete, Shunifa, Tummat, Metrhat, Seferdb, Banbo, Dibaba, Bermil, and Mehadid on the side of the west region up to Metemma Woreda in the North Gonder Zone, Quara Woreda.[92] The regional state constitution, however, does not recognize the local Gumuz community. Furthermore, the Shinasha community is very prevalent in Gojjam areas, particularly in Shindi district or Woreda. The Shinasha, like the Kemant, have lost their identity, which has been replaced by the identities of the Amhara and Agew. Yet, there is a positive recent development towards the recognition of the Kemant people's right to self-government and identity.

In view of the foregoing, it can be concluded that there are gaps in the handling of the rights of ethnic minorities within the Amhara National Regional State. It is worth noting that this situation is having a negative impact on the federal system. The FDRE Constitution recognizes equality for all nationalities, and requires political representation for all nations, even at various political institutions. It requires the representation at different levels of government, but it can be stated that this constitutional provision is not adequately implemented in the Amhara region.

With regard to the Oromia Regional State Constitution, it does not hesitate to provide acknowledgment to ethnic minorities. However, the preamble, only makes reference to the Oromo people. For example, the

[91] Refer to Argoba Nationality Woreda Establishment Proc No 130/2006 of Amhara Regional State.

[92] The author's field observation, 2019.

preamble reads “we, the people of the Oromo nation.” However, it is clear that there have been other minority ethnic groups living in the Oromia region for many years. For example, Amhara and Shinasha have settled in the region for many years. Moreover, here is no systematic arrangement for equitable representation and participation at different levels of government in the region. In fact, it is a prerequisite and mandatory to speak and write the Oromiffa language to participate in various government structures, exercise the right to vote, and be elected under the regional state constitution.

Although some scholars try to refer to this constitutional provision as an inclusive system in the region, it can be argued that this provision is not inclusive; rather, it is an exclusive constitutional provision towards minority ethnic groups. As language is an expression of identity, it can be said that the constitution excludes the existence and participation of minority ethnic groups in regional politics. It can also be said that, like the Amhara region and other regions, the region’s nomenclature is exclusive, which is based on the Oromo people. In general, it can be said that the lack of fair treatment of ethnic minorities in the region has a negative impact on the federal system. This is because it is well known that the objective of the federal system of Ethiopia is to treat the nation, nationalities, and people properly. It can be argued that this constitutional provision is not being properly implemented in the Oromia region.

With regard to the Southern Nation, Nationalities and People’s Regional State (SNNAPRS), it there are more than 55 regional owner nationalities in the region. The territorial ownership of the right to self-government within the region is limited to the owner nationalities of the region. It is known that the Amhara, Oromo, Tigray, Afar, Gambella, etc., have not been granted the right to self-government in the region. In fact, it is possible to mention that there are other minority ethnic groups other than the 55 owner nationalities residing in the SNNPRS, like the rest of other regions. For instance, hundreds of thousands of Amhara and Oromo live in the SNNPRS. However, it can be said that there is no system in place in the region for these other minority ethnic groups to govern themselves. Yet, Amharic is the region's working language in the SNNPRS. This has advantages for the region's minority ethnic groups. This is because minority ethnic groups are active in the region, making it easier for them to obtain government and other job opportunities.

Like other regional states, Tigray National Regional State is also a region where ethnic groups have been living for a long period of time. For example, in addition to the Tigray ethnic group, it is a region inhabited by the Kunama

and Irob. It is worth noting that the Tigray Regional State Constitution recognizes minority ethnic groups. For example, the preamble and Articles 33, 39, and 45 of the Tigray National Regional State Constitution state that the rights of minorities within the region are respected and recognized. Moreover, the Kunama and Irob ethnic groups have been recognized at various levels of government structure to govern themselves.

With respect to the Benishangul Gumuz Regional State, the region is multi-ethnic. According to the Benishangul Gumuz Regional State Constitution, the Bertha, Gumuz, Shinasha, Mao, and Komo nationalities are owner nationalities of the region. In addition to the five owner-nationalities of the region, it is clear that other minority ethnic groups have lived in the region for years. For example, the Agew, Oromo and Amhara ethnic groups have lived in the region for a long period.

Ownership of the region is recognized in all regional states in Ethiopia. Other than its express articulation, Benishangul Gumuz Regional State is not thus unique to other regions in the country. According to empirical data gathered from various interviewees, the peaceful-coexistence of owner nationalities in BGRS and other minority ethnic groups has been harmed by this constitutional dichotomization. In contrast to this constitutional provision, it can be pointed out that the other minority ethnic groups at the Kebele and Woreda level have considerable political representation in different governmental bodies.[93] This has positive effects. Because Amharic is the official language of the region it has its own positive implications for the protection of the rights of other minority ethnic group. As Amharic is also the official language of the federal government, this situation allows every citizen of the country to move to work in the region. However, at various levels of government, other nationalities have not been adequately represented, especially at the executive body of the regional state.

8. Concluding Remarks

The preceding sections have critically examined the pathologies and triumphs of federalism in Ethiopia. In a multi-national federation, the federal government is not the only level of government where group interests can be accommodated. Sub-national governments should thus manage existing diversity in accordance with their respective contexts. Ethnic conflict in contemporary Ethiopia also relates to the problems in the treatment of ethnic minorities that can be observed in all regional states.

[93] Muluneh K. (2021), *supra* note 56.

This author argues that although ethnic federalism alone does not exacerbate ethnic conflicts in Ethiopia, ethnic-federalism, together with the existence of ethnic-based political parties and the hasty proliferation of narrow ethno-nationalist politics, has constituted a major impediment to peaceful coexistence among various ethnic groups in Ethiopia. In the context of ethnic federalism, organizing political parties primarily through the lens of ethnicity would gradually increase ethnic fundamentalism, chauvinism, and parochialism among politicians and individuals. It eventually allows politicians and individuals to engage in lopsided proxy ethnic political games within regional states, resulting in ethnic conflict. Hence, this type of political party establishment roadmap in the country has paved the way for a series of ethnic conflicts, resulting in major predicaments and conflicts among various ethnic groups in the country in general and in regional states in particular.

Therefore, I argue that the Ethiopian government should constitutionally ban the formation of ethnic based parties with a view to harnessing and controlling the destructive effects of the ethnification of politics in the country in general and the regional states, zones, woredas and local community units in particular. During the 1991-2018 TPLF–led EPRDF leadership, ethnic entrepreneurs have worked tirelessly to promote and entrench identity politics analogous to the transformation of water in a refrigerator into ice. As the logical anti-thesis to this approach of the TPLF-led EPRDF regime, I argue that the current government at federal and regional state levels must work hard to ensure that identity-based politics should incrementally melt like salt in water. ■

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Community Participation as Power Distribution:
Insight into Law and Practice in Sheka Forests Conservation

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Abstract

Community participation is a pillar principle in democratic decision-making processes. It is redistribution of power among public institutions, officials and people. With regard to forest conservation, Ethiopian laws and practices in Sheka Zone were examined by using Sherry Arnstein's model of citizen participation. We argue that community participation recognized in the FDRE Constitution falls under the fifth rung of the ladder of citizen participation: *placation*. In pursuits of forest conservation, the right of the citizens to have their views and opinion be taken into account is not guaranteed. The practice in Sheka Zone ignores the role of community participation, and it does not go beyond the rung of informing. This rung is a stunted one-way communication, and the community members in the Sheka Zone were simply informed about what is planned. Qualitative methodology is employed including legal analysis and literature review with some data collected through interviews, FGD and observation.

Key terms:

Indigenous Knowledge · Community Participation · Forest legislation · Sheka Forest

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Contents

Abstract

1. Introduction

2. The Concept of Community Participation
   2.1 Defining community participation (CP)
   2.2 Significance of community participation
   2.3 Level of community participation
   2.4 The need to address challenges in community participation

3. Legal Framework to Ensure Community Participation in Forest Conservation
   3.1 International legal instruments
   3. 2 National legislation
      3.2.1 The 1995 FDRE Constitution
      3.2.2 Forest Development, Conservation and Utilization Proclamation
   3.3 Regional forest laws

4. Community Participation in Sheka Forest Conservation
   4.1 Forest conservation efforts
   4.2 Subsidiary laws
   4.3 Demarcation, designation and environmental impact assessment

5. Concluding Remarks

1. Introduction

The concept of 'Community Participation (CP)' is among the basic principles that are envisaged in good governance and democracy. It is also among the most recognized principles in international, regional and national laws. It is adopted in the legal systems of developed and developing countries even though its implementation varies from state to state. CP stands for "involvement of communities and individuals in decision-making processes that affect their lives".[1] The task of forest conservation needs meaningful CP because it has a potential to motivate communities and stakeholders. If it is properly implemented, CP can serve as an engine for the

Frequently used acronyms

CP	Community Participation
FEPOs	Forest and Environment Protection Offices
EIA	Environmental Impact Assessment
SNNPRS	Southern Nations Nationalities and Peoples Regional State

[1] Danny Burns *et al* (2004), *Making Community Participation Meaningful: A handbook for development and assessment*, Policy Press, University of the West of England, 2.

government to realize objectives of environment laws and effective forest management.

The concept of CP has obtained wider acceptance because of the movements on human rights and activists of environmental protection. The 1977 UN Convention to Combat Desertification and the 1992 Convention on Biological Diversity are typical examples of international legal instruments that clearly call for the application of CP to ensure sustainable utilization of scarce natural resources.

The FDRE Constitution recognizes pluralism that encourages operation of indigenous knowledge which is consistent with the constitutional principles and CP. Other national laws such as environmental laws and forest legislations also require government and public officials to ensure effective CP in decision-making processes affecting the lives of communities.

This article aims at examining the adequacy of the degree of community participation required to conserve the Sheka forest biosphere. Qualitative methodology is used with due attention to legal analysis and literature review. Qualitative data collection tools such as interviews, focus group discussions and personal observation were employed to collect relevant data. Interviews were conducted with 9 public officials. Two Focus Group Discussions (FGD) were conducted with experts and employees who have experience in relation to forest management tasks. Interviewees and members of FGD were selected through purposive non-probability sampling. The authors have also used data obtained through personal observation.

The next section provides brief discussion of the conceptual framework and highlights the empirical research. Section 3 analyzes the relevant international instruments and domestic laws. The fourth section provides discussion on practices of community participation in Sheka Forest management followed by concluding remarks.

2. The Concept of Community Participation

2.1 Defining community participation (CP)

The term 'Community Participation [CP]' is "characterized by its diversity of practice and theory. It is an emerging field with many different players using different definitions and with different perspectives."[2] It can be

[2] Involve (2005), *People and Participation: How to put citizens at the heart of decision-making*, p. 16.

defined as the involvement in decision-making process. It can be understood in terms of some level of collaboration and shared ownership or responsibility.[3] Participation facilitates "the expansion of people's horizons, social contacts and sense of their own power and ability."[4] CP is also represented as part and parcel of basic human rights and a pillar principle of democracy that require "involvement of people in a community in projects to solve their own problems."[5]

There are scholars who argue that CP is an important end unto itself in a democratic society.[6] It can be considered as a process and an outcome.[7] Sometimes, members of a certain community may be unwilling to engage themselves in decision making. In this case CP does not mean that these members should be forced to be involved in decision making process. In democracy it is the people who rule. Therefore, communities should be allowed to "shape the governance process and provide input on decisions to be made by the government so as to ensure meaningful CP." [8]

2.2 Significance of community participation

Decision-making process in which people meaningfully participate is advantageous for community and government authority. CP, as Sir Bernard Crick described, "provides people with skill and relationships so that they are better able to govern themselves"[9], and it "invokes a sense of ownership and local pride in the local community." The CP helps us build informed and responsible citizens and improves the quality of public life by incorporating the knowledge of the public in decision-making process.[10] Debble Wilkie

Involve is an organization in the UK (set up in September 2003). It focuses on the practical issues of making public participation work.

[3] Id., 17.

[4] Ibid.

[5] Peter Harvey (2002), *Emergency Sanitation: Assessment and Program Design*, Loughborough University Leicestershire, 177.

[6] Kathryn S. Quick and John M. Bryson (2016), *Public Participation*, University of Minnesota Twin Cities Press, 3 – 4,

[7] Burns, *supra* note 1, p.3

[8] *Principle of Community Engagement* (Clinical and Translational Science Awards Consortium Community Engagement Key Function Committee Task Force on the Principles of Community Engagement 2nd Edition, June 2011) 187.

[9] As cited in Involve (*supra* 2) p. 20.

[10] Bright Muronda (2017), *A Conceptual Public Participation Framework for Ward Committees to Promote Local Government Democracy*, MA Dissertation, Potchefstroom Campus of the North-West University, p. 19.

notes that CP strengthens the legitimacy of politicians and leads to greater public trust.[11]

The purposes of CP further include augmenting social justice, informing the public, improving the understanding of public problems, exploring and generating potential solutions, symbolizing ideals of democratic participation and inclusion. It can also be used to produce policies, plans and objects of higher quality.[12] It enables us to know people's priority, enables better understanding of the problems, provides more ideas about how to address problems, reduces risks of domination by the special interests of elites or groups, facilitates public support for implementation, educates the public and develops a sense of citizenship thereby contributing to the formation of responsive and accountable states.[13]

2.3 Level of community participation

Genuine community participation requires acts of "recognizing the intrinsic value of all people, investing in their ability to contribute to governance processes."[14] Bad practices of CP have a potential to create mistrust and waste of people's time and money. For example, it would be very bad practice to "set up a participatory exercise to try to legitimize a decision that has already been taken behind closed doors and which participants are misled into thinking they can affect" the decision.[15] This can seriously undermine future attempts at public engagement. Bad practices of CP can be worse than no practice. It should not be used without respect for the participants.[16]

The mere fact that community members are convened in a certain place does not warrant meaningful CP. Representation, power and authority are vital in order to realize quality and legitimacy of the participation.[17] CP can take place during need assessment, planning, mobilizing, training, implementing, monitoring and evaluation. Full CP is not the same as

[11] As cited in Involve, *supra* note 2, p.21.
[12] Quick, *supr*a note 6.
[13] International Peace Building Advisory Team (2015), *Public Participation and Citizen Engagement*, Effective Advising in State building and Peace building Contexts-How, Geneva, Interpeace, pp. 2-3.
[14] Id., p. 7.
[15] Involve, *supra* note 2, p. 4.
[16] Ibid.
[17] Harvey, *supra* note 5

consultation because "communities play an active part and have a significant degree of power and influence" in the case of full participation.[18]

Ladder of citizen participation proposed by Sherry Arnestein is one of the most widely referenced and influential models in the field of democratic public participation.[19] This model "describes how public institutions and officials deny power to citizens and how the level of citizen power can be increased." According to this model, citizen participation is citizen power. It is redistribution of power that enables citizens to be deliberately included in the future. [20]

Arnstein's framework embodies eight 'rungs' of participation. The rungs are manipulation, therapy, informing, consultation, placation, partnership, delegated power and citizen control. The first two rungs (i.e., manipulation and therapy) constitute non-participation. Citizens do not have power in planning and decision making process in the case of *manipulation* and *therapy*. These rungs represent illusory form of participation and public officials and administrators create pseudo-participatory programs that attempt to convince citizens.

Informing is the third rung and the most important first step toward legitimate citizen partnership. It refers to an act of informing citizens of their rights, responsibilities and available options. Here, participants are not allowed to give feedback because this step does not provide channel for feedback and there is no power for negotiation. It is one-way flow of information from officials to citizens. It is just telling the people what is planned. Citizens' feedback is not taken into consideration. Listening what has been planned is the only thing required from the people because they are mere observers.

The fourth rung of citizen participation is *consultation*. It refers to acts of offering some options, listening to feedback, but not allowing new ideas. People are hindered not to come up with new options. Even though people are offered some options, they have no assurance that their concerns and ideas will be taken into account. Officials often use attitude surveys, neighborhood meetings and public hearings. Here, participation is not genuine; rather it is window dressing ritual. Under this rung, effectiveness of participation is measured by the number of people present at meetings and

[18] Burns, *supra* note 1.
[19] Sherry Arnstein (1969), 'A Ladder of Citizen Participation', *Journal of the American Planning Association*, 35(4), 216–224.
[20] Ibid.

who take brochures. The role played by the participants at the time of meeting does not determine the effectiveness of participation.[21]

The next rung is *placation*. It occurs when people are granted a limited degree of influence in decision making process. Here involvement of people is required for the sake of demonstrating that they are involved. Participation as placation is tokenistic.

The sixth rung is called *partnership*, and this "occurs when public institutions allow citizens to negotiate better deals, to share funding." At this stage/rung, power is "in fact redistributed through negotiation between citizens and public institutions".[22] People have power to influence planning and decision making. It represents acts of encouraging additional options and ideas, and provides opportunities for joint decision making. At this level of 'acting together' not only do different interests of the community decide together; they also form a partnership to carry it out.[23]

The remaining two rungs are delegated power and citizen control. *Delegated power* is a step that requires public institutions, officials, or administrators to give up some degree of control, management, decision-making authority or funding to citizens. The typical example is the situation where a citizens' board or cooperation is tasked with managing community program rather than merely participating in a program managed by public institutions. At this level, citizens hold the significant cards to assure accountability of the bargaining process rather than respond to pressure from the other end.[24]

Citizen control is the final rung of the ladder of citizens' participation**.** It takes place when citizens are allowed to govern a program or an institution, and in effect, they are "in full charge of policy and managerial aspects", and are empowered "to negotiate the conditions under which 'outsiders' may change them." In citizen-control situations, "for example, public funding would flow directly to a community organization, and that organization would have full control over how that funding is allocated".[25]

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[21] Ibid.

[22] Ibid.

[23] David Wilcox (1994), *Community Participation and Empowerment*: *putting theory in to Practice*, PLA Notes CD-ROM 1988–2001.
Available at: https://pubs.iied.org/g01549 (Last accessed:2 December 2021)

[24] Ibid.

[25] Ibid.

2.4 The need to address challenges in community participation

Efforts to gain meaningful CP need inclusive approach and trust between government (initiator) and the members of a certain community. Concerned individuals, groups, and organizations must feel they can join a community engagement effort and influence it. "If trust is not present, relationships are guarded and commitments are tentative."[26] CP has to be inclusive of the entire community of interest. This (inclusiveness) can create some organizing challenges, such as managing the decision-making process.

However, successfully overcoming these challenges will provide a greater return on the investment made by engagement leaders through the greater involvement of partners and the assets they bring to the process. Clear plan of action is decisive for the proper implementation of CP. Purpose, outcome desired and knowledge of the community determine the legible stakeholders, the strategy and approach used to gain their involvement, and the resource needed. In articulating the purposes or goals of a community engagement effort, we have to know what is of interest and the kind of community involvement that is expected.[27]

The problem of many CP efforts is that the efforts fail to consider in advance the aforementioned determining factors even though working with the community requires "a continual effort to balance costs and benefits and sustain cooperation and accountability among participating groups".[28] Although CP plays a crucial role in ensuring sustainable utilization of natural resources and in augmenting attainment of social justice, it is surrounded by many challenges. For example, governments and officials are "reluctant to allow people to participate because of fear of control. They believe that there is only so much power to go around, and giving some to others means losing their own."[29]

Ethiopia is not immune from the problems surrounding the CP. There are flaws with regard to the CP even though the 1995 FDRE Constitution and forest legislations require application of the CP in decisions that have impact on the lives of individuals and community. Studies have identified the existence of various problems in applying or using CP in decision making process.

[26] Ibid.
[27] Id., 186.
[28] Id., 187.
[29] Id., 2.

A study conducted by Takele Tuke has identified a gap in community involvement in planning phase. This problem was among the challenges that affected the local community's role in the efforts and endeavors to achieve sustainable development in Aleta Wondo Town administration.[30] Another study revealed failure of citizens to understand the meaning and importance of their participation in a development project in Oromia Regional State. This failure contributed towards corrupt practices by casting shadow on the involvement of the local community in decision making process. [31]

In another study, unsatisfactory level of CP in budget allocation, decision making and implementation was identified as the main factor that hindered improvements in environmental rehabilitation and agricultural extension development progress in *Boloso Sore Woreda*.[32] Moreover, Mesfin and Birhanu have identified gaps in community participation which resulted from institutional, socio-cultural and financial related matters in Legetafo-Legedadi Town.[33] Bad practice in CP has also been manifested in Shebele Berenta district. Willingness for the CP was very low. Hence, punishment and peer pressure were employed to attain community participation. The CP in the area was found to be passive and encountered low commitment from the side of government.[34]

Similar problems were identified in a study conducted by Habtamu Degefe and Hendrike Clouting. Poor status of involvement, participation, consultation and lack of adequate information were serious limitations of CP

[30] Takele Tuke (2017), 'Role of Local Government for Community Development: A Study in Aleta Wondo Town Administration, Sidama Zone, SNNPR, Ethiopia', *Journal of Humanities And Social Science* 22(9), p. 6.

[31] Sileshi Leta (2017), 'Assessment of Community Participation on Local Development Projects: The Case of Oromia Regional State,' *International Journal of Research in Social Sciences,* 7(10), p. 65.

[32] Merihun Fikru Meja and Endrias Geta (2017), 'Challenges and Prospects of Community Participation in Improving Environmental Rehabilitation and Agricultural Extension: The Case of Boloso Sore Woreda, SNNPR, Ethiopia', *Developing Country Studies*, Vol. 7, No. 10, p. 25.

[33] Mesfin Asefa & Birhanu Girma (2020), 'Community Participation in Integrated Solid Waste Management in Legetafo-Legedadi Town, Oromia Ethiopia', *Urban and Regional Planning*, Vol. 5 No.1, p. 23

[34] Mengist A., Nurie E., Nega M. (2021), 'Community Participation in the Reduction of Land Degradation: The Case Study of Shebel Berenta District, Amhara National Regional State'. *RUDN Journal of Public Administration*', 8(1): 59-71, p. 69.

in irrigation water use in Central Rift Valley.[35] Other studies also revealed diminished level of community participation in Aleta Wondo district[36] and various field research sites in Southern Ethiopia[37] because of constraints such as lack of supportive policies.

The above mentioned studies reveal problems related with Community participation. However, the scope of the studies did not include examination of national laws and practices in relation to the degree of community involvement in the efforts towards the distribution of decision-making powers. This article examines laws and practices of community participation by using Sherry Amstein's Ladder of Participation. Amstein's framework regarding levels of community participation is preferred by the authors of this article because it is "the most famous articulation of participation in terms of the degree to which power is devolved to the community".[38]

3. Legal Framework to Ensure Community Participation in Forest Conservation

3.1 International legal instruments

Severe global problems have forced the international community to shift its focus from the instrumental value of the environment to the intrinsic value of biodiversity.[39] The UN Convention on Biological Diversity (UNCBD) is among the pertinent international legal instruments devised for the protection, conservation and sustainable utilization of the environment. It aims at achieving the conservation of biological diversity, sustainable use of its components and the fair and equitable sharing of the benefits arising out of its utilization.[40] The parties to the Convention have affirmed that

[35] Habtamu Degefe and Hendrike Clouting (2014), *Case Analysis of Public Participation in Environmental Impact Assessment of Irrigation Water Use in Central Rift Valley, Ethiopia,* Baltzer Science Publishers, p. 59.

[36] Aschalew Hailu and Tefere Makonnen (2016), 'Determinants and Levels of Community Participation in Agricultural Development Programs in Aleta Wondo District of Southern Ethiopia', J*ournal of Sustainable Development in Africa*, Vol.18 No. 4, Clarion University of Pennsylvania, p. 9.

[37] Tafesse Matewos Karo (2018), "An Assessment of Youths' Perception and Participation on Environmental Management Undertakings: Empirical Evidence from Youth Development and Change Package Implementation in Southern Ethiopia", *Journal of Geography and Regional Planning*, Vol. 11(11):183-190, p. 188.

[38] Involve, *supra* note 2, p. 18

[39] *The United Nations' Convention on Biological Diversity*, (5 June 1992) Preamble

[40] Id., Art. 1.

conservation of biological diversity is a common concern of humankind.[41] Under this broad concern, they have expressed commitment towards conserving biological diversity and for its sustainable use.[42]

The Convention requires contracting parties to respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities. It also obliges them to promote the wider application of indigenous practices; and it encourages the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices.[43]

The Convention recognizes meaningful CP as a tool to ensure the respect, preservation and protection of indigenous knowledge and practices which are compatible with the environment.[44] Moreover, it requires facilitating the exchange of information (from all publicly available sources) relevant to the conservation and sustainable use of biological diversity.[45] Such exchange of information shall include exchange of result of indigenous and traditional knowledge. Methods of cooperation for the development and use of indigenous and traditional knowledge shall be encouraged and developed so as to rip as much benefits as possible from the treasure of traditional knowledge, practices and experiences.[46]

Another international legal instrument is the United Nations' Convention to Combat Desertification. Combating desertification and drought or mitigating their adverse effects call for joint action of the international community because the causes of desertification and drought involve complex interactions among physical, biological, political, social, cultural and economic factors that cannot be resolved by unilateral actions.[47]

Needless to say, combating desertification and/or drought necessitates due attention to meaningful CP. For instance, the role of local communities is given emphasis to achieve the objective of the Convention which has set CP as a guiding principle. Consequently, contracting parties are obliged to ensure that decisions, on the design and implementation of programs to

[41] Id., preamble paragraph 3,
[42] Id., preamble paragraph 5.
[43] Id., Art. 8(j), Art. 10(c).
[44] Id., Art. 14(a).
[45] Id., Art. 17(1).
[46] Id., Art. 18(4), Art 17(2).
[47] United Nations Convention to Combat Desertification (Convention to Combat Desertification) (1977), preamble para 4 and art 2.

combat desertification and mitigate the effect of drought involve the participation of local communities.

Affected country parties (including Ethiopia) have pledged to establish strategies and priorities to combat desertification and mitigate the effects of drought[48] and to address the underlying causes of desertification and pay attention to the socio-economic factors that contribute to desertification processes. To this end, they are required to promote awareness and facilitate the participation of local communities. Effective participation of the local population, particularly resource users, in policy planning, decision making, and implementation and review of national action programs are also identified as crucial tools to achieve objectives of the Convention.[49]

The Convention accords outstanding emphasis to the protection, promotion and use of indigenous knowledge. For instance, it envisages exchange of information on local and traditional knowledge and adequate protection to it; and it further requires the integration, enhancement and validation of this knowledge, how-know and practices.[50] To this end, the parties to the Convention have undertaken to make inventories of such information, knowledge and practices and their potential uses with the participation of the local people. They have also undertaken to facilitate the adoption of such knowledge to wide use and integrate them with modern technology.[51] These are possible only through meaningful community participation.

Likewise, the International Treaty on Plant Genetic Resource for Food and Agriculture (ITPGRFA) intends to ensure the conservation and sustainable use of plant genetic resources for food and agriculture. In this treaty, contracting parties have recognized the substantial contribution of local and indigenous people in all the regions of the world.[52]

The treaty adopts various mechanisms to realize the conservation and sustainable utilization of plant genetic resources for food and agriculture. Developing and maintaining appropriate policy and legal measures that promote the sustainable use of plant genetic resource for food and agriculture is one of these mechanisms. By appropriate policy, we are referring to policies that include meaningful participation as guiding

[48] Id., Art. 5(b), Art 3(a).
[49] Id., Art. 5 (c) and (d) Art 10(2)(e) (f)and Art 19(a) Art 17(f).
[50] Id., Art. 16(g), Art 17(C) and Art 18(b).
[51] Id., Art. 18 (a), (c) and (d).
[52] International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Genetic Resource Treaty) preamble para. 1, id., Art. 9.1

principle. One of the treaty obligations is the promotion and integration of approaches to the exploration, conservation and sustainable utilization of plant genetic resources for food and agriculture and to assess any threat to them. Assessment of threat to plant genetic resource for food and agriculture has to be assisted by utmost efforts of member states to minimize or eliminate the threats.[53]

The Aarhus Convention is the most relevant international legal instrument that provides details on the issues of public participation in decision-making concerning environmental matters. It is aimed at furthering the accountability and transparency in decision-making, and strengthening public support for decisions on the environment.[54] It obliges state parties to promote environmental education and environmental awareness in order to empower the public to participate in decision-making.[55] The Aarhus Convention requires state parties to realize the right of the public concerned to be informed (of the proposed activity) early in an environmental decision-making procedure, and in an adequate, timely and effective manner.[56] It gives due attention to ensuring meaningful participation of the public throughout the decision making process.

The decision-making procedure shall include reasonable time-frames to allow sufficient time for informing the public and for the public to prepare and participate effectively during environmental decision-making. The public should have adequate time to submit any comments, information, analyses or opinions that it considers relevant to the proposed activities. State parties to the Aarhus Convention commit themselves to make appropriate practical and other provisions for the public so that it can participate during the preparation of plans, programs and policies relating to the environment. They also undertake to strive to promote effective public participation during the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.[57] The Convention requires state parties to ensure that due attention is given to the result of public participation.[58]

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[53] Id., Art. 5.1, Art 5.1.a , Art 5.2 & Art 6.1

[54] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Done at Aarhus, Denmark, on 25 June 1998, preamble, paragraph 10,

[55] Id., Art. 3(3), paragraph 12.

[56] Id., Art. 6(2)(a).

[57] Id., Arts. 6(3), 6(7) and 7(1).

[58] Art. 6(8) and Art 8.

In a nutshell, international legal instruments have accorded due consideration to CP for achieving environmental and plant /forest conservation objectives and sustainable development. Hence, parties to these instruments have international obligation to realize the highest possible level of CP in the development, conservation and utilization of natural resources including forests. As Ethiopia is among the parties to the conventions, the obligations therein are expected to be respected.

3.2 National legislation

3.2.1 The 1995 FDRE Constitution

The FDRE Constitution, as the supreme law of the land[59] entrusts the power to enact laws concerning development, utilization and conservation of natural resources to the federal lawmaker[60] whereas regional lawmakers are empowered to administer natural resources in accordance with laws enacted by the federal government.[61] The right to improved living standards, sustainable development and the right to participate in national development are recognized by the Constitution.[62] And according to Article 43(2), citizens "have the right to participate in national development, and in particular to be consulted with respect to policies and projects affecting their community". Moreover, the government has constitutional duty to ascertain that international agreements are complied with and to ensure sustainable development.[63]

On the other hand, the Constitution recognizes formal legal pluralism that enables the application of customary practices and the implementation of indigenous knowledge provided that they are compatible with provisions of the Constitution.[64] It also embodies a provision that encourages people of Ethiopia to express, to develop and to promote their culture and to preserve history.

The Constitution imposes duty on government to hold, on behalf of people, natural resources including forest, and to deploy them for their common benefit and development.[65] The initiatives of the people in their

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[59] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, 1st Year No. 1(21 August 1995) Addis Ababa, Art. 44(1).
[60] Id., Art. 51(5).
[61] Id., Art. 52(2)(d).
[62] Id., Art. 43(1).
[63] Id., Art. 43(3).
[64] Id., Art. 9(1) and Art 34(4).
[65] Id., Art. 89(5).

development endeavor should also be supported by the government to allow the local community in order to achieve developmental goals.[66]

To this end, the government is required to promote CP in the formulation of national development policies and programs at all times. Chapter 10 of the Constitution embodies national policy principles and objectives. It requires the Ethiopian government to promote the people's self-rule at all levels[67] by supporting the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals and the provisions of the Constitution.[68] With regard to environmental objectives, the Constitution envisages healthy and clean environment. It provides:

> [1] The government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment. [2] The design and implementation of programs and projects of development shall not damage or destroy the environment. [3] People have the right *to full consultation and to the expression of views [Emphasis added]* in the planning and implementation of environmental policies and projects that affect them directly. [4] Government and citizens shall have the duty to protect the environment.[69]

The words "full consultation" and "expression of views" indicate the required degree of public participation. Under Sherry Arnstein's model, *consultation* offers some options, listening to feedback. But it does not allow people to come up with new ideas. There are no guarantees that public inputs will influence decision-making because authorities can involve the public as a mere gesture without any commitment to include the views elicited from the people thereby hindering new options to be suggested by the public.

Another issue relates to whether the FDRE Constitution (that guarantees the freedom of expression of views) obliges public institutions and officials to take into account and give due weight to views of people. According to Article 92(3) of the Constitution, quoted above, people have "t*he right to full consultation*" and "*to the expression of views* …". Apparently, freedom of expression does not include a corresponding obligation that obliges public institutions to take the views into account. Therefore, the scope of

[66] Id., Art. 89(6).
[67] Id., Art. 88(1).
[68] Id., Art. 91(1).
[69] Id., Art. 92.

community participation embodied in the FDRE Constitution seems to be within the rung of "*placation*." That means the required degree of community participation is not genuine. It is "tokenism" as the involvement of people is required for the sake of demonstrating that they are involved.

3.2.2 Forest Development, Conservation and Utilization Proclamation

Efforts have been made to come up with well-organized forest legislation. The enactment of a new Forest Development, Conservation and Utilization Proclamation (hereinafter the Federal Forest Proclamation) is a typical example of such efforts.[70] It recognizes the important role played by the forest sector 'in addressing the adverse effect of climate change'[71] and gives due attention to sustainable forest development and conservation in the course of utilization. Unlike its predecessors, it has introduced the concept of community forest ("የማኅበረሰብ ደን") and association forest ("የማህበራት ደን") and it envisages the implementation of the policy and strategy of sustainable forest development, conservation and utilization to ensure effective CP[72]

The federal and regional executive bodies are required to formulate forest development, conservation and utilization plan to allow and encourage the participation of local communities in the conservation, development and utilization of the forest.[73] Once forest management plan is developed by the relevant executive bodies, the conservation, development and utilization of the forest should be in accordance with the requirements in the plan.[74] Identification and demarcation process of state forests are also required to involve CP.[75]

The new federal forest proclamation uses terms, such as public participation, participation of local communities, participation of community and community participation. This proclamation is a special law with regard to forest development, conservation and utilization. As a special law, it could have identified some details on the elements of community participation in forest conservation.

Unfortunately, there is no indication in the proclamation with regard to the degree of community participation that is required. The Constitution specifies the right of people in planning and decision making process in a

[70] Federal Forest Development, Conservation and Utilization Proclamation No. 1065/2018, 24th Year No. 21(23 Jan 2018) Addis Ababa.
[71] Id., preamble. para 1.
[72] Id., preamble, para 4.
[73] Id., Art. 12(3), Art. 17(3), Art. 17(8), Art. 19(5).
[74] Id., Arts. 7(1(f)), 12(7), 15(1), 15(3), 19(8), 20(2)&(3)
[75] Id., Art. 19(3).

manner that is better than the specific forest proclamation. In general the required level of community participation in forest conservation is not specifically determined in the forest proclamation. This opens doors for public institutions and administrators to disregard public concerns.

3.3 Regional forest laws

Ethiopia's federal structure empowers the regional Councils to enact laws on regional matters. Accordingly, the Southern Nations Nationalities and Peoples Regional State (SNNPRS) has enacted regional forest proclamation (SNNPRS Forest Proclamation). This Proclamation recognizes the need to utilize the forest resources of the region in sustainable manner by ensuring the participation of the communities.[76] It indicates the regional state's obligation to ensure CP when it designates the forests and forestlands of the region as protected forests and productive forest.[77] Local community shall be encouraged to be active participant and share their experience and knowledge therewith while the management plan is prepared in order to realize the development, conservation and sustainable utilization of forests in the region.[78]

The Proclamation endeavors to ensure the application of knowledge of the people in traditional forest development, conservation and utilization. Hence, it obliges the concerned regional bureau to take traditional knowledge, skill and technologies into consideration in forest management. The bureau is also under duty to ensure the use of indigenous knowledge, practices and technologies in forest development, conservation and utilization.[79] The objectives of these obligations are to be achieved by "active" participation.

The problem with this stipulation is that the term 'active participation' is not clearly defined in the Proclamation. In the absence of a clear stipulation on the required degree of citizen participation, it is unlikely to ensure full-fledged (i.e., effective and meaningful) community participation. Based on the SNNPRS Forest Proclamation, the regional government has issued a

[76] The Southern Nations, Nationalities and Peoples Regional State Forest Development, Conservation and Utilization Proclamation No 147/2012, 18th Year, No. 6 (28 July 2012), preamble paragraph 2 & Art. 6(1) and Art. 11(3).
[77] Id., Art. 6(1) and Art. 11(3).
[78] Id., Art. 7(2).
[79] Id., Art. 28(3).

subsequent regulation specifically applicable to Sheka protected forests. [80] This regulation has been issued to designate, demarcate and register Sheka Zone Protected Forest.[81] The regulation sets standards and principles relating to the protected forest. One of these principles is active CP. [82] Women and youths of the local community shall be active participants during the preparation of forest management plan, and participate in the survey, conservation, development and utilization of the forest.[83]

The regulation has provisions relating to the use of indigenous knowledge in order to prevent the forest resource from disease and pests.[84] To this end, the regulation requires stakeholders (in the management of the protected forest) to accord appropriate recognition and support for cultural activities and practices that have been undertaken towards the conservation of forest and forest resources.[85] Moreover, the regulation clearly expresses the need to conserve and preserve pre-existing cultural values and the indigenous knowledge of the local community regarding the forest resource.[86]

4. Community Participation in Sheka Forest Conservation

Sheka Forest is one of the biosphere reserves registered by the UNESCO Man and Biosphere Program. It is located in Sheka Zone of the SNNPRS, Ethiopia. The Zone has three districts: Masha, Andracha and Yeki. It endows extraordinary natural and cultural heritage, mosaic of dense natural forest, cultural forest, managed forests for coffee and beekeeping, bamboo thicket, wetlands, agricultural land and historical sites. The total area covers 238,750 hectares of forest, agricultural and wetlands, bamboo thickets, rural settlement and towns. It comprises Afromontane forest vegetation which has been considered as the world's most threatened eco-region.[87] The rich culture is an omnipresent part of the biosphere reserve, shaping the

[80] The Southern Nations, Nationalities and Peoples' Regional State Sheka Zone Protected Forest Development, Conservation and Utilization Regulation No. 101/2012, 18th Year, No. 7 (12 April 2012).
[81] Id., Art. 4 and Art. 5(1).
[82] Id., Arts. 4, Art 7(1), 7 (6), 7(8) & 8(3)(a).
[83] Id., Arts. 4 & 10(a)(c).
[84] Id., Art 8(2)(a).
[85] Id., Arts. 4 & 8(3)(d).
[86] Id., Arts. 4 & Art 10(b).
[87] Sheka Forest Biosphere Reserve Nomination Form (UNESCO-MAB National Committee Federal Democratic Republic of Ethiopia, September 2011, Addis Ababa), 6-7.

landscape and the sustainable development of the area.[88] The Sheka forest biosphere embraces over 65 endemic species of plants and birds, and 30 threatened plant species.[89]

This forest biosphere has been maintained by the local community through indigenous knowledge. This is attributable to the distinct culture and human activities which are ecologically sustainable while fulfilling practical needs of the local people. These indigenous forests have economic, ecological and cultural functions to the communities that have ensured the preservation of the forests for centuries.[90]

4.1 Forest conservation efforts

Currently, Sheka Forest is decreasing at an alarming rate. This problem is aggravated by multifaceted factors. Households are dependent on natural forest for fuel consumption. The residents of the zone use charcoal and fire wood from the forests.[91] Officials of local government are reluctant and are not committed to conserve and sustainably use the forest resource in the Zone. As reported by informants, the officials have been permitting many small scale business enterprises engaged in woodwork. [92] The authors have observed a number of such enterprises in the three districts.

The local government has organized unemployed youths with the objective of job creation who are given license for woodwork enterprises without due caution relating to checking out the sources of the inputs for their woodworks.[93] The licensing procedures did not consider the subsequent adverse impact of unsustainable usage by the licensed enterprises. There was

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[88] *See* for example, MELCA- Ethiopia: Sheka Forest Biosphere Reserve, Available at: https://melcaethiopia.org/sheka-biosphere-reserve/
Last accessed: 30 November 2021

[89] Sheka Forest Biosphere Reserve Nomination Form, *supra* note 87.

[90] Id., at 9.

[91] During data collection, the researchers observed some of the community members who were transporting fire wood using horses. Charcoal was also provided to cities by females. Mostly, Masha and Gecha towns along with many villages were totally dependent on fire wood and charcoal as there was no sufficient electric power supply.

[92] Interview with Mr. Asmare Chorro, An Expert, Department of Forest and Environmental Protection, Sheka Zone Administration (Masha, Ethiopia 2 August 2010 E.C)

[93] The researchers observed various wood work enterprises licensed in the main district towns of Sheka zone in which more than three-fourth was in Tepi town and the rest in Gecha, Gemadirro and Masha.

no legally recognized private forest in Sheka zone, and it is apparent that the furniture was made of timber from natural forest.[94] The enterprises (that have no contribution to the development and conservation of the forest) have been using forest products that are conserved by the local community.

Moreover, grave deforestation has been inflicted by large-scale agricultural 'investments' which were grossly introduced in the area. The large scale farms are focusing on coffee[95] and tea plantations.[96] The local communities were not involved in the process of identifying appropriate lands for large scale investments. Communities were completely excluded in the process of licensing for woodwork enterprises and identification of lands for large-scale investment. But, the FDRE Constitution requires the government to respect the right of communities to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that directly affect them.[97]

Conservation of forest is one of the pillars and indispensable tasks in the effort to achieve the objectives of forest laws. In order to ensure the implementation of forest laws, the Ministry of Environment and Forest (MEF) was established. Its name was changed to Environment, Forest and Climate Change Commission (EFCCC), and at present it is renamed as Environmental Protection Authority (EPA) as the federal government has committed itself to reduce the number of executive cabinet members. At Zonal and district levels, the Forest and Environment Protection Offices (FEPOs) are established to manage the forests in accordance with the provisions of forest laws.

The FEPOs of Sheka Zone were organized at deputy cabinet level, and the Heads of FEPOs were not members of cabinets. The implication of this structure is that the FEPOs do not have an opportunity to participate in decision making directly; and in the absence of zonal cabinet membership FEPOs find it difficult to have effective voice relating to budget allocation and other decisions. Thus, FEPOs of the Sheka Zone had no chance to influence decision making in budget allocation and other decision making

[94] Interview with Mr. Asmare *supra* note 92.

[95] According to the information from the Sheka zone investment office, there were more than 40 investments which hold roughly more than 10,000 hectares land in coffee and tea plantation.

[96] From the two large scale tea plantations one is in the adjacent Majang zone

[97] FDRE Constitution, *supra note* 59, Art 92(3).

processes.[98] Even though the FEPOs are pertinent organs relating to decisions that have impact on environment, the organizational structure of Zonal offices hinders the FEPOs to perform their functions as required by environmental and forest laws.

The FEPOs do not have power to influence the local government to allocate adequate budget to facilitate active CP at different levels. This adversely affects community participation because the process of ensuring active involvement of communities requires adequate finance and facilities. The structure of the local government was not devised so as to ensure the right of communities to full consultation and to the expression of views in the planning and implementation of environmental policies and projects.

At federal level, the Ministry of Agriculture, Ministry of Water, Minerals and Energy, and the then Ministry of Forest and Environmental Protection had started a forum in order to work together on overlapping issues. Horizontal relation between different sectors which had overlapping interest on environment was created at Zonal and district levels as well. The sectors had devised a forum that comprised eight individuals from different sectors.[99] It was called 'Climate Resilience Green Economy' forum, commonly abbreviated as (CRGE),[100] and was led by the FEPO.[101]

According to informants during interviews, the team work was not effective.[102] Even though there were established institutional structures, the

[98] As the researchers noticed from the official reports and records, human resource both at zonal and Woreda levels was by far below expected; and annual budget of the office was Birr 133,000. The office had only two motor bicycles to coordinate the work within the Zone. Masha Woreda Forest and Environmental Protection Office annual budget was only Birr 25,000 during the budget year 2010 E.C. (July 2017-June 2018).

[99] Interview with Mr. Abebe Atto, Expert, Forest and Environmental Protection Office of Masha District (Masha, Ethiopia 3 Nehassie 2010 E.C/ 9 August 2018)

[100] Forest and Environmental Protection Office, Investment Office, Agriculture and Natural Resources Conservation Office, Police Station, Office of Public Prosecution, Court and Biosphere Reserve Offices are members of CRGE

[101] Interview with Mr. Tamiru Digo, Expert, Investment Department, Sheka Zone Administration (Masha, Ethiopia 7 Nehassie 2010 E.C/ 13 August 2018) and Interview with Mr. Tadesse Shobeno, Expert, Agriculture and natural resources conservation Department, Sheka Zone Administration (Masha, Ethiopia, 7 Nehassie 2010 E.C/ 13 August 2018)

[102] Interview with Mr. Biruh Tesfaye, Head, Department of Biosphere Reserve, Sheka Zone Administration (Masha, Ethiopia 9 Nehassie 2010 E.C/ 15 August 2018)

cooperation among the sectors was poor and inefficient.[103] Such forum is very important as it can serve as an opportunity to bring the relevant institutions together to address shared concerns. However, the CRGE did not embrace members from the community elders and individuals who have adequate traditional knowledge, practices and experiences. The Forum included different experts and cabinets, but it failed to include representatives from local elders and clan leaders.

This clearly shows that CP had been ignored in the efforts of government organs to conserve Sheka forest biosphere. Involvement of local communities in the forum would have enabled the use of indigenous knowledge, experiences and practices to ensure sustainable management of the forest. As Nishizaki noted, such exclusion of local community in the task of conservation was a cause for Arssi Oromo community to resist the imposed conservation policies by using different tactics.[104] The government should take a big lesson from the resistance of the Arssi Oromo community towards imposed policy of the Swayne's Hartebeest Sanctuary conservation. This verifies that there cannot be sustainability of policies, projects and the environment in the absence of high levels of community participation.

4.2 Subsidiary laws

The Federal Forest Proclamation empowers regional states to administer any forestland and state forest found in the respective regional states.[105] It empowers Council of Ministers and Ministries to come up with regulation and directives necessary for its implementation.[106] In order to realize the implementation of forest laws, there have to be regulations, directives and guidelines that specify details relating to issues of CP and that indicate the approaches to be used to incorporate indigenous knowledge in forest management tasks.

In practice, however, the FEPOs and other sectors had no subsidiary laws such as guidelines that specify how local communities should be represented in decision making processes impacting their lives and the approaches that are required to be followed in order to incorporate indigenous knowledge, experiences and practices with regard to ensuring forest development, conservation and sustainable use. Provisions in federal and regional forest

[103] Ibid.
[104] Nobuko Nishizaki (2004), 'Resisting Imposed Wildlife Conservation: Arssi Oromo and the Swayne's Hartebeest Sanctuary, Ethiopia', *African Study Monographs*, Vol. 25 No. 2: 61-77, p. 72.
[105] Federal Forest Proclamation, *supra* note 70, Art. 17.
[106] Id., Article 27.

laws are general and they are not self-executing provisions. These laws also lack provisions that indicate accountability and administrative measures against office holders who –intentionally or by negligence– ignore the right of the local community to participate in the planning and decision making process.

The regulation that governs the administration of Sheka protected forest lacks detail rules that ensure the implementation of local communities' right to participation. Although it requires active participation of the community, the term 'active participation' has not been defined thereby rendering it difficult to clearly identify the required degree of community participation in the conservation of Sheka Forest.

4.3 Demarcation, designation and environmental impact assessment

As stipulated under the Federal Forest Proclamation, in order to conserve, develop and utilize preserved forests, "… major forestlands shall be designated as state forests, their boundaries shall be demarcated and they shall be registered as protected and productive forests".[107] The demarcated state forest "shall be proclaimed by legislation of the concerned state".[108] Demarcated and designated state forests need also to have "certificate of title deed which is to be supported by maps".[109] Demarcation, designation and certification were intended, among other things, to serve as credible evidence.

Such demarcation and designation would indeed require effective CP.[110] Sheka Zone protected forest is designated, demarcated and registered by regulation.[111] This is a commendable progress. Nevertheless, the designation and demarcation processes were not participatory. The local community was not even informed whether protected forests around them are designated, demarcated and registered. [112]

Environmental Impact Assessment (EIA) is among the tools that can be used to conserve resources by ensuring sustainability of uses. The main

[107] Id., Arts. 14(1) & 13(4).
[108] SNNPRS Forest Proclamation *supra* note 76, Art. 6(1).
[109] Federal Forest Proclamation *supra* note 70, Arts.12(10), 13(4) & 14(3)
[110] Id., Art. 8(2).
[111] Ibid.
[112] FGD held in Andracha District (Discussion with Forest and Environmental Protection Office, Investment Office, Agriculture and Natural Resources Conservation Office, Police Station, Office of Prosecution, Court and Biosphere Reserve Offices held on 24 September 2018/ 14 Meskerem 2011 E.C).

objective of the EIA is to ensure sustainability of projects, programmes and activities. The EIA needs CP for sharing information and knowledge to enhance community interest.[113] In this regard the local community of the study area had a commendable culture:

> The clan and ritual leader, the '*Gepi-tato'*, is at the heart of the land-tenure and forest-management system, as his permission is required before anyone may clear forest or acquire farming land. For example, when a resident or newcomer is looking for farmland, he must appear before the clan leader, who then consults with the clan, assesses land availability and performs rituals to purify the land before it is handed over to the new holder. According to religious beliefs, settlement or clearing for agricultural activities is never allowed on land that is in contact with forest areas, cultural places, wetlands and headwaters.[114]

The quote above shows the indigenous practice that has preserved the Sheka forest through generations. As one of the most respected clan leaders stated: '[w]e have the moral obligation to transfer the forest which we inherited from our forefathers'.[115] This culture is also meant to contribute much for the preservation of the dense forest in the area.

As the key informants and the FGD participants reported at the time of data collection, the investment license provision procedures were problematic. Huge projects that need prior Environmental Impact Assessment were permitted without ensuring the effective participation of local communities. The power of Zonal Investment office to examine and approve the EIA was limited to projects that require less than 100 hectares of land. For investment projects that need greater than 100 hectares, EIA was to be approved by the regional office which is very far thereby usually causing reluctance to come down to the area to assess the realities on the ground. Officials of regional bureau and Zonal offices were perceived, by respondents, as close friends of investors, and they failed to ensure the

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[113] Dejene Girma (2010), 'Environmental Democracy in Ethiopia: Emphasis on Public Participation in Environmental Impact Assessment Process"), *Bahir Dar University Journal of Law* 1(2), 210.

[114] Interview with Mr. Kedane Dachachew, Administrator, Wollo kebele (Masha District Wollo Kebele, Ethiopia, 17 Nehassie 2010 E.C/ 23 August 2018); *See* also <https://sacredland.org/sheka-forest-ethiopia/ > Accessed on 20 December, 2018

[115] Interview with Mr. Atestata Dakito, Atesso clan leader, (Atesso kebele, Masha, Ethiopia, 20 August 2018).

implementation of the forest proclamation and regulation because of their affiliation with investors or corruption.[116]

The social values that maintained the Sheka forests have been eroded by misconduct associated with large-scale farms. The local people are increasingly becoming engaged in selling their oxen and buying horses for charcoal transportation to the nearby cities."[117] Unsustainable large scale investments have (in the behaviours of many members of the youth) cultivated counterproductive tendencies of monetary gains through deforestation. Moreover, "efforts to create awareness have encountered great challenge and the confidence of the people have been eroded."[118]

Even though effective forest conservation needs application of indigenous knowledge, practices and experiences, clan leaders and elders were not allowed to share such kinds of knowledge and skills.[119] Because of the failure to respect the right to grassroots participation, local communities were not in the position to participate in EIA procedures and contribute indigenous knowledge, experience and practices which are proved to be sustainable in practice.

The officials and experts of the FEPOs did not ensure participation of the local community at required levels. The communities were not allowed to accord feedback on the proposed project. Officials and experts often announce plans and try to convince the community. They did not have guidelines or directives that provide for schemes which can integrate or use indigenous knowledge, practices and skills in day to day tasks. Hence, there seemed to be one-sided focus on what seemed to be advantageous with respect to 'economic development'.[120]

Sheka Forest conservation practices were insensitive to local communities because the communities, as stated above, were excluded from the task of forest management. This violates the constitutional rights of the local community members to develop and to promote their culture and to preserve its legacy of forest conservation.[121] Sovereign power does not

[116] Interview with Mr. Tadesse Shobeno, *supra* note 101.
[117] Ibid.
[118] Interview with Mr. Girma Haile, Head, Department of Youth and Sport Affairs, Sheka Zone (Masha, Ethiopia 23 Hamle 2010 E.C/ 30 July 2018).
[119] Ibid.
[120] *See*, for example, SNNPRS Forest Proclamation, *supra* note 76, Art. 20(2).
[121] FDRE Constitution, *supra* note 59, Art 39(2) and 93(4)(c).

reside in officials and experts. Officials are delegates of the people.[122] Delegation of citizens' power to political representative does not mean that authority of communities is undermined.[123] As discussed above, the right of communities in Sheka Zone to actively participate and influence decision-making processes affecting them was undermined by government organs that did not pay attention to identify and address the priority of the community. This is susceptible to eventual widespread dissatisfaction.

Ignoring the community in the conservation of the forest amounts to disrespecting them. They should be given a chance to be involved and substantially affect decisions, policies and projects. The government organs should respect these communities who have maintained distinct culture that enhances ecological sustainability. Failing to do so discourages the legacy of community engagement in forest conservation.

5. Concluding Remarks

Community participation is one of the pillars of democratic governance. It enables public institutions, officials and local communities to work together to increase trust, outcome and positive impact of decisions and projects. International and national environmental laws and forest legislations oblige Ethiopian government organs at federal and local levels to ensure the development, conservation and sustainable utilization of forest resources through effective CP and the use of indigenous knowledge.

Ethiopia recognizes legal pluralism[124] and CP. However, we argue that the degree of community participation recognized by the FDRE Constitution is *placation*. It does not ensure that the rights of citizens to have their views and opinions are taken into account. The maximum right given for the community is the right to full consultation and to the expression of views. In view of Sherry Arnstein's Ladder of Citizen Participation, the degree of participation recognized by the Constitution is narrower than the scope of participation that are articulated under federal and regional forest laws.

Even though federal and regional forest laws set broader and attractive purposes and objectives with regard to CP, they lack clarity. It is indeed commendable that they require concerned government bodies to ensure CP

[122] Id., Art. 8.
[123] Muronda, *supra* note 10, p. 23.
[124] FDRE Constitution, *supra* note 59, Art 9(1) impliedly recognizes customary practices that do not contravene the Constitution.

in the development, conservation and utilization of forest resources. They, however, fail to clearly specify the required degree of community participation. It is difficult to identify the exact rung in the ladder of citizens' participation because the laws use general terms, such as '*active participation*' that are not defined in the laws.

The actual practice in the Sheka Zone forest preservation is problematic. Even concerned offices in the Zone do not have power to negotiate and influence decisions of cabinets. The officials of Forest and Environmental Protection Offices (FEPOs) are not among the decision makers.

Although legal reforms that have been made so far are commendable, utmost attention should be given to detailed guidelines that facilitate and ensure effective community participation at regional level. Moreover, the FEPOs should be members of cabinet in regional states, and the officials of local government must respect the right of people to full consultation and to expression of ideas as prescribed in the Constitution.

In this regard, what is enshrined in the Constitution should materialize through effective and legitimate citizen partnership. Moreover, enhanced levels of CP are required through amendments in the FDRE Constitution, the federal forest proclamation and regional forest laws. Failure to do so will have grave adverse impact because precious knowledge of local communities will continue to be ignored. This can eventually lead to the loss of the dense Sheka Forest and the biosphere in the zone. ■

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Conspicuous Absence of Independent Judiciary and 'Apolitical' Courts in Modern Ethiopia

Simeneh Kiros Assefa ♣

Abstract

Ethiopia had revolutions in 1974 and 1991, after which the Provisional Military Administration Council ('PMAC') and Ethiopian Peoples' Revolutionary Democratic Front ('EPRDF') governments came to power, respectively. Each incoming government re-established and re-structured the courts. Likewise, criminal jurisdictions of the courts and the rules of appointment of judges and court personnel were changed. Yet, the governments presented the courts as independent, insulated from political interference. After examining the respective legislation and the decisions of two sets of courts, I argue that Ethiopia never had an independent judiciary; there were courts established for dispute settlement for the ordinary citizen. The courts were not as apolitical as claimed by the respective governments. They have been, often, compliant with the interests of the regime of the day by giving effect to the executive's excesses of power or by creating enabling conditions, as though they were extension of the executive.

Key terms:

Ethiopian Courts · Judiciary · Modernisation of courts · Apolitical judiciary · Judicial independence

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Contents

Abstract

1. Introduction

2. Setting the Context of the Study

3. The Establishment of Modern Courts
   - 3.1 Establishment of modern national courts
   - 3.2 Re-structuring of the court relative to the federation of Eritrea with Ethiopia
   - 3.3 Restructuring courts after the 1955 Revised Constitution
   - 3.4 The last imperial re-structuring of courts

4. Courts under the Military Government
   - 4.1 The regular courts
   - 4.2 The establishment of Special Courts-Martial
   - 4.3 The re-establishment of the special courts with civilian judges
   - 4.4 The re-establishment of the supreme court as per the 1987 PDRE Constitution
   - 4.5 Observations regarding the Special Courts-Martial and the Special Court
   - 4.6 Selected cases of the Special Court

5. Federalisation of Courts
   - 5.1 De facto federalisation of courts under the Transitional Government
   - 5.2 Federal courts under the FDRE Constitution
   - 5.3 Selected cases of the Cassation Division
     - 5.3.1 Binding interpretative decisions relating to bail
     - 5.3.2 Interpretative decisions relating to objections to charges
     - 5.3.3 Interpretative decisions relating to administrative decisions' 'finality clause'

6. Developments Relative to Federal Courts Proclamation No 1234/2021

7. Conclusion and the Way Forward

Frequently used acronyms

EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
PDRE	Peoples Democratic Republic of Ethiopia
PMAC	Provisional Military Administration Council
TGE	Transitional Government of Ethiopia

1. Introduction

In modern governance, the judiciary is the third branch of the state that controls the other two powerful branches. Its competence and independence are indispensable for its proper functioning. However, the history of modern governance in Ethiopia is short; the story of the court is even shorter. The court is not treated as the third organ; it is rather treated as an extension of the executive as a matter of fact and, until recently, as a matter of law.

Upon change of political power, incoming governments have been re-establishing the courts, redefining their jurisdiction, their rules of procedure, rules of appointment, tenure, and discipline of judges. Accordingly, important changes were made during the Imperial period when Eritrea was federated with Ethiopia. Later, when the Provisional Military Administration Council ('PMAC') came to power in 1974, Special Courts-Martial were established to try the Imperial Government officials. Major restructuring of the courts was made as per the 1987 Constitution of the People's Democratic Republic of Ethiopia ('PDRE Constitution').

Likewise, as soon as the Ethiopian Peoples' Revolutionary Democratic Front ('EPRDF') came to power in 1991, the foundations for a federal structure of the courts were laid down long before the inception of the FDRE Constitution. The respective governments, both in official statements and legislative rules asserted that courts are independent (from political forces and processes) while blaming the previous regimes for abusing justice.[1]

This article argues that Ethiopia never had an independent judiciary; there were only courts established for dispute settlement for the ordinary citizen; in the exercise of their criminal jurisdiction, they were utilised as state apparatus, as though they were extensions of the executive for suppressing political opposition or dissent. It examines the various legislation re-establishing and re-structuring the courts. It specifically examines the criminal jurisdiction of the courts, the rules of appointment, tenure and discipline of judges and court personnel. Judicial decisions (of the Special Court of the Provisional Military Administration Council operating between 1981 and 1987, and the Cassation Division of the Federal Supreme Court of Ethiopia operating since 1996) are reviewed.

[1] *See* for instance, *The Independence of the Administration of Justice Proclamation No 23/1992* ('Proc No 23/1992') preamble. In the earlier days of PMAC, its Chairman Lt. Gen. Aman Andom made a statement implying independence of the Special Courts-Martial. 'Objectives of the Dergue', *Addis Zemen*, Addis Ababa, 13 September 1974 (in Amharic) 1, 3.

As the criminal law is effective state social control mechanism, this article focuses on criminal jurisdiction of courts and their decisions on criminal matters. The next section sets the context to the discussion how courts in non-democratic regimes function. Section 3 dwells on the establishment and evolution of modern courts in the Imperial period. It illustrates how the political changes have also influenced the judicial structure. Section 4 dwells on the restructuring of courts in the military regime. It also examines interpretation and application of the (Revised) Special Penal Code by the Special Court. Section 5 deals with the restructuring of the court in the EPRDF era and reviews the decisions of the Cassation Division which are binding decisions in legal interpretation. Federal Supreme Court Cassation Division decisions on petitions against administrative decisions regarding access to court are also examined.

2. Setting the Context

In constitutional governance, the judiciary is the third branch of the state, at par with and controlling the other two. Constitutions are the documents which create the three branches of the state and defining their role in governance. In a non-constitutional, non-democratic state, there are often courts with limited jurisdiction.[2] In the judiciary or in the courts, there is only one question that needs to be raised[3] -what is the role of the judge? The simplest answer is resolving disputes pending before the court.[4] But this calls for two further questions: how does the judge resolve such disputes? Is dispute resolution the only role of the judge?

The answers to these two questions fairly overlap. The court resolves such disputes by applying the law. In applying the law, the court makes choices. Those choices include the determination of the law and the applicable rule, which also necessarily involve a choice of legal theory, and

[2] Ethiopia did not have a constitution under the PMAC (1974-1987), but it had courts established by *Special Courts-Martial Establishment Proclamation No 7 of 1974* ('Proc No 7/1974'), and by *Administration of Justice Proclamation No 52/1975* ('Proc No 52/1975').

[3] In this study, the words 'court' and 'the judiciary' are used to mean different things. 'Court' is used to refer to any institution for dispute settlement among the citizenry established in any form. The word 'judiciary' refers to the third branch of the state that does all activities enforcing the bill of rights and controlling the other branches of the state within their limit.

[4] Aharon Barak (2006), *The Judge in a Democracy* (Princeton UP) 307 ff.

the method of interpretation of such rule.[5] In resolving disputes, both the court and the judge are claimed to be free from interference. It is presented as a non-political organ. Even working under authoritarian regime, as in Nazi Germany, Apartheid South Africa,[6] former military dictatorships, such as Chile and Brazil,[7] including our own Ethiopia,[8] judges opine that they are apolitical while they are under repression.[9] The definition of the political/apolitical is certainly founded on legal positivist perspectives.[10] In this sense, 'political' is an adjective that describes those running for public office or those organs that are involved in the lawmaking process.[11]

However, irrespective of the applicable legal theory, the political nature of the court may be seen in two ways. Wojciech Engelking argues that if the political is legislative action, the judicial application of the law by the court is an extension of the legislative process.[12] Judicial application of the law has both application of the law and lawmaking aspect. Aharon Barak further

[5] Simeneh Kiros Assefa (2020), 'Non-Positivist 'Higher Norms' and 'Formal' Positivism: Interpretation of Ethiopian Criminal Law', 14 *Mizan LR*, at 66.
Lisa Hilbink (2007), *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge UP) 31 – 33.
Hans Petter Graver (2015), *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Springer) 208 – 212, 221.
Barak, '*The Judge*' (*supra* note 4) 106 – 107, 117 – 121.
EW Thomas (2005), *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge UP) 7 – 22.

[6] Graver, *supra* note 5, at 53 ff.

[7] *See* for example, Anthony W Pereira (2008), 'Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina. Brazil, and Chile' in Tom Ginsberg and Tamir Mustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge UP) 23 ff.

[8] Simeneh 'Higher Norms', *supra* note 5.

[9] Graver, *supra* note 5, 39 - 45.

[10] Wojciech Engelking (2019), 'The Political Character of the Judiciary: Schmitt, Kelsen and the Polish Constitutional Tribunal' in Martin Belov (ed), The *Role of Courts in Contemporary Legal Orders* (Eleven International Publishing) 386 - 389. Simeneh Kiros Assefa (2020), 'Limiting Criminalisation Power of the State in Ethiopia' (PhD dissertation submitted to Addis Ababa University Law School, unpublished) 137-139.

[11] Mauro Zamboni (2008), *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer) 61-63.

[12] Luc J Wintgens (2002), 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing) 11-13.

argues that in common law, it is evident that the court is making the law[13] through case laws in addition to the statutes enacted by the legislature. The fate of statutory law is not any different because the statute before and after the decision is entirely different.[14] Although the binding interpretative decision of the Cassation Division of the Federal Supreme Court[15] cannot be considered as lawmaking (as in *case laws* in common law jurisdictions), the binding nature of its legal interpretation (for cases that invoke the same legal provision, identical issues and comparable facts) in its decisions is clear.

Barak opines that, in a democracy, the role of the judge is to bring law and society closer as well as to protect and defend democracy and rule of law.[16] Barak admits such assertion presupposes the judiciary as a third branch of the state. However, whether a democratic or otherwise nature of the state, where the decision of the court has implication on political power, even the selection and appointment of the judges is a political decision.[17] This is because, even when courts are established only as dispute settlement organs, there are instances where courts are used by the executive as in the case of administration of criminal justice which, by its very nature, is political.[18]

The criminal law, as mentioned earlier, is the most effective state social control devise that is used for the prevention of crime. However, the 'greater

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[13] Thomas, *supra* note 5.

[14] Aharon Barak (2012), *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, Cambridge UP).

[15] *Federal Courts Proclamation Re-amendment Proclamation No 454/2005*, art 2(4).

[16] Barak '*The Judge*' (*supra* note 4). For instance, the US Supreme Court in *Marbury v Madison* 5 U.S. 137 (1803) had defined its jurisdiction. In the 20th century, exercising its self-defined jurisdiction, it expanded the scope of civil rights in the criminal process, such as in *Miranda v Arizona* 384 U.S. 333 (1966), *Mapp v Ohio* 367 U.S 497 (1961), *Escobedo v Illinois* 378 U.S. 478 (1964), *Beck v Ohio* 379 U.S. 89 (1964), *Brady v Maryland* 373 U.S. 726 (1963), *Ker v California* 374 U.S. 23 (1963), *Katz v United States* 389 U.S. 347 (1967).

[17] Engelking *supra* note 10. Also see Graver (n 5) 45 – 46. The US Supreme Court nomination is a highly contentious issue in the US. See "Supreme Revenge" a documentary made by the American Public Broadcasting Services on conflicts in the Senate between the two parties at <https://www.youtube.com/watch?v=1Yt2xUJfdyw> last accessed on September 23, 2021.

[18] For in-depth discussion on how the criminal law is used in the Ethiopian criminal process, *see* Simeneh Kiros Assefa and Cherinet Wordofa Wetere 'Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power' (forthcoming in 32 J Eth L).

good' is perverted and the individual is subjected to 'the good of society' which unjustifiably expands the realm of the criminal law.[19] The government makes laws that are 'excessive' or 'harsh'. And the government uses (desires to use) the court as an extension of the executive to enforce such laws that are contrary to certain 'higher principles'.[20] The courts in such regimes, find themselves in a dilemma between enforcing the black letters of the law adopted by such authoritarian regimes or refuse to enforce such 'unjust laws' based on a higher principle.[21] That is why, at times, the debate necessarily involves legal theory.[22]

The political nature of the courts and their operations should now be clear. What is not clear is the magnitude of the political nature of the court. In order to better appreciate the extent of the political nature of the courts, one needs to see the context judges and courts in Ethiopia work. There are four major issues which appear overlapping but conceptually distinct. *First*, for the most part, Ethiopia was ruled without a constitution;[23] the courts were, thus, established by sub-constitutional norms. The courts were established as dispute resolution fora for the citizenry, not as judiciary at par and in control of the other two branches of the state. The re-establishment and re-structuring of the court often related to criminal jurisdiction because the criminal law is effective social control mechanism used by the state.

Second, in the absence of a constitution until 1931, there was no legally set limit to the power of the government other than such power being exercised by the government benevolently. Even after 1931, lack of the democratic process was reflected in the establishment of courts created by a monarch or group of persons (PMAC/ the Dergue) or TGE (Transitional

[19] The central justification of continental criminal law the doctrine of 'legal good' or 'common good'. Santiago Mir Puig (2008), 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct' 11 *New Crim Law Rev*: An International and Interdisciplinary Journal, pp. 410-112. Markus D Dubber (2005), 'Theories of Crime and Punishment in German Criminal Law', 53 *Am J Comp L,* pp. 684-686. Simeneh 'Limiting Criminalisation', *supra* note 10, at 34-36.

[20] Simeneh 'Higher Norms', *supra* note 5, at 67-69.

[21] Graver *supra* note 6, at 5-7.

[22] *See* for instance, Roberty Alexy (2021), *Law's Ideal Dimension* (Oxford UP). Robert Alexy (2002), *Argument from Injustice: A Reply to Legal Positivism* (Bonnie Litschewski Paulson and Stanley L. Paulson tr., Clarendon Press).

[23] *See* Simeneh and Cherinet 'Governing' *supra* note, 18.

Government of Ethiopia) which were not democratically elected. The fate of the courts was, thus, at the mercy of those at the helm of power.

Third, there was no bill of rights on which claims may be based and that limits the power of governments on the basis of which the court could hold the other two branches to account for their actions. Even the 1995 FDRE Constitution does not empower courts with judicial review which limits their functions thereby rendering them unable to control the other two branches. Nor can the judiciary consistently and effectively implement the bill of rights embodied in the FDRE Constitution, mainly because of the timidity of courts.[24]

Often, courts in authoritarian regimes, not just in Nazi Germany and Apartheid South Africa, but in former military dictatorships, such as Argentina, Brazil and Chile[25] and the former socialist Soviet Union[26] were compelled to comply with the demands of the government; in some instances, those judges may even be complicit to the repression of authoritarian regimes.[27]

In an effort to understand the predicaments of judges in authoritarian political systems, Lisa Hilbink examines judicial structure and ideology in such regimes. She offers explanation for complicity of judges with authoritarian regimes[28] which can fall under two categories, i.e., *regime related* and *attitudinal*.

The *regime related explanation* relates to the direct involvement of the regime in judicial decision-making. This is manifested through designing the structure of the court that is palpable to the regime, restriction of jurisdiction of the court, strictly controlled recruitment, appointment, promotion and discipline of judges. There is always formal independence of both the court as an institution and the judges personally. For instance, the Special Courts-

[24] The court believes enforcement of the constitution involves interpretation which is left to the House of Federation (HoF) and the Council of Constitutional Inquiry (CCI). Simeneh Kiros Assefa (2010), *Criminal Procedure Law: Principles, Rules and Practices* (Xlibris) 64 ff.

[25] *See* for example, Tamir Moustafa and Tom Ginsburg (2008), 'Introduction: The Functions of Courts in Authoritarian Politics' in Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge UP) 4 ff.

[26] Kazimierz Grzybowiski (1960), 'Main Trends in The Soviet Reform of Criminal Law' 9 *Am Univ LR*.

[27] Graver *supra* note 5, at 205.

[28] Hilbink offered four explanations: regime related explanation, the attitudinal explanation, the class-based explanation and the legal theory explanation. Hilbink *supra* note 5, at 27 -33.

Martial Establishment Proclamation article 12(1) provides that '[j]dges shall be completely independent in the exercise of their functions, and in the administration of justice, they shall submit to no other authority than that of the law'.[29] The Transitional Government of Ethiopia had adopted a separate statute, *Independence of the Administration of Justice Proclamation No 23/1992*. However, judges were often handpicked and appointed either because of personal acquaintance or party affiliation.[30] In spite of such laws, judicial administration was still under the watchful eyes of the government.[31]

The *attitudinal explanation* refers to the social role of courts. This relates to the choice the judges made, either to stick to the letters of the law in order to remain 'apolitical', or refuse to enforce such 'unjust' laws based on higher principles, such as justice and rule of law.[32] This can better be seen in the context of *legal theory and methodology*.[33] Although the law claims higher principles, such as natural law, customs, human conscience for its legitimacy,[34] the judges limit themselves to the black letters of the law, at times, in full disregard of the basic methods of interpretation.[35] Often, it is positivism that is blamed for the political wrongs, and blundering justice.[36] The judges interpret the law and the facts in so far as it is 'convenient'. In such a situation, the choice of a particular legal theory and a particular

[29] *Special Court Establishment Proclamation No 215/1981* ('Proc No 215/1981') art 9. *Supreme Court Establishment Proclamation No 9/1987* ('Proc No 9/1987') art 7.

[30] The PMAC Special Courts-Martial judges were members of the army; the EPRDF judges were for the most part party-affiliated or had proven themselves in other responsibilities particularly those in the leadership and administrative role.

[31] *Judicial Administration Proclamation No 323/1973,* art 4. Proc No 9/1987 (*supra* note 29) arts 27 *cum* 21(1); Proc No 23/1992 *supra* note 1, art 8; *Federal Judicial Administration Commission Establishment Proclamation No 24/1996* art 4. Also see Ethiopian Human Rights Council Report that judges were suspended because they were allegedly belonging to the former regime.

[32] Hilbink *supra* note 5, at 5-7.

[33] Ibid. Graver *supra* note 5.

[34] *Special Penal Code Proclamation No 8 of 1974* ('Proc No 8/1974') preamble, paras 9-11.

[35] *See* Simeneh Kiros Assefa (2017) 'Methods and Manners of Interpretation of Criminal Norms', 11 *Mizan LR,* Simeneh 'Higher Norms' *supra* note 5.

[36] Ugo Mattei and Laura Nader (2008), *Plunder: When the Rule of Law is Illegal* (Blackwell Publishing).

method of interpretation of the law is a matter of politics.[37] The 'apolitical' claim of judges in an authoritarian regime is thus a mere farce.[38]

3. The Establishment of Modern Courts

3.1 Establishment of modern national courts

We can focus on developments since 1942 for convenience. There were courts, prisons and the police before 1942;[39] and the 1931 Constitution had embodied five provisions (Articles 50 to 54) on the judiciary. Chapter 5 of the sub-constitutional rule (adopted on the same date as the 1931 Constitution) provided that the country is divided into 14 provinces, which were further divided into Awradja and Woreda.[40] The Governors of the provinces were required to establish offices such as the municipality, a court, and offices relating to services including health and education.[41] The functions of the judiciary were provided for under Chapter 9. Articles 77 and 78 provided that the Minster of Justice would draw up legislation regarding the determination of the number of judges, appointment of Awraja judges, appeal, the jurisdiction of the King's Court, whether hearing would be held in public or otherwise, among others, and through the two Houses present such draft to the Emperor.

After the *Negarit Gazeta* was established as official legal gazette (in 1942), the Supreme Imperial Court, the High Court, the Provincial Courts and Regional or Communal Courts were established by *Administration of Justice Proclamation No 2 of 1942*.[42] The lack of skilled judges for such

[37] Graver *supra* note 5.

[38] It is rather argued that an apolitical judiciary is 'far better suited to authoritarianism than to democracy': Hilbink, *supra* note 5 at 8. Zamboni *supra* note 11, 130.

[39] *See* Getahun Mesfin Haile (2012) 'Urbanisation, Centralisation, and the Rise of Modern Incarceration Regime in Ethiopia: Some Notes toward a History of the Dire Dawa Prison', 45 *J of Eth Studies*; Semeneh Ayalew 'A History of Kerchele, 1974 – 1991' (Addis Ababa University, unpublished MA thesis, 2004) cited in Alex de Waal and Rachel Ibreck (2013) 'Alem Bekagn: The African Union's Accidental Human Rights Memorial', 112 African Affairs, p. 196.

[40] Art 42 of the sub-constitutional rule adopted in July 1931 on the same day the Constitution was adopted. Blatangeta Mahteme Selassie Woldemeskel (1942 EC), *Zikre Neger*, Second Ed., 777 *ff*.

[41] Id., art 48.

[42] *Administration of Justice Proclamation No 2 of* 1942 ('Proc No 2/1942') art 2. The Police was established by *Police Proclamation No 6 of 1942* and *Police (Addis Ababa) Proclamation No 7 of 1942*; the public prosecution was established as per the

courts had clearly been reflected in the arrangement of the courts. First, both the Supreme Imperial Court and the High Court of Ethiopia had their seats in Addis Ababa. And the Supreme Imperial Court was constituted by the *Afe Negus*, two judges from the High Court, provided such judges did not see the case earlier.[43]

The High Court comprised such number of judges as found to be necessary from time to time as recommended by the Minister of Justice.[44] The High Court had 'full criminal and civil jurisdiction in Ethiopia' and adjudicated in any part of the country as was convenient for the hearing and was constituted by three judges.[45]

A Provincial Court that was established in every Province had one of the judges as the President of such Court.[46] It had both criminal and civil jurisdiction as well as appellate jurisdiction from the decision of a Regional or Communal Court.[47] This was probably the first time civil and criminal jurisdiction were separately provided for except one division of the court established in 1926 in Addis Ababa to deal with some serious crimes.[48]

Modern Administrative Structure

The *Administrative Regulation Decree No 1 of 1942* created the administrative structure, which also had impacted the court structure because

Public Prosecutors Proclamation No 29 of 1942 and prisons were established as per *Prisons Proclamation No 45 of 1944*.

[43] Proc No 2/1942, *supra* note 42, arts 10 and art 3, respectively.

[44] It also included British nationals as the Emperor decides. Ibid art 4. For further details, *see* Esubalew Belay Fanta (2016), 'The British on the Ethiopian Bench: 1942 –1944', 16 Northeast African Studies.

[45] Proc No 2/1942, *supra* note 42, arts 7- 9.

[46] Id., art 12. *Administrative Regulations Decree No 1 of 1942* ('Decree No 1/1942') part 78. By the time these legislation were adopted there were no less than 70 provinces. Nathan Marein (1954), *The Ethiopian Empire – Federation and Laws* (Vurtheim and son) 28.

[47] The statute merely recognises the potential existence of such Regional or Communal Courts, as it would be established 'by a warrant' issued by the Emperor. ibid art 18.

[48] In the *Fiteha Negest*, *The Court Procedure Rules Legal Notice No 33 of 1943* applied in the High and Provincial Courts, and *The Supreme Imperial Court Procedure Rules Legal Notice No 155/1955*, there did not seem to be distinction regarding the process and the consequences in civil and criminal matters. Prince Teferi in 1926 established a division of a court to hear only serious criminal cases. Merse'Hazen WoldeQirqos (2008 EC), *The Beginning of the Twentieth Century: Memories of My Eventful Days: From What I Saw and Heard 1896 - 1922, 3rd Ed* (title in Amharic), Addis Ababa University Press, 329-330.

Governors had also been Presidents of the respective courts. There was thus a Governor-General for each province, under whom there was Governor for each Woreda.[49] Courts were established for each Province and the Governor-General was the President of such Provincial Court.[50]

There were three other judges appointed by the Emperor on the recommendation of the Minster of Justice, one of whom was the Vice-President of such court. The Governor-General was responsible to the Minister of Justice regarding his responsibilities in the administration of justice.[51] Likewise, the Governor of a Wereda was the President of the Wereda Court.[52] And the *Mislenie* was 'the President of the Court … constituted in the *Mislenie* district.'[53]

Establishment of Local Courts

Local judges (*atbiya dagna*) were appointed by virtue of the *Establishment of Local Judges Proclamation No 90 of 1947*[54] to adjudicate both civil and criminal matters. The local judge would first attempt to compromise the parties and he would enter a judgement only where that was not possible, in criminal cases 'a fine not exceeding 15 dollars'.[55]

Courts for the Prosecution of Special Crimes

The establishment of a special court as per the *Security Proclamation No 87 of 1947* was meant to deal with 'treason, espionage and allied offence', committed during World War II.[56] There is no record showing this division had been working other than a single event which involved Dejazmach Haile

[49] Decree No 1/1942 *supra* note 46, parts 1 and 9.

[50] Proc No 2/1942 *supra* note 42, art 2; Decree No 1/1942, *supra* note 46, part 78.

[51] Id., part 81.

[52] Id., part 82. Also see WEH Howard (1955), *Public Administration in Ethiopia: A Study in Retrospect and Prospect* (JB Wolters) 60 - 61.

[53] Decree No 1/1942 (*supra* note 46) part 83; Howard (*supra* note 54) 61 – 62. The already existing 'traditional' dispute settlement mechanisms would be maintained. Proc No 2/1942 *supra* note 42, art 23.

[54] Such judges would be selected by the Awraja Court President and the Vice-President in consultation with the elders of the community. *Establishment of Local Judges Proclamation No 90 of 1947* ('Proc No 90/1947') art 6.

[55] Proc No 90/1947 (*supra* note 54) art 3. Article 11 had also provided that the provisions of the Proclamation shall not affect 'the tradition of the Country in settling disputes by compromise.'

[56] The Special Court would be constituted of 9 judges, 4 of them were judges from the High Court of Ethiopia, 3 army officers not below the rank of Lieutenant Colonel, and 2 civil servants not blow the rank of Governor.

Selassie Gugsa who was handed over by the British to be tried by such Court.[57]

Administrative Re-Structuring

Administrative re-structuring was made based on *Decree No 6 of 1946*.[58] Moreover, the courts were re-structured by *Proclamation No 102 of 1948*. Accordingly, (a) the Teklay Ghizat Court; (b) the Awraja Ghizat Court; (c) the Woreda Court; and (d) the Mikitil-Woreda Ghizat Court were established.[59] Thus, the Provincial Courts became Teklay Ghizat Courts;[60] and the Regional and Communal Courts became Awraja Courts. Woreda and Mikitil-Woreda Ghizat Courts were also created.[61]

3.2 Re-structuring of the court relative to the federation of Eritrea with Ethiopia

The federation of Eritrea to Ethiopia in 1952 was a major political change[62] that demanded reform both in the law and institutions.[63] The Supreme Imperial Court thus became the Federal Supreme Court, and a separate division of Federal High Court was established in Eritrea by virtue of the *Federal Judiciary Proclamation of Ethiopia No 130 of 1953*.[64] The Imperial Supreme Court was considered as Federal Supreme Court, with the *Afe Negus* at its president, and it had two other judges one of whom was Eritrean.[65] This was made without affecting the jurisdiction of courts stipulated under the *Administration of Justice Proclamation No 2 of 1942*.

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[57] Marein, *supra* note 46, at 74-76. There had also been a Security Court of Appeal established constituted by 5 judges: (1) the *Afe Negus*, (2) President of the Senate, (3) President of the Chamber of Deputies, (4) a person designated by the Emperor from the Crown Council, and (5) one designated by the Emperor from among highest ranking generals of the Imperial Army.

[58] *Administrative Regulations (Amendment) Decree No 6 of 1946* art 1.

[59] *Proclamation to Amend the Administration of Justice Proclamation, Proclamation No 102 of 1948* art 2.

[60] Id., art 4.

[61] Id., art 5.

[62] *The Entry into Force of the Federation of Eritrea with Ethiopian Proclamation No 124/1952.*

[63] Marein, *supra* note 46, 15 -16.

[64] *The Federal Judiciary Proclamation of Ethiopia No 130 of 1953*.

[65] Id., art 3.

As part of the pact federating Eritrea with Ethiopia, *Public Rights Proclamation No 139/1953* was adopted.[66] In order to protect the newly created Federation, the *Federal Crimes Proclamation No 138 of 1953* was also adopted. The jurisdiction relating to violations of these laws was vested in the Federal Courts.

3.3 Restructuring courts after the 1955 Revised Constitution

Eritrea later became part of Ethiopia. After the adoption of the 1955 Revised Constitution, (a) the Woreda Court; (b) the Awradja Court; (c) the High Court; and (d) the Supreme Imperial Court[67] were re-established by virtue of *Courts Proclamation No 195 of 1962*. The federal structure of courts was abolished. High Courts were set up 'permanently in each Teklay Guezat'.[68] The number of judges sitting in a case was also changed.

In Woreda and Awradja Courts, cases are seen by one judge. However, Awradja Courts had three judges with regard to cases submitted to them on appeal from the Woreda Court. High Court and Imperial Supreme Court benches had three judges.[69] Specialisation of jurisdiction of courts was introduced. While the Woreda and Awraja courts had criminal and civil jurisdictions, the High Court had jurisdiction on specialised subjects, such as the formation and dissolution of commercial organisations, negotiable instruments, bankruptcy, insurance and maritime, trademark and nationality issues.[70]

According to Proclamation No 195/1962, 'law' was limited to those 'proclamations, decrees, orders and any subsidiary legislation published in Negarit Gazeta' deliberately disregarding traditional dispute settlement mechanisms.[71] It further introduced modern court hearing processes, such as hearing in open court, removal of judges, contempt of court, and prohibition of appeal on interlocutory matters.[72]

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[66] The 1955 Revised Constitution, unlike its predecessor, would contain a bill of rights replacing the Public Rights Proclamation.

[67] *Courts Proclamation No 195 of 1962* ('Proc No 195/1962'), art 3(1).

[68] Id., art 3(2).

[69] Id., art 4(1).

[70] Id., arts 5 and 7.

[71] While the Amharic version is definitive, the English version does not give such impression. Id., art 2.

[72] Id., arts 12-21. It is worth noting that Ethiopia had already adopted the Criminal Procedure Code in 1961.

3.4 The last imperial re-structuring of courts

The last Imperial period re-structuring of courts was made by *Judicial Administration Proclamation No 323/1973* which had two major features. First, it established the Judicial Administration Commission and defined its powers.[73] Second, it ended the functions of Governors as judges in their respective Governorate in an effort to introduce separation of powers.[74]

There are a few *observations* to be made regarding the Imperial Courts. First, the early years were marked by the establishment and progressive improvisation of both the institutions and norms. This period started with the introduction of modern court system in 1942 where judges sat in the different tiers of the higher courts[75] while in the lower courts there was extensive overlapping between the executive and the judiciary.[76] The system also had recognised the traditional dispute settlement[77] to merely address the insufficiency of state laws, institutions, and skilled personnel befitting the newly created court structure (rather than due recognition to legal pluralism).

Eventually benches of courts expanded their reach and in some instances specialized in certain areas of the law thereby leaving out traditional dispute settlement mechanisms and they ultimately brought disputes fully in the realm of the state.[78] The progressive 'modernisation' of the court structure and functioning made it appear a public institution rendering justice as a public service. The circle got closer to completion when the court was (an institution) physically separated from the executive.[79] This did not, however, lead to the independence of courts because the Emperor appointed judges as a sovereign, and he reviewed cases at his *Zufan Chilot* without substantive or procedural legal restrictions.[80]

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[73] *Judicial Administration Proclamation 323/1973*, art 4 and 5, respectively.

[74] Id., art 15. Aberra Jembere holds that the adoption of this statute had created ambivalence between those Governors and the Emperor adding fuel to the already brewing 'Revolution' as one of possible causes leading to ending the Imperial government. Aberra Jembere (1991), *Agony in the Grand Palace: 1974 - 1982* (Shama Books, in Amharic) 33 -34.

[75] Proc No 2/1942, *supra* note 42, art 3.

[76] Decree No 1/1942, *supra* note 46, art 10.

[77] Proc No 2/1942, *supra* note 42, art 23.

[78] Proc No 195/1962, *supra* note 67. Also see Civ. C., art 3347(1).

[79] *See* text for *supra* note 75.

[80] Howard *supra* note 54, 166; *Zufan Chilot* would later be incorporated into Proc 195/1962 *supra* note 67, without defined procedure.

4. Courts under the Military Government

4.1 The regular courts

The military government introduced fragmented criminal law. A Special Penal Code was adopted and applied by a Special Courts-Martial. Accordingly, following the practice of former socialist and/or military dictatorships, the military regime created two categories of courts.[81] The courts established by the *Administration of Justice Proclamation No 52/1975*, re-established the Woreda Court, the Awradja Court, the High Court and the Supreme Courts having criminal and civil jurisdictions in their respective local limits.

4.2 The establishment of Special Courts-Martial

In September 1974, the Provisional Military Government established itself as 'the government' and defined its powers.[82] The PMAC then created the Special Courts-Martial and adopted the Special Penal Code to deal with past and prospective wrongs, including those that were alleged to have been committed by the officials of the Imperial regime.[83]

The Imperial ministers and high-ranking officials were detained since 26 April 1974, most of them voluntarily submitting on the same day with a strong conviction that they would be acquitted after fair trial.[84] The detention continued until 8 September 1974. On 23 November 1974, however, the PMAC executed 60 (sixty) high-ranking Imperial Government Officials, without trial including the short-time president of the PMAC Government, Lt. General Aman Michael Andom[85] was also killed on the same day in the course of an attempt to arrest him.

The Government Press Statement stated that other wrongdoers would "immediately be dealt with through the Special Courts-Martial'.[86] However, the PMAC criminal charge did not come forth within the period that was promised. The press briefings were only meant to calm the public. There

[81] Grzybowiski (*supra* note 26). Pereira, *supra* note 7.

[82] *Provisional Military Government Establishment Proclamation No 1 of 1974* ('Proc No 1/1974'). *Definition of Power of the Provisional Military Administration Council and Its Chairman Proclamation No 2 of 1974* ('Proc No 2/1974').

[83] Proc No 7/1974, *supra* note 2, and Proc Ns 8/1974, *supra* note 34.

[84] Aberra, *supra* note 74, 18, 39- 43, 61.

[85] 'Serious Political Decision Taken by the Provisional Military Administration Council' *Addis Zemen* 26 November 1974 (Addis Ababa) 1, 7, 8.

[86] 'Objectives of the Dergue' (*supra* note 1). 'Serious Political Decision' (*supra* note 85).

were even pleadings of the PMAC authorities with those prisoners to tell their families that they would be charged and tried sooner.[87] The Court was supposed to be assisted by an Inquiry Commission whose investigation took longer, and it rather focused on the famine in Wollo than investigation of the alleged crimes. Further, there was no body nor institution that responded to the Commission's call for criminal allegation and evidence against the detainees. The Commission was finally abolished in mid-1977.[88]

The Special Courts-Martial that started hearing cases (after the termination of the Inquiry Commission) was presided by five judges who were military officers. It conducted hearings inside the Grand Palace in *Zufan* Hall,[89] and very little record is available regarding the proceedings of the Court. The initial cases were against 12 individuals six of whom were acquitted by the Special Courts-Martial,[90] two were sentenced to suspended sentence on two years' probation and the cases against four defendants were dropped. For Instance, Major Admassie Zeleqe was acquitted on 3 December 1975.[91] Aberra Jembere recounts that there were people who were executed based on the decision of the Special Courts-Martial including one Colonel Hailu Regassa who was a judge in a Special Courts-Martial.[92]

The special criminal law was made retrospectively applicable;[93] it was applied by a Special Courts-Martial, Special Prosecutor and Special Registrar, appointed by the Head of State (the Dergue).[94] The process was also governed by *Special Criminal Procedure Code Proclamation No 9 of 1974*. It was made equally applicable to both civilian and military personnel;[95] and the decision of the court was final and non-appealable.[96]

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[87] Aberra, *supra* note 74 at 99, 137.
[88] Id., 61.
[89] Id., 14.
[90] Lt. Colonel Adella Qitaw, Maj. General Girma Mulat, Major Admassie Zeleqe, Ato Teshome GebreMariam, Ato Gorfu GebreMedihin and Ato Aklilu BeteMariam. Id., 139, the note.
[91] Ibid. Major Admassie demanded a copy of the judgement in order to report to the people of Harar –whom he had been representing in the Imperial Chamber of Deputies– that the charges were not as reported on the Radio. However, his release would be suspended'. Id., 139-40.
[92] Id., 96, 97.
[93] Special Penal Code adoption Proclamation, preamble, para 11, art 2(1).
[94] Proc No 2/1974, *supra* note 83, art 3.
[95] Proc No 7/1974, *supra* note 2, art 2(2).
[96] Proc No 1/1974 (*supra* note 82) art 9. Proc No 7/1974 (*supra* note 2) art 10.

The Special Penal Code criminalised certain conducts that were vaguely stated;[97] it increased criminal punishments and it introduced additional modes of punishments.[98] Outside of Addis Ababa, the jurisdiction of the Special Courts-Martial were delegated to regular courts based on their specific jurisdictions.[99]

4.3 The re-establishment of the special courts with civilian judges

In 1981, there was legal revision.[100] The Special Courts-Martial was replaced by a Special Court, established by Proclamation No 215/1981, to try cases based on the Revised Special Penal Code, and it was presided also by civilian judges.[101] The Special Court had first instance court to try all cases arising out of the Revised Special Penal Code and an appellate court.[102] Same as its preceding legislation, decisions of the Special Court that involved 'life imprisonment or death sentence [were] … reviewed by the Head of State'.[103]

Article 22 of the Special Court Establishment Proclamation provided that the Special Court was the successor of the Special Courts-Martial with respect to any question arising from the decision of the latter. And, based on Article 21, pending cases were allowed to be decided by the court before which they were pending. The detainees in the Grand Palace were released; and the judges of the Special Courts-Martial were transferred to the Special Court. The Special Court began its work with new cases that mostly involved low profile offences.[104]

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[97] *See*, such as the provisions of article 35 – Offences against the Motto 'Ethiopia Tikidem', which is later dropped in the Revised Special Penal Code.

[98] Proc No 8/1974 (*supra* note 34) preamble, paras 2 – 5, 8. Simeneh and Cherinet 'Governing' (*supra* note 18).

[99] *Special Courts-Martial Establishment Proclamation, Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 21 of 1975* ('Proc No 21/1975').

[100] The *Revised Special Penal Code Proclamation No 214/1981*.

[101] Proc No 215/1981, *supra* note 29, art 22.

[102] Id., arts 4, 5.

[103] Id., art 14.

[104] For instance, *Maj. Teshager* was charged with receiving birr 200; *Const. Getachew* was charged with receiving birr 500; and *Deputy Comm. Abbe* for receiving wristwatch, all of whom were later acquitted. *Special Prosecutor v Major Teshager Assefa* (10 February 1984, Crim File No 15/76, Special First Instance Court); *Special Prosecutor v Const. Getachew Demissie and Deputy Commander Abbe Wodemichael* (6 July 1983 Crim File No 31/75, Special First Instance Court). See text for (*infra* note 139) and (*infra* note 135), respectively.

It should be noted that during the post-1974 period, the regular Woreda, Awradja, High and the Supreme Courts were re-established without any material change as per article 3(1) of *Administration of Justice Proclamation No 52/1975.* The benches that handled criminal charges applied the 1961 Criminal Procedure Code, and these regular courts operated parallel to the Special Courts.

4.4 The re-establishment of the Supreme Court as per the 1987 PDRE Constitution

The Constitution that was promised in 1974 was adopted after thirteen years in September 1987 as *The Constitution of the People's Democratic Republic of Ethiopia* which was used as a justification for the re-establishment of almost all justice institutions in a totally different ideological context.[105] Chapter 14 of the Constitution created the judiciary as an autonomous state organ for the first time. Article 100(1) provided that 'judicial authority shall be vested only in one Supreme Court, courts of administrative and autonomous regions, and other courts established by law' which is further affirmed by *Supreme Court Establishment Proclamation No 9/1987*.

The Constitution further provided that the central objective of the courts would be 'safeguard[ing] the legally guaranteed rights, interests and freedoms of the state, mass organisations, other association and individuals' and inculcation of 'socialist legality'.[106] The Government was interested in the collective interest and unscrupulous obedience to law than in individual rights and maintenance of the rule of law. The Supreme Court was made in charge of administration 'of all courts of the country' supervising their function. [107]

The High Court and the Awraja Court were established by *High Courts and Awraja Courts Establishment Proclamation No 24/1988*. The High Courts were established in each autonomous and administrative region,[108]

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[105] Also, the military court and prosecution office were established by *Military Court Establishment Proclamation No 10/987*, *Procuratorial Office Establishment Proclamation No 11/1987*, respectively.

[106] *The Constitution of the People's Democratic Republic of Ethiopia* ('PDRE Const') art 100(2). Proc No 9/1987 (*supra* note 29) art 3; *High Courts and Awraja Courts Establishment Proclamation No 24/1988* ('Proc No 24/1988') art 4.

[107] PDRE Constitution, *supra* note 106, art 102.

[108] 'Administrative Regions' were designated as local administration in the PDRE Government; under the FDRE Government, they are referred to as 'Zones'.

and the Awraja Courts were established in each Awraja.[109] The jurisdictions of Woreda Courts were transferred to Awraja Courts.[110] The Special Court was abolished and matters arising out of the Revised Special Penal Code came under the jurisdiction of the High Court.[111] Appeals from such decisions were heard by the Supreme Court.[112] The court structure had the Supreme Court at the top with cassation power; the High Court was entrusted with first instance and appellate jurisdictions and Awraja Court was at the bottom of the hierarchy.[113]

Judges were elected by the respective *Shengos*[114] and their term was 'the same as the *Shengo* which elected them.'[115] The President of the Republic had absolute power on the removal and replacement of the Supreme Court Judges.[116] The President of the High Court would submit reports of activities of the High Court and the Awraja Court to the Ministry of Justice.[117] The staff of these courts were considered part of the Ministry of Justice and the High Court and Awraja Court presidents administered the staff and prepared work program and budget of the Courts on behalf of the Ministry.[118] These sub-constitutional rules which were given effect contradict with the PDRE Constitutional provision which stated that courts would be autonomous.

Moreover, the Supreme Court Establishment Proclamation had introduced the cassation procedure in the manner we know today –to correct fundamental error of law committed in a final judgement.[119] Whether a particular case merits review by cassation was decided by the President of the Supreme Court or the Procurator General.[120] However, the protest of the Procurator General against a certain decision was directly sent to the Cassation Division.[121]

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[109] Proc No 24/1988, *supra* note 106, art 3.
[110] Id., art 30(1).
[111] Proc No 9/1987, *supra* note 29, art 31(2) and 32(1), respectively.
[112] Id., art 33(2).
[113] Woreda Courts jurisdiction was transferred to Awraja Court. Id., art 30(1).
[114] PDRE Constitution, *supra* note 106, art 101(1); Proc No 9/1987, *supra* note 29 are 11; Proc No 24/1988, *supra* note 106, art 12.
[115] Ibid.
[116] Proc No 9/1987, *supra* note 29, art 13(3).
[117] Proc No 24/1988 , *supra* note 106, arts 20(2), 21(1)(d).
[118] Id., arts 20(1)(a), 21(2)(a).
[119] Id., arts 4(4) and 20. For in-depth discussion, see Yoseph Gebre Egziabher 'The Hearing of Final Judgment by the Supreme Court by way of Cassation: Another Right of Appeal Granted to Any One of the Parties?' (1989) 14 J Eth L 161.
[120] Proc No 24/1988, *supra* note 106, art 5(1), 24(7).
[121] Ibid.

4.5 Observations regarding the Special Courts-Martial and the Special Court

The courts during the PMAC regime exhibit all the features of courts in non-democratic regimes.[122] The PMAC appears to have taken Chile's approach under Pinochet because the several similarities are more than accidents. Pinochet took power on 11 September 1973. In the first few years, the Government used the wartime military courts to try both civilian and military personnel. Because the Supreme Court expressed its support to the military regime, the Court allowed it to continue functioning until a new constitution was adopted in 1980 which restricted the power of the Supreme Court in reviewing the decisions of such military courts.[123]

Because the PMAC had been in a precarious situation, it established the Special Courts-Martial as soon as it came to power in September 1974. The Court had its seat in the Grand Palace trying imprisoned Imperial officials. Until the trial began, the Government even resorted to extra-judicial measure against the highest-ranking officials of the country. The Special Courts-Martial operated between 1974 and 1981, and the Special Court worked between 1981 and 1988 until it was finally integrated into the regular courts.

Two statements reflect the operations of the Special Courts-Martial. The first relates to in the preamble of the PMAC Proclamation while the second refers to official statements. With regard to the suspension of the Imperial Parliament, and preamble of the PMAC Proclamation reads:

> [the] Parliament heretofore has been serving not the people but its members and the ruling elite and aristocratic classes, [] passing laws at various times intended to raise the living standard of its members, thereby using the high authority conferred on it by the people to further the personal interests of its members.[124]

Regarding the suspension of the 1955 Revised Constitution, the preamble stated that the Constitution 'was prepared to confer on the Emperor absolute powers; […and] merely serves as a democratic façade for the benefit of world public opinion'.[125] Lt. General Aman Andom, as the then Chairman of the PMAC, had (regarding the overthrow of the Imperial regime) stated that

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[122] Moustafa and Ginsburg 'Introduction', *supra* note 25 at 2. Pereira, *supra* note 7.

[123] To diagnose the similarity of the PMAC regime to that of Pinochet's Government act of legitimising its authoritarianism through the law and the judicial process, see Hilbink, *supra* note 5, at 102-176.

[124] Proclamation No. 1/1974, *supra* note 82, preamble para 2.

[125] Id., preamble, para 3.

'we have removed those enemies of Eritrea; they are awaiting their judgement.'[126]

The PMAC, in its statement during the execution of 60 high ranking civil and military officials, had stated that 'other than those whose name is listed above to have been sentenced to death on political decisions, wrongdoers would be judged before the Special Courts-Martial in expeditious manner'.[127] Finally, the proclamation establishing the Special Courts-Martial stated its objective 'to expedite the administration of justice in an efficient, speedy and decisive manner'.[128]

Even though PMAC's statements criticized the previous regime in its acts of using the law as a means of achieving certain ends, which the PMAC considered illegitimate, the PMAC did the same in using the law and institutions as means of achieving its political ends it considered 'legitimate'. The judges of the Special Courts-Martial were army officers assigned by the PMAC.

Upon their release on 12 September 1982, PMAC representative had stated to the detainees that they were detained during the precarious period of the revolution and he related their release with the revolution's level of development. The certificate of release given to the detainees merely stated the reasons for their detention as: 'on suspicion they would impede the revolution'.[129] These are indications that the PMAC used the criminal justice for political expediency. The argument is further strengthened by the fact at a stage when the government felt its steady grip on power, it abolished the Special Court and merged it with the regular courts.

4.6 Selected cases of the Special Court

Substantial number of the cases brought to Special Court were related to breach of trust. A few cases of bribe appeared before the court and other cases included charges such as perjury,[130] political homicide,[131] crimes

[126] ENA 'Opposing the Motto 'Ethiopia First' Tantamount to Opposing the Ethiopian People' *Addis Zemen*, 11 October 1974 (in Amharic) at 1.

[127] 'Serious Political Decision', *supra* note 85.

[128] Preambles of Proc No 7/1974, *supra* note 2 and Proc No 8/1974, *supra* note 34. Proc No 21/1975, *supra* note 99.

[129] Aberra, *supra* note 74 at 172-173.

[130] *Special Prosecutor v Taddese Bekele Gashu and Achamyeleh Belaye Ferede* (8 August 1984, Crim File No 58/76, Special First Instance Court).

[131] *Special Prosecutor v Getachew Balacha* (12 October 1984, Crim App File No 55/76, Special Court of Appeal).

against the state,[132] and smuggling of money or property to foreign countries.[133] The evidence presented in breach of trust cases were almost exclusively financial audit reports and the auditors had also appeared as witnesses; the evidence in bribe cases were exclusively witnesses who claimed to be victims.

The review of various cases reveals that the court was fair in the evaluation of the facts and the evidence to establish guilt or otherwise. In all cases reviewed here, the Special Court evaluated evidence professionally; shortcomings, if any, may only be professional errors. The court routinely applied the principle 'doubt favours the accused' both in terms of fact and in terms of law. In *Haregewoin,*[134] the prosecution evidence was a financial audit report, and it was the basis of the charge. As the case progressed, the court had twice ordered further audit. All the three audit reports presented had different results. The Special First Instance Court acquitted the defendant on the ground that the evidence was doubtful. The Special Court of Appeals affirmed the decision of the lower court.[135] In *Lt. Tesfaye,*[136] the court held that the doubts in the facts and the evidence favours the accused.

Particularly impressive is the manner the Court dealt with confessions even better than the regular courts of the time. The Court, for various reasons, rejected confessions made as per articles 27(2) and 35 of the Criminal Procedure Code that shows the level of the independence of the court in the assessment of the facts. For instance, in *Abdi Mohammed, et al.*,[137] defendants had been charged with violation of article 2 of the Special Penal Code. Defendants were arrested in 1973 Ethiopian Calendar and their statements were recorded in 1975 EC. The Court reasoned that this confession was obtained after a long period and was not thus admissible.[138]

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[132] *Seid Dirar Hamid v Special Prosecutor* (26 November 1984, Crim App File No 65/76, Special Court of Appeal).

[133] *Asmerom Mengeste'ab v Special Prosecutor* (25 May 1984, Crim App File No 40/76, Special Court of Appeal).

[134] *Special Prosecutor v Haregewoin Menegesha* (8 December 1983, Crim App File No 38/75, Special Court of Appeal).

[135] Likewise, *Const. Getachew and Deputy Comm. Abbe* (*supra* note 109) defendants were acquitted because the evidence is doubtful.

[136] *Special Prosecutor v Let. Tesfaye Atilabachew* (21 March 1984, Crim App File No 29/75, Special First Instance Court).

[137] *Special Public Prosecutor v Abdi Mohammed Ibrahim, et al.* (29 November 1983, Crim File No 62/75, Special First Instance Court).

[138] Defendants were acquitted without they being required to enter their defence as per art 142 of the Criminal Procedure Code.

In *Const. Abebe and Berhe,*[139] defendants were charged with bribery under article 20(1)(a) of the Revised Special Penal Code. The principal evidence presented was confession made to the police as per articles 27(2) and 35. Defendants proved they were coerced while they were under police custody at the Central Investigation Department. The court held 'a confession retracted, unless corroborated was not admissible'.

Although the court had maintained formal positivist view of law, it attempted to be consistent in its application. It always demanded the public prosecutor to prove each element constituting the crime unless expressly provided for in the law otherwise. The provisions of article 12 of the Special Penal Code dealt with breach of trust and were amended by Proclamation No 96/1976.[140] The elements of the crime were (a) defendant is entrusted with government property; (b) such property is appropriated or alienated; and (c) it is appropriated or alienated to procure benefit for oneself or a third person.[141]

In *Mulugeta*,[142] the court held that the provision of article 12 was amended in order to expedite the judicial process. If the public prosecutor proves the first two elements of the crime, the third element would be presumed. In *Let. Goshime*,[143] the court held that the provisions of article 20(3) lowers the burden of the prosecutor; yet, the court indicated that this does not preclude the right of accused to defend (same as it had held in Crim File Nos 20/74 and 8/75). In both cases defendants were acquitted.

Often, defendants were acquitted after the hearing of prosecution evidence if the court believed that prosecution evidence was not sufficient to

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[139] *Special Prosecutor v Const. Abebe Kene'aa and Berhe Gebretatios* (17 March 1983, Crim File No 25/75, Special First Instance Court).

[140] Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976.
Art 12(1) prohibits acts 'with intent to obtain or to procure for himself or to a third person ill-gotten gain; appropriates, alienates, hides, or undervalues or pts to his own or another's use a State or public property entrusted to him or to which he has access by reason of is powers or duties or commits such other acts'.

[141] This is had become a common practice that it was held also in *Special Prosecutor v Deputy Commander Yihe'alem Mezgebu and Petty Officer Zenebe Shiferaw* (15 April 1983, Crim File No 24/75, Special First Instance Court); *Special Prosecutor v Oukube'ezgi Teklemariam* (29 November 1983, Crim File No 50/75, Special Frist Instance Court).

[142] *Special Prosecutor v Mulugeta Girma* (8 December 1982, Crim File No 15/74, Special First Instance Court).

[143] *Special Prosecutor v Lt. Goshime Wondimtegegn* (26 March 1983, Crim File No 7/75, Special First Instance Court).

enter conviction should there be no contrary evidence. This was clear in *Oukube'ezgi*,[144] whereby the court, after hearing the prosecution evidence, acquitted the defendant without requiring him to enter his defence.[145]

The last point relates to judicial political statements. The criminal hearing had two levels – for the determination of guilt and where defendant is found guilty, the sentencing hearing. Often, political matters were reserved for the sentencing hearing which appears to have reflected on the character of the convict, as in the case of *Mulugeta*[146] which involved a harsh sentence. In exceptional circumstances, where the matter is raised by the parties, the court would address it in the hearing on guilt as in the case of *Assefa*.[147] In these and similar other cases, the court made unfounded and clearly political statements supporting the then socialist political ideology either in convicting the accused or in sentencing the convict.

5. Federalisation of Courts

5.1 De facto federalisation of courts under the Transitional Government

Regional Courts- The other important restructuring of the court is the federalisation of the courts. After the EPRDF came to power there was regionalisation of the country, and the Transitional Government of Ethiopia ('TGE') was constituted of several armed factions.[148] The Members of the Council of the Transitional Government defined territories for election purposes.[149]

The Council established three special committees, one of which was 'Committee for the Execution of Election'.[150] In its reports to the Council, the Committee established a standard for demarcation of electoral districts

[144] *Supra* note 141.
[145] Also *see*, *Maj. Teshager* (*supra* note 109); *Asmerom* (*supra* note 138).
[146] *Supra* note 142.
[147] *Special Prosecutor v Assefa Aynalem Mehanzel* (7 June 1982, Crim File No 14/74, Special Frist Instance Court).
[148] The seats are distributed in proportion to the size of their army. *See* for instance, 'Reports of the Defence and Security Committee 11 April 1992' (Addis Ababa).
[149] *See* for instance, 'Minutes of the Sixteenth Regular Meeting of the Council of Representatives of the Transitional Government of Ethiopia, 3 October, 5 October, and 8 October 1991' (Addis Ababa).
[150] 'Minutes of the Fourth and Fifth Regular Meeting of the Council of Representatives of the Transitional Government of Ethiopia, 31 July – 01 August 1991' (Addis Ababa).

based on ethnic identity.[151] The several round of reports to the Council and the Council discussions[152] resulted in the establishment of the administrative structure as per *National/Regional Self-Governments Establishment Proclamation No 7/1992*.[153]

This Proclamation established 'National Self-Governments' (states in the present sense) with legislative, executive and judicial powers.[154] Each National Self-Government was required to have at least 7 core structures one of which was the judicial organ.[155] Such judicial organ had territorial jurisdiction within its National Regional Government.[156] Their material jurisdiction extended to matters not 'specifically assigned to the courts of the Central Transitional Government'.[157] The statute recognised that all judicial power in any Self-Government would 'exclusively be vested in courts'.[158] Such National Self-Government courts had one Superior Court and other lower courts, including Woreda court, established by the Council of such Self-Government.[159]

The Proclamation also provided for institutional and personal judicial independence of judges and courts, respectively, working language of the respective regional courts, and selection and appointment of judges, among others.[160] Such claim of independence of the courts was further strengthened by the *Independence of the Administration of Justice Proclamation No 23/1992*.

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[151] 'Minutes of the Seventh Regular Meeting of the Council of Representatives of the Transitional Government of Ethiopia, 8 August 1991' (Addis Ababa).

[152] 'Minutes of the Twelfth Regular Meeting of the Council of Representatives of the Transitional Government of Ethiopia, 22, 27, and 29 August 1991' (Addis Ababa); 'Minutes of the Fifteenth Regular Meeting of the Council of Representatives of the Transitional Government of Ethiopia 17, 19, September and 1 October 1991' (Addis Ababa).

[153] *See* particularly, 'Minutes of the Sixteenth Regular Meeting of the Council of Representatives of the Transitional Government of Ethiopia 03, 05 and 08 October 1991' (Addis Ababa).

[154] *National/Regional Self-Governments Establishment Proclamation No 7/1992* arts 3, and 2(3). The demarcation of borders of woredas as they existed prior to 1974. Ibid art 6(2)(a). The reason for picking the year 1974 is not stated in the Minutes.

[155] Id., art 8(1)(c).

[156] Id., art 9(1).

[157] Id., art 10(9).

[158] Id., art 23.

[159] Id., arts 24, 34(3), 50.

[160] Id., arts 25 -30.

Central Government Courts Constituting a Judiciary– Based on the *de facto* defined federal structure, the Central Government Courts were established by *Central Government Courts Establishment Proclamation No 40/1993*. The statute established the Central Supreme Court, the Central High Court and the Central First Instance Court of the TGE,[161] and provided for both the material and local jurisdiction of the courts.[162]

The Central Supreme Court was given first instance jurisdiction on 'suits between two or more National/Regional Self-Governments'.[163] Central Courts applied the Transitional Period Charter, International Treaties and laws of the Central Government.[164] The bill of rights during the transitional period was the Universal Declaration of Human Rights.[165] Where the subject in dispute involved National/Regional Self-Government law, such dispute was determined on the basis of such law, 'provided such laws shall not apply where they are inconsistent with the Charter, International Treaties or laws of the Central Government'.[166]

The Central Courts had the power to invalidate Central Government or National/Regional Self-Government laws, and the Central Supreme Court was given the power of certification. Judgements of the High Court were subject to review by the Central Supreme Court in its appellate jurisdiction.[167] However, where a 'National/Regional Supreme Court renders or confirms life imprisonment or capital punishment' it would be subject to review by the Central Supreme Court on appeal.[168]

The Central Government Courts Establishment Proclamation, had provided that matters 'relat[ing] to a provision of a law with regard to which there is a fundamental difference in interpretation between divisions of the Central Supreme Court', such would be heard by a division 'constituted of by no less than five judges'.[169] Such hearing was presided by the President or Vice-President, and the decision was 'binding.'[170]

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[161] Id., art 3
[162] Id., art 5 – 7, 20, 21.
[163] Id., art 10(1).
[164] Id., art 8.
[165] *Transitional Period Charter*, art 1.
[166] *Central Government Courts Establishment Proclamation No 40/1993* ('Proc No 40/1993') art 8(2).
[167] Id., art 11(3), (5), and (6).
[168] Id., art 11(4).
[169] Id., arts 24 (3), and (2)(c), respectively.
[170] Id., art 24(4).

5.2 Federal courts under the FDRE Constitution

At the end of the transitional period, the Constitution of the Federal Democratic Republic of Ethiopia was adopted. The FDRE Constitution had envisaged an 'independent judiciary' entrusted with 'all judicial power'.[171] The Constitution created a Federal Supreme Court, Federal High Court and Federal First Instance Court. The Federal Supreme Court was established by the Constitution and the establishment of the Federal High and First Instance Courts was left to the decision of the House of Peoples' Representatives.[172] The Constitution also created State Supreme Courts, State High Courts and Woreda Courts, the establishment and jurisdiction of which were left to the respective States' Councils.[173]

The subsequent amendments to the Courts' Proclamation relate to the establishment of Federal High Courts in certain states,[174] the hearing of certain cases by a single judge,[175] and the reintroduction of the binding interpretative decision of the Cassation Division of Federal Supreme Court constituted by no less than five judges.[176]

However, the Federal Supreme Court was not adequately empowered. The courts in general have been timid both individually and institutionally to address criminal matters. The court has never determined its jurisdiction based on the Constitution; and it has been accepting whatever is determined by the lawmaker. Constitutional interpretation, even for the purpose of application, is fully avoided based on the justification that it is a power reserved to the House of Federation.[177] Thus, constitutional provisions are rarely invoked and addressed before regular courts.

The court considers ordinary ministerial papers as part of criminal rules and at times modifying constitutional provisions.[178] Rules are interpreted in a manner appeasing the executive beyond the call of duty. Administrative

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[171] *Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995* ('FDRE Const') art 78 and 79(1), respectively.

[172] Id., art 78(2).

[173] Id., art 78(3).

[174] *Federal High Court Establishment Proclamation No 322/2003*.

[175] *Federal Courts (Amendment) Proclamation No 138/1998*.

[176] Proc No 454/2005 (*supra* note 15).

[177] Getachew Assefa (2010), 'All About Words: Discovering the Intention of Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' 24 *J Eth L*. *See* also, Sisay Alemahu Yeshanew (2008), 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia'8 *AHRLJ* .

[178] Simeneh, 'Methods', *supra* note 37, at 104 -107.

decisions regarding criminal matters that negatively impacted the individual, such as the registrars' refusal to open dossier as gatekeepers against the judge, unfairly expediting prosecution cases, such as giving preference to police and prosecutors' demands, and other matters require in-depth research.[179]

The party affiliation of judges, the strong executive, and other factors have been negatively impacting the performance of the court.[180] Special prosecution agencies have also been adopted, such as the Federal Ethics and Anti-Corruption Commission and the Ethiopian Customs and Revenue Authority,[181] which overwhelmed the court, always demanding to be treated differently, the prosecutors acting as though their case is more important than others'. The special influence of the intelligence and security forces which at times are reportedly influencing the process or outcomes, had a crippling effect on the court.[182]

The net effect of the lack of independence of the judiciary and the act of serving an authoritarian government beyond the call of duty, violates the commonly understood rules of interpretation thereby creating a sub-culture of subservient behaviour.[183] Various decisions of the Cassation Division have been mere assertions very much in want of reasoning and explanation on the underlying theories of interpretation or any higher principle, such as justice, rule of law, the principles of coherence, and unity of legal system.[184]

The Federal High Court has been the forum for the prosecution and conviction of (a suspected) opposition. The waves of prosecution and the label under which such individuals are prosecuted differ.[185] In the following section, however, only decisions of the Cassation Division are discussed.

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[179] The author is recounting personal experience.

[180] Assefa Fiseha (2015), 'Legislative-Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform' in Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye (eds), *Constitution-Building in Africa* (Nomos) 248 -262.

[181] They are all brought under the Federal Attorney General. *Federal Attorney General Establishment Proclamation No 943/2016*, art 22.

[182] There were two documentaries broadcast on national television, after the TPLF led EPRDF was replaced by other members in May 2018, regarding violation of human rights by security forces which the court could not address.

[183] Simeneh 'Higher Norms', *supra* note 5.

[184] Ibid.

[185] At one moment there was a high rate of prosecution against All Amhara People's Organisation (AAPO) leadership; at another moment there was prosecution of alleged members of Oromo Liberation Front (OLF); and recently there were

5.3 Selected cases of the Cassation Division

Jurisdiction of a cassation court in the present sense is recognised since 1987 to correct fundamental error of law[186] and such decision relating to legal interpretation is binding on lower courts since 1993.[187] The cassation jurisdiction of the Federal Supreme Court is constitutionally vested. The binding nature of the interpretative decisions are re-established in later proclamations.

The interpretative power of the Cassation Division does not include changing the law, either in wording or spirit, but to interpret the law in a manner that shades light on its application. Such may be made by elaborating the underlying theories or principles where such provision is vague or subject to potentially different interpretation and application. This is the core responsibility of the Cassation Division. Those decisions discussed in this section, however, significantly deviate from the clear provision of the law, and they rather negatively impact individual rights thereby apparently favouring the state's case.

5.3.1 Binding interpretative decisions relating to bail

Bail is a constitutional right although its scope is frequently changed and arguable. The discussion is made based on the provisions of article 75 of the Criminal Procedure Code which provides that '[w]here bail has been refused by a court, the accused may apply in writing within twenty days against such refusal to the court having appellate jurisdiction.' The contents of this provision are sufficiently clear. The condition of appeal against a decision on bail is when it is denied, and it is the accused that may lodge such appeal. However, the Cassation Division has rendered binding interpretative decisions on bail matters deviating from the clear provisions of the law thereby nullifying the protection that is accorded to the accused.

In *Habtamu Deju*[188] petitioner was charged with telecom fraud, and the Federal High Court granted him bail. The Public Prosecutor appealed to the Federal Supreme Court which reversed the decision of the High Court. The cassation petition was against such decision of the Supreme Court on the ground that the public prosecutor cannot appeal against the granting of bail.

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prosecution for alleged membership of the Patriotic Front, or as Islamic Fundamentalism.

[186] Proc No 9/1987, *supra* note 29, preamble, para 4, art 4(4).

[187] Proc No 40/1993, *supra* note 166, art 24(4). Proc No 195/1962, *supra* note 67, art 15.

[188] *Habtamu Deju v Federal Public Prosecutor* (17 July 2017, Cass File 110969 in 18 Decisions of the Cassation Division of the Federal Supreme Court).

The Cassation Division held that even though the provision is coined in a manner that an accused who is denied bail may appeal against such decision, it should not be read as *a contrario* prohibition of appeal against granting of bail. The Cassation Division rendered a similar decision in *Hassen Abdal*.[189]

One can see that the court was very much influenced by the politics of the day. The *Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 236/2001* did not prohibit bail. However, it was soon amended, and the law provided that a person suspected of 'a corruption offence shall not be released on bail.'[190] When it was finally revised, the *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005,* article 5(1) provided that both the public prosecutor and the suspect have 'the right to appeal' against a decision on bail.

Both cases discussed above are not corruption cases, and they involve charges for violation of special penal legislation. The provisions governing corruption cases have impact on other crimes when they are misread as expression of 'state interest' regarding bail in criminal matters.

The other aspect of bail in corruption offences relates to the provisions of article 4(1) of the Special Procedure. It provides that a person arrested or 'charged with a corruption offence punishable […with] *more than 10 years* may not be released on bail' [emphasis added]. The obvious understanding of this provision is that the legal minimum sentence for an accused to be denied bail should be ten years imprisonment.

In *Lalu and Kemal,*[191] respondents were charged with aggravated breach of trust in violation of article 676 of the Criminal Code which imposes 5 to 25 years of rigorous imprisonment. The Zonal (High) Court denied them bail. On appeal, the State Supreme Court granted respondents bail which was affirmed by the State Supreme Court Cassation Division. The courts held that the legal minimum sentence that justifies denial of release on bail is 10 years imprisonment while the crime defendants were charged with is punishable with 5 years' imprisonment.

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[189] *Hassen Abdal v Federal Public Prosecutor* (2 November 2015, Cass File No 112725, in 19 Decisions of the Cassation Division of the Federal Supreme Court).

[190] *Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No 239/2001*, art 2(2).

[191] *SNNRS Ethics and Anti-Corruption Commission v Lalu Seid Akelta and Kemal Hussien Dalbo* (4 August 2011, Cass File No 63344, in 12 Decisions of the Cassation Division of the Federal Supreme Court).

The case was brought to the Federal Supreme Court Cassation Division which made a binding interpretative decision on the provisions of article 4(1). According the Cassation Division's decision, there are three things to be taken into consideration. The *first* consideration was related to the special nature of the procedure and the intended objective of the lawmaker. In this regard, the court held that this element is stated in the preamble of the statute. The *second* and *third* considerations were, respectively, the *exposé* des *motifs* (*Hateta Zemikniyat*) for the statute, and interpreting the rule in a manner to make it effective.

It finally held that the interpretation of the State Courts by considering the legal minimum punishment would nullify such intended objective. It held that the matter relating to bail should be determined by taking the maximum punishment of the crime the accused is charged with. Because several of those crimes are punishable with imprisonment between 7 and 15 years[192] unless aggravated, this interpretation makes the provisions of article 4(1) unhelpful. In all these cases, the court never referred to the provisions of the Constitution while the subject clearly involves constitutional rights.

5.3.2 Interpretative decisions relating to objection to charge

Objection to charge is an important procedure helping the court sort out legal matters at early stage of the process. Because objections are based on legal issues, often they could be resolved merely based on the records of the court. In *Teoum,*[193] the petitioner was charged under article 408(2) of the Criminal Code for taking bribe Birr 2,000 while being manager of a company, not functional then. He raised objection that the conduct is covered under article 408(1). Based on such objection, the Federal High Court ruled that the benefit obtained, the harm caused, and the motive are not grave; thus, the charge should be drawn up under article 408(1).

Contrary to article 184(b) of the Criminal Procedure Code, the Prosecutor appealed against such ruling and the Federal Supreme Court held that those matters may be determined only after hearing the prosecution evidence. Therefore, the Court was required to proceed with the case maintaining the charge as drawn up by the prosecutor. The defendant had submitted cassation petition to the Federal Supreme Court Cassation Division, unfortunately not on the procedural matters but on the substance of the case.

[192] Such provisions are maintained in the *Corruption Crimes Proclamation No 881/2015*.

[193] *Teoum Tekea Gebrai v FEACC (Dire Dawa)* (27 January 2015, Cass File No 103452 in 17 Decisions of the Cassation Division of the Federal Supreme Court).

The Cassation Division affirmed the decision of the Supreme Court, that those matters may be determined only after hearing prosecution evidence.

Likewise, in *Addis,*[194] petitioner was charged with aggravated breach of trust contrary to 676(1) of the Criminal Code which is punishable with 5 to 15 years rigorous imprisonment. Defendant argued that this legal provision is replaced by article 31(1) of the *Corruption Crimes Proclamation No 881/2015*, which embodies a punishment range from with 3 to 7 years of imprisonment.[195] Obviously, seen in light of article 4 of the special procedure, this newly adopted provision makes the offence bailable as it is punishable with less than 10 years imprisonment. The Federal High Court then granted bail to the defendant.

The Public prosecutor appealed against the decision of the High Court. The Supreme Court held that article 37 of the Corruption Crimes Proclamation provides 'corruption cases that are committed before effective date of this Proclamation shall be finalised in accordance with the provisions of the Criminal Code.' The proceedings were progressing under article 676(1) as stated in the charge. The Supreme Court held that these provisions do not allow petitioner to be released on bail. Determination of whether the conduct is covered under article 31(1) of the new proclamation would be made only after evidence is heard and the facts are established. The Cassation Division affirmed the decision of the Supreme Court.

The issues raised in both cases relates to law, not facts. However, they are corruption cases prosecuted by the Federal Ethics and Anti-Corruption Commission. By indirectly denying bail to petitioners, the court met the demands of the public prosecutor. However, those decisions of the Cassation Division muted the significance of objections to charges for good.

5.3.3 Interpretative decisions relating to administrative decisions' 'finality clause'

The FDRE Constitution provides that '[j]udicial Powers, both at Federal and State levels, are vested in the courts.'[196] It further provides that '[e]veryone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.'[197] There is no any exception to these rules. The explanatory note to

[194] *Addis Walelign Belay v FEAAC* (16 November 2015, Cass File No 117383 in 19 Decisions of the Cassation Division of the Federal Supreme Court).
[195] Further, art 36(1) expressly repeals the provisions of the Crim. C., art 676.
[196] Id., art 79(1).
[197] Id., art 37(1).

the draft constitution states that disputes may be resolved both by the court and administrative organs which would ultimately come to court.[198] Stated otherwise, this judicial power cannot be limited by the lawmaker nor can such judicial power be given to a non-judicial organ to the exclusion of the regular courts.

There are instances where the lawmaker establishes administrative tribunals or boards for review of administrative decisions. For instance, the Social Security Authority is given the power to 'implement social security laws, regulations and directives', among others.[199] This involves administrative decision-making and the statute has established an appeal tribunal to review and give a 'final decision'.[200] The Federal Supreme Court Cassation Division has abdicated its responsibilities in some cases, by holding that the decision is 'final', while in others by holding that if such judicial power is given to another organ, courts are precluded from entertaining such action.

In *Birhanu and Kebede*,[201] the respondents requested the Federal First Instance Court to review an administrative decision, and the court rejected the pleading for want of jurisdiction. The Federal High Court affirmed the decision. The Cassation Division of the Federal Supreme Court held that the power to decide on such matters is reserved to the Social Security Authority Appellate Tribunal as per Proclamation No 38/1996 article 11(4). The Court further held that as stipulated under article 4 of the Civil Procedure Code, if such judicial power is given to another organ, courts are barred by such laws and, thus, they do not have jurisdiction.

The contents of article 4 of the Civil Procedure Code appear to have already been established; so is the finality clause of statutes. The lawmaker has revised the decisions of the Cassation Division by at least allowing appeal on matters of law.[202] However, the Cassation Division further

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[198] 'Brief Explanatory Memorandum to the Draft Constitution Certified by TGE Council of Representatives 28 October 1994' (in Amharic) 94- 95.

[199] *Social Security Authority Establishment Proclamation No 38/1996* art 5(1).

[200] Id., art 11(1).

[201] *Social Security Authority v Birhanu Hiruy and Kebede Gebremaryam* (26 December 2005, Cass File No 18342, Federal Supreme Court Cassation Division, unpublished).

[202] *Public Servants Pension Proclamation No 714/2011*, article 56(4); *Aberra Kidane v Gamo Goffa Zone Abra Minch Social Security Branch Office* (19 October 2012, Cass File No 72928 in 15 Decisions of the Cassation Division of the Federal Supreme Court); *Public Servants Social Security Agency v Aberra Boken, et al.* (02 November 2012, Cass File No 80964, 15 Decisions of the Cassation Division of the Federal Supreme Court).

recognised the quasi-judicial power of Privatisation Agency Board in *Spouse and Heirs of Wasihun Mekonnen*[203] and *Heirs of Mohammed Hussien.*[204]

In *Woldai, et al.,*[205] petitioners were employees of the Ethiopian Revenue and Customs Authority. They petitioned the Civil Service Commission, protesting the termination of their employment contract; the Commission rejected their appeal. The decision of the Commission was based on Council of Ministers Regulations No 155, article 37(1) which provides that the Director General may dismiss any employee whom he suspects of corruption without following the regular disciplinary process. Sub-article (2) further provides that '[a]ny employee of the Authority, who has been dismissed from duty by the General Director, may not have the right to reinstatement by the decision of any judicial body.' This decision of the Commission was affirmed by the Federal Supreme Court in its appellate division. This cassation petition was against these decisions.

The Cassation Division, invoking both the provisions of article 4 of the Civil Procedure Code and article 37(1) of Regulations No 155, held that it is not 'justiciable matter'; it can at best be said exercise of administrative prerogative. Nine years later, the Council of Constitutional Inquiry in its 13 February 2019 session held that this provision of the Regulations is unconstitutional. The difference does not lie in the content of the law, but is clearly attributable to change in political power.

6. Developments Relative to Federal Courts Proclamation No 1234/2021

As part of the justice reform effort, various proclamations relating to courts are replaced by *Federal Courts Proclamation No 1234/2021*. The new statute reaffirms three fundamental constitutional assumptions regarding the role of courts: (i) judicial power is vested in the courts; (ii) everyone has a right to bring a justiciable matter to court and obtain a judgment; and (iii)

[203] *Spouse and Heirs of Wasihun Mekonnen v Government Houses Agency* (2 November 2012, Cass File No 43511 in 14 Decisions of the Cassation Division of the Federal Supreme Court).

[204] *Heirs of Mohammed Hussien v Government Houses Agency and Haileyesus Gebremedihin* (4 February 2011, Cass File No 37964 in 12 Decisions of the Cassation Division of the Federal Supreme Court).

[205] *Woldai Zeru, et al. v Ethiopian Customs and Revenue Authority* (24 May 2011, Cass File No 51790 in 12 Decisions of the Cassation Division of the Federal Supreme Court).

courts have inimitable role in enforcing the rules of law and protection of human and democratic rights.[206]

The statute, further contains two substantive provisions; *first*, article 3(1)(a) provides that Federal Courts have jurisdiction on 'cases arising under the Constitution.' Article 6(1)(a) further provides that courts settle cases before them on the basis of the Constitution, among others. *Second*, article 11(3) provides that 'the Federal High Court may render decisions [] to protect justiciable human rights.'[207] It is further provided under article 3(3) that in rendering judgments, the courts 'shall interpret and observe the provision of the Constitution pursuant to articles 9(2) and 13(1) of the Constitution.'[208] Based on these provisions the Federal High Court has established a division to deal with constitutional disputes.

Some might want to believe this division of the High Court, in its endeavour to resolve constitutional disputes, would engage in 'constitutional interpretation'. However, these provisions of the Federal Courts Proclamation do not change the *status quo* for the following reasons. *First*, the statute cannot grant jurisdiction to courts more than what is vested in them by the Constitution. What the Constitution grants to the courts is constitutional disputes short of issues that challenge the constitutionality of laws, which is reserved to the House of Federation and the Council of Constitutional Inquiry.[209] To that extent, the courts cannot hold the lawmaker accountable when it exceeds its constitutional power.

Second, consequent to the above argument, the concepts and phrases 'constitutional dispute' and 'constitutional interpretation' have different connotation in the Constitution and the Courts Proclamation. For the purpose of defining jurisdiction of the Council of Constitutional Inquiry, the Constitution uses the phrase 'constitutional dispute' in reference to petitions challenging constitutionality of a statute; and 'constitutional interpretation' is used in reference to decisions nullifying a sub-constitutional norm found to have contradicted the Constitution.[210] The Courts Proclamation does not use these phrases. However, conceptually, constitutional disputes in the Proclamation seem to refer to claims based on constitutionally recognised

[206] *Federal Courts Proclamation No 1234/2021*, preamble, paras 1- 3.
[207] It also includes public interest litigation, art 11(4).
[208] Those provisions deal with the obligation state organs to respect and enforce the Constitution.
[209] FDRE Const., arts 62(1) and 84(1), (2).
[210] Id., arts 84(2), (3), respectively.

rights, and constitutional interpretation appears to refer to giving content to those constitutional provisions.[211]

Third, the fact that such jurisdiction emanates from the provisions of the Courts Proclamation (which appears to be subject to change by the lawmaker) does not change the predicaments of the court. It should be noted that the Court is not granted the power to nullify any statute or provision of any sub-constitutional norm; rather it is merely encouraged to utilize constitutional provisions to settle disputes based on the provisions of the Constitution.

7. Conclusion and the Way Forward

The judiciary is the third branch of a state holding the other two branches accountable for their actions. Ethiopia's courts are mostly established and re-established by sub-constitutional norms. Even when it is established by the respective constitutions, the court is not given such power to hold the other branches accountable. The power and jurisdiction of courts is redefined by the sub-constitutional norms. The court is not challenging the sub-constitutional norms that define (restrict) its powers. The court does not want to appear addressing political issues either. It desires to present itself as a 'non-political' institution dealing purely with legal matters. The court always complies with what 'the law' says.

Although the instrumental nature of the court is clearly seen in the PMAC period when the Special Courts-Martial was created, the attempt was already there in the imperial period, by controlling the court from the top at *Zufan Chilot*. Even when the court is created as an independent institution under the FDRE Constitution, its jurisdictions were defined by sub-constitutional rules. Thus, the Federal Supreme Court in its binding interpretative decision, merely declares its judgement based on jurisdictions given to it and rules made by the lawmaker even when they appear to contradict the Constitution. Even if the new Courts Proclamation makes reference to 'constitutional disputes' and 'constitutional interpretation', it does not change the circumstances of the courts.

The way forward, evokes the concerns in Lisa Hilbink's observiations highlighted in Section 2 regarding the *regime related* and *attitudinal* factors that render courts mere extensions of the executive. The required *attitudinal* reform hinges upon the level of competence, commitment and integrity of

[211] Courts Proclamation, arts 6(1)(a) and 11(3), respectively.

judges so that they can focus on rule of law far beyond the black letter reading of the laws.

With regard to *regime related* hegemony, prospective Ethiopian laws should go beyond formal recognition of judicial independence and create the objective conditions thereof. This, *inter alia*, requires (i) constitutional amendment to entrust courts with the power of interpreting the Constitution, and (ii) entrench judicial review of administrative decisions by enhancing the commendable beginning that is made under recent law reforms. [212]

Addressing the challenges of hegemony against the judiciary thereby effectively ensuring judicial independence thus require the amendment of the Constitution in a manner that puts the court at par with the executive and the legislator to hold both accountable to their constitutional limits. Until such time the constitution is amended, the chairperson and the deputy chairperson of the Council of Constitutional Inquiry are the *de facto* president and the vice-president of the Federal Supreme Court. The Council has been advising the House of Federation in a manner that would not help the courts. The recent example can be the Witness Protection Proclamation, an obvious unconstitutional provision that is maintained as constitutional by the House of Federation.[213] Therefore, in interpreting the Constitution, a path that would encourage the court to indulge more into constitutional interpretation is indispensable. ■

[212] *See* for example, the fourth section titled 'Judicial review of directive and administrative decisions' (Articles 48-57) of the *Federal Administrative Procedure Proclamation No. 1183/2020*.

[213] *Federal Public Prosecutor v Getachew Assefa Aberra, et al* (23 defendants) (Federal High Court, Crim F No 238040).

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Critical Gaps in Land Governance with Respect to the Land Registration System in Ethiopia

Melkamu Belachew Moges ♣

Abstract

Land registration is a useful land information system practised in almost all modern nations. It is also true that many land registration systems fail due to a number of reasons. This article investigates whether the land registration system in Ethiopia has given due attention to sound land governance components which are critical for the success of any land registration system. Doctrinal and content analysis of legislative documents of Ethiopia is applied to this end. Desk review of relevant secondary material was also used. The article discusses the general role of good governance in such systems and shows the benefits of a land registration system that is exercised under good governance. A conceptual framework is used by which the land registration governance system of Ethiopia is weighed. I argue that the land registration system of Ethiopia has major gaps of land governance. Good land governance in land registration of the country could be enhanced by the provision of adequate legislative and policy framework, effective land registration institutional organs and efficient processes for the enforcement of the system.

Key terms:

Land registration · Land governance · Good governance · Ethiopia

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Contents

Abstract

1. Introduction

2. The Critical Role of Good Land Governance in Land Administration
   2.1 Components of good land governance
   2.2 The relationship between land governance and land administration systems
   2.3 Potential benefits of land registration systems under good governance

3. Evaluating Land Registration Governance in Ethiopia: Towards a Conceptual Framework

4. Governance of the Land Registration System in Ethiopia
   4.1 Legislative framework for the land registration system
   4.2 Practical enforcement of the land registration system
      4.2.1 Setting land registration in motion
      4.2.2 System quality assurance and compliance mechanisms

5. Salient Land Governance Gaps in Ethiopia's Land Registration System

6. Concluding Remarks

1. Introduction

Generally, in Ethiopia, like much of Africa, land administration in general and land registration in particular is based on rudimentary and informal practices rather than formal institutions. However, Ethiopia has undertaken a massive systematic rural land certification (a variant of land registration) since 1998 successfully covering a large part of the country which exceeds 50 percent.[1] More than 25 million parcels have been registered in the rural

Frequenly used Acronyms

ANRS	Amhara National Regional State
ARLAU P	Amhara (Regional State Revised) Rural Land Administration and Use Determination Proclamation
FRLAUP	(Federal) Rural Land Administration and Land Use Proclamation
FULRP	(Federal) Urban Landholding Registration Proclamation
LGAF	Land Governance Assessment Framework
SNNPR	Southern Nations, Nationalities, and Peoples' Region

[1] Frank Byamugisha (2016), *Transforming Africa's Agriculture Securing Land Tenure and Easing Access to Land, Background Paper for African Transformation Report 16* (Joint research between African Center for Economic Transformation (ACET) and Japan International Cooperation Agency Research institute (JICA-RI), p. 1.

areas of the country at an impressive scale, pace, and cost-effectiveness. The issuance of land certificates began in the region of Tigray in 1998, followed by ANRS in 2002[2], and Oromia and the Southern Nations Nationalities and Peoples Region in subsequent years.[3] Research shows that a 'Primary Book of Land Holding' was issued to almost all land holders in these regions under the first phase of land certification program.[4]

Following this, the Government has been in the process of undertaking the second level certification which involves extensive surveying, boundary demarcation and, potentially, the use of modern ICT technology. This would result in the issuance of "Secondary Book of Land Holding". The establishment of an efficient land administration system was one of the targets in the First Growth and Transformation Plan (GTP I)[5] and subsequent related strategies. Pilot second-level land certification process was implemented in Tigray, Amhara, Oromia and Southern Nations, Nationalities, and Peoples' Region ('SNNP') from 2005 to 2013.[6]

Concerning the coverage of the second level certificates in Ethiopia, Gizachew *et al* indicated that 27% of the surveyed and adjudicated parcels

[2] Felix M. Muchomba (2017), 'Women's Land Tenure Security and Household Human Capital: Evidence from Ethiopia's Land Certification', *World Dev.,* Vol. 98, pp. 310, 313.

[3] Id., p. 313; Berhanu Adenew and Fayera Abdi (2005), *Land Registration in Amhara Region, Ethiopia* (Research Report 3, Central Research Department of the UK's Department for International Development), p.10.

[4] Lauren Persha, Adi Greif and Heather Huntington (2017), *Assessing the Impact of Second-Level Land Certification in Ethiopia* (Paper prepared for presentation at the "2017 World Bank Conference on Land and Poverty" The World Bank –Washington DC, March 20-24, 2017), p. 5; Muchomba, *supra* note 2, p. 313 (citations omitted). In Ethiopia the land certification has been undertaken in two phases. The first phase is called Primary Book of Holding or 1st level certification that involved the demarcation of parcels and issuance of holding certificates based on customary surveying methods and less modern registration system without maps. The second phase is called Secondary Book of Holding or 2nd level certification that involves more advanced surveying and registration methods and certificates of holding. *See* Shewakena Aytenfisu Abab (2007), *An Assessment of Rural Land Registration and Land Information System in Amhara Region, Ethiopia: a Land Administration Perspective* (unpublished MSc thesis, the Royal Institute of Technology, Department of Real estate Planning and Land Law, Sweden), pp. 29−31.

[5] Ministry of Finance and Economic Development (MOFED), (2010). *The Federal Democratic Republic of Ethiopia Growth and Transformation Plan (GTP)* 2010/11–2014/15, Addis Ababa.

[6] Persha, Greif and Huntington, *supra* note 4, p. 3.

were provided with second level certificates by 2015.[7] It can be observed that these attempts are meant to introduce relatively modern form of land management system with improved tenure security in the country through creating improved institutional and legislative mechanism for the system. In other words, the aim is to enhance a formal land administration system.

With respect to urban lands too, Ethiopia has included its aspiration of urban land registration development in the urban land development and management policy and its strategic plans. For instance, within the framework of GTP II (2016–2020), adjudication and registration of 1.6 million and 1.2 million landholdings respectively across 91 cities were planned in five years.[8] Similarly, it is targeted to increase the performance of land registration services in the urban centers from 3% to 60% from 2021 to 2030.[9]

These policies aspire to introduce an efficient and well-functioning cadastral system with the view to make urban land a driving force for political, social, economic, and environmental transformation.[10] The Urban Landholding Registration Proclamation together with a set of regulations, directives, and manuals, have been adopted to govern the adjudication and registration of urban land held in line with the urban lands lease law.[11] The overall objective of the urban cadastral system is to accelerate the socio-economic and environmental development of urban centers by ensuring land holders' security of holding and recognition of title to immovable property.[12]

A land registration system as a tool for formal property system can yield positive fruits to the society only if it is carried out under appropriate conditions.[13] Fulfillment of good (land) governance conditions is one of the

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[7] Gizachew Abebe, Tigistu Gebremeskel and Rohan Bennett (2015), *Implementation Challenges of the Rural Land Administration System in Ethiopia: Issues for Land Certification and the Information System* (Paper prepared for presentation at the 2015 World Bank Conference on Land and Poverty, Washington DC, March 23–27, 2015), p.16.

[8] Solomon Dargie Chekole, Walter Timo de Vries and Gebeyehu Belay Shibeshi (2020), 'An Evaluation Framework for Urban Cadastral System Policy in Ethiopia', *Land*, Vol. 9, Issue 60, p.8.

[9] Federal Democratic Republic of Ethiopia Planning and Development Commission, Ten year's Development Plan a Pathway to Prosperity 2021–2030, p. 48.

[10] Solomon, *supra* note 8.

[11] Urban Landholding Registration Proclamation, 2014, Proc. No. 818/2014, *Fed. Neg. Gaz*., Year 20, No.25 (hereinafter 'FULRP').

[12] Solomon, *Supra* note 8, p.8.

[13] Melkamu Belachew (2015), *Modelling Legislation for a Sustainable Cadastral System,* Ch. 4 (PhD thesis, University of Melbourne, Melbourne Law School**),** pp. 78-

essential requirements for the success of a cadastral system.[14] This article examines the gaps in the governance of land registration system put in place in Ethiopia. This will be carried out based on the conceptual framework formulated based on some universally accepted features of good land governance and some specific indicators of good land governance from the Land Governance Assessment Framework ('LGAF').[15]

2. The Critical Role of Good Land Governance in Land Administration

2.1 Components of good land governance

The question of addressing good governance within land administration is increasingly becoming key in the land sector among development professionals, policy makers and academics.[16] Good governance is an aspect of governance and government. "Government" is generally considered to be the exercise of control, power, or authority over a state in which land or territory is a central component.[17] Governance is defined as 'the set of traditions and institutions by which authority in a country is exercised' which includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement policies (including land policy); and the respect of citizens and the state.[18]

A more widely applicable definition is that governance is the process of decision-making and the process by which decisions are implemented and power is exercised by governments in managing a country's social,

102; *See* also: Klaus Deininger & Hans Binswanger (1999), 'The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges', *The World Bank Research Observer*, No. 34, pp. 258–259; Joseph Blocher (2006), 'Building on Custom: Land Tenure Policy and Economic Development in Ghana', *Yale Human Rights & Development Law Journal,* Vol.9, pp. 166, 176.

[14] *See* Melkamu, *supra* note 13, pp. 78-102.

[15] *See* generally Klaus Deininger, Harris Selod, and Anthony Burns (2012), The Land Governance Assessment Framework Identifying and Monitoring Good Practice in the Land Sector).

[16] Tony Burns and Kate Dalrymple (2008), *Conceptual Framework for Governance in Land Administration* (FIG Working Week in Stockholm, Sweden).

[17] Keith C. Bell (2007), *Good Governance in Land Administration* (FIG Working Week Hong Kong, China SAR, May 13-17, 2007), p.7.

[18] Burns & Darlymple, *supra* note 16, p.4 (citation omitted).

economic, and spatial resources.[19] Governance involves an analysis of both formal and informal actors involved in decision-making and the formal and informal structures that have been set in place to arrive at and implement the decision.[20]

It is even more difficult to define 'good governance'.[21] Further, good or bad land governance is not an absolute condition; rather, there is a continuum between the two.[22] Governance is qualified as 'good' when it adheres to certain interdependent principles.[23] Some of the commonly identified key principles of good governance for land administration are efficiency; effectiveness; transparency, consistency and predictability; integrity and accountability; subsidiarity, autonomy and depoliticisation; civic engagement and public participation; equity, fairness and impartiality; and legal security and rule of law.[24]

The principle of *efficiency* implies that the procedure to register property transactions should be short and simple. The principle of *effectiveness* stresses the importance of capacity building and financial provision, as well as sound general socio-political conditions, such as political will and commitment, the rule of law, regulatory quality and political stability. The principles of *transparency*, *consistency* and *predictability* refer to the transparent recruitment of staff and transparent service standards and costs of services which will contribute to increased efficiency, accountability, fairness and confidence in agency integrity.

The principles of *integrity* and *accountability* dictate the application of uniform service standards, codes of conduct for staff (as well as mechanisms of sanction) and incentives such as awards. The principles of *subsidiarity*, *autonomy* and *depoliticisation* refer to increasing the autonomy of local land administration while introducing checks and balances at the national level to improve services and fight corruption. The principles of *civic engagement*

[19] Ibid.
[20] Id., p. 5.
[21] Id., p.4.
[22] UN–Habitat (2016), *Fit-for-Purpose Land Administration Guiding Principles for Country Implementation*, Report 2, p.65.
[23] Simon Hull &Jennifer Whittal (2013) 'Good e-Governance and Cadastral Innovation: In Pursuit of a Definition of e-Cadastral Systems', *South African Journal of Geomatics*, Vol. 2, No. 4, p. 345 (citations omitted).
[24] W Zakout, B Wehrmann and M Torhonen (2007), *Good Governance in Land Administration: Principles and Good Practices* (World Bank and FAO,) cited in Bell, *supra note* 17, p. 12.

and *public participation* imply improved access to information which would help achieve client orientation and responsiveness in land administration.

The principles of *equity*, *fairness* and *impartiality* require that all people should have the same access to service and receive the same service standards without any distinction based on political, economic status or any other factor. And finally, the principles of *legal security* and *rule of law* refer to a consistent, coherent, and legitimate legal framework and institutions as well as a fair and transparent judiciary to protect property rights. Those in power must have got the right to govern, have assumed their power through democratic processes, and can be replaced if the citizens are dissatisfied with them.[25]

Land governance is a system of governance with respect to just one basic aspect of socio–economic life, i.e., land. 'Land governance cannot be separated from governance of other sectors'.[26] In particular, land governance can be loosely defined as:

> the range of political, organizational and administrative processes through which communities articulate their interests, their input is absorbed, decisions are made and implemented, and decision makers are held accountable in the administration, development and management of land rights and resources and the delivery of land services.[27]

So, land governance is about the policies, processes and institutions (formal or informal) by which decisions about land are made. This includes decisions on access to land, land rights, land use, and land development and determining and implementing sustainable land policies.[28] Working to achieve good land governance or administration is also one way in which a society can improve its governance system and its commitment to democracy, the rule of law and human rights.[29]

In particular, good governance in land registration systems implies the prevalence of capable enforcement institutions. When the state fails to

[25] FAO (2007), *Good Governance in Land Tenure and Administration*. Land Tenure Series No. 9, Rome, p. 9.
[26] UN–Habitat, *supra* note 22, p. 65.
[27] Burns & Darlymple, *supra* note 16, pp. 4–5.
[28] Enemark, S. (2009) *Facing the Global Challenges: the Importance of Land Governance and the Significance of the Cadastre* (Proceedings of FIG Commission 7 One-day International Open Symposium "Progressing Towards u-Cadastre"), p.3.
[29] UN–Habitat, *supra* note 22, p. 65.

enforce property rights, "a variety of non-state actors define and enforce" them.[30] Hence capacity development becomes a critical component of good governments. The United Nations Development Programme and the Organization for Economic Cooperation and Development provide the definition of capacity development as:

> the process by which individuals, groups, organizations, institutions and societies increase their abilities to: perform core functions, solve problems, and define and achieve objectives; to understand and deal with their development needs in a broader context and in a sustainable manner.[31]

The success of a land registration system 'will depend on the quality, character and capacity of the state'.[32] Deininger and Feder stress that 'without institutions to enforce property rights effectively, the rights presumably protected by the land registry may exist only on paper and have little practical value'.[33] That is, '[a] property right that is not enforced does not exist'.[34] Capacity, at least in the context of Third World countries, also involves the development of cultures and attitudes to better way of lives, and envisages the requisite level of effectiveness and competence of the enforcement institutions, namely, the authorities and agencies which administer land registration and dispute resolution systems.[35]

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[30] Sandra F Joireman (2011), *Where There is No Government: Enforcing Property Rights in Common Law Africa* (Oxford University Press), p. 5.

[31] Stig Enemark (2005), *Supporting Capacity Development for Sustainable Land Administration Infrastructures* (Paper presented at the Eighth United Nations Regional Cartographic Conference for the Americas (UNRCCA), New York), p. 5 (citation omitted).

[32] Peter Larmour (2002), 'Policy Transfer and Reversal: Customary Land Registration from Africa to Melanesia', *Public Administration & Development*, Vol. 22, p. 160; *See* also Daniel Fitzpatrick (2006), 'Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access', The Yale Law Journal, Vol. 115, p. 1000; Robert T Deacon (1994), 'Deforestation and the Rule of Law in a Cross-Section of Countries', *Land Economics*, Vol. 70, p. 414.

[33] Klaus Deininger and Gershon Feder (2009), 'Land Registration, Governance, and Development: Evidence and Implications for Policy', *The World Bank Research Observer*, Vol. 24, p. 239.

[34] Joireman, *supra* note 30.

[35] Roman Krznaric (2006), 'The Limits on Pro-poor Agricultural Trade in Guatemala: Land, Labour and Political Power', *Journal of Human Development*, Vol. 7, p. 132.

2.2 The relationship between land governance and land administration systems

Measures of good governance and measures of land administration reform have largely developed separately.[36] In particular, the question of good land governance is relatively a new idea.[37] However, the momentum for incorporating good governance in the development agenda and within land administration reform strategies has been building over the past two decades highlighting its importance to socially and economically responsible sustainable development.[38]

Conceptually and operationally, there is a strong link between the concepts of good land governance and land administration. As discussed earlier, sound land governance requires a legal and regulatory framework, operational processes and capacity to implement land policies and land management strategies consistently within a jurisdiction or country in sustainable ways. The land management paradigm developed by Enemark *et al* helps us to best understand this interrelationship.[39] The Paradigm illustrates that the land management activities may be described by three components, namely, land policies, land information infrastructures, and land administration infrastructures which underpin sustainable development.[40] It further indicates that the land management activities are run by institutions and organisations whose arrangements and structures differ from one jurisdiction to the other and which may change over time.[41] Land governance therefore involves land management, land administration, land law and policy, land registration systems (commonly denoted by the words, 'cadastre' and 'land register') and land tenure.

These key terms need careful understanding so that their salient features and the nexus between them can be carefully identified. *Land management*, a concept broader than land administration, is the process by which the

[36] Burns & Darlymple, *supra* note 16, p.1.
[37] Robin Palmer (2007), *Literature Review of Governance and Secure Access to Land*, p. 10.
[38] Burns & Darlymple, *supra* note 16, p.3.
[39] Stig Enemark (2005), *Understanding the Land Management Paradigm* (FIG Com 7 Symposium on Innovative Technologies for Land Administration 19-25 June, Madison, Wisconsin, USA).
[40] Id., p. 3.
[41] Ibid.

resources of land are put into good effect.[42] Land management encompasses all activities associated with the management of land and natural resources that are required to achieve sustainable development. Sound land management is the operational process which is the tool for implementing land policies in comprehensive and sustainable ways.

Land administration is the operational component of the land management paradigm. It is about the relationship between people, places and rights, and the policies, institutions and legal regulations that govern this relationship. It includes the range of functions that ensure proper management of rights, restrictions, responsibilities and risks in relation to land, namely, land tenure, land value, land use planning, and land development (implementing utilities, infrastructure and construction planning). Land administration determines the processes of recording and disseminating information about each of these functions with respect to land and its associated resources when implementing land management policies.[43] In this regard, land administration sits within the principles of responsible land governance and the overall framework of national land policies.

Land policy is part of the national policy on promoting objectives including economic development, social justice and equity, and political stability. Land policies may be associated with: security of tenure; land markets (particularly land transactions and access to credit); real property taxation; sustainable management and control of land use, natural resources and the environment; the provision of land for the poor, ethnic minorities and women; and measures to prevent land speculation and to manage land disputes.

Land laws are a set of instruments which are designed in various forms in order to authoritatively prescribe the types of rights and duties persons have with respect to land and associated natural resources, the types of enforcement institutions of the rules, and the mechanisms of getting redress in times of violation of the rights, restrictions, and obligations in land. The functions of a land registration system will be best served by legislation that meets certain criteria or principles.[44] As Deininger and Binswanger note,

[42] United Nations–Economic Commission for Europe, Geneva (1996) *Land Administration Guidelines with Special Reference to Countries in Transition* ECE/HBP/96 (United Nations), p. 13.

[43] Id., p. 14.

[44] Fuller has coined eight excellences of the law which, according to him, a legal system needs to possess or exhibit as a minimal amount of respect and dignity for those affected by it and which, together, give the law its existence. These are generality of

'titling process requires a clear legal basis and a streamlined institutional infrastructure that is capable of administering the process efficiently.'[45] There are ample evidences that strengthen the claim that land registration systems need to be accompanied by appropriate legislation. Thus, Manji notes 'in Eastern Europe, South America, Asia and sub–Saharan Africa, the rule of law is seen as the cure for perceived economic and political ills.'[46]

Cadastre is normally a parcel based, and up-to-date land information system containing [a] record of interests in land and which usually includes a geometric description of the location of land parcels describing the nature of the interests, the ownership or control of those interests, and often the value of the parcel and its improvements.[47] *Land register* is a process of official recording of rights in land through deeds or as title on properties concerning changes in the legal situation of defined units of land.[48] *Land tenure and property rights* refer to the relationship among people, as individuals or groups, with respect to land or property and the exclusive right to use land, enjoy the yield from land and improvements, and the right to transfer the land to another person.[49]

law, promulgation, prospectivity, clarity, consistency or coherence, possibility, constancy, and congruence between official action and declared rule. *See* generally Lon Fuller (1969), *The Morality of Law, Rev. Ed*. (New Haven: Yale University Press), pp. 46–91.

[45] Deininger & Binswanger, *supra* note 13, p. 260. *See* also Malcolm Park (2003), *The Effect of Adverse Possession on Part of a Registered Title Land Parcel* (University of Melbourne, PhD Thesis,), p. 36.

[46] Ambreena Manji (2006). *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (Zed Books), p. 52.

[47] The International Federation of Surveyors (FIG) (1995), *FIG Statement on the Cadastre* (Pub. No 11).

[48] Jo Henssen, 'Basic Principles of the Main Cadastral Systems in the World' (Paper presented at Annual Meeting of Commission 7, Cadastre and Rural Land Management, the International Federation of Surveyors (FIG), Delft, The Netherlands, May 16, 1995) quoted in Jürg Kaufmann and Daniel Steudler, Cadastre 2014: A Vision for a Future Cadastral System (International Federation of Surveyors (FIG), 1998) 13.

[49] FAO, Land Tenure and Rural Development, FAO Land Tenure Studies 3 (FAO, 2002) 7; FIG, *supra note* 47, No 5.

2.3 Potential benefits of land registration systems under good governance

As indicated above, land registration systems consist of data about land, persons and interests.[50] The idea that land registration systems are critically important for any society –irrespective of the nature of land tenure system– is well-settled.[51] In fact, the advantages of the system are not questioned at all, especially in the developed world; the challenge is always how to maintain the existing system in line with the fast changing needs of society especially the increasing needs of sustainable development.

For example, Kjellson had compared the US public cadastral system with that of Australia and Western Europe, and found out that it entailed a cost of $20 billion annually.[52] Similarly according to Wadhwa, India loses 1.3 per cent economic growth annually as a result of disputed land titles.[53] In Thailand, 'land improvements have been greater, land values are higher, there are improved credit and borrowing patterns by Thai farmers, and outputs and inputs per unit of land have been higher for the titled land than the untitled land'.[54]

Some of the commonly known advantages of land registration systems are the enhancement of security of land tenure, credit, investment and productivity, bolster property market, facilitate revenue collection from land, manage land disputes and conflicts, support land policy, land management

[50] FIG, *supra note* 47.

[51] De Soto has made an authoritative argument in favour of formalisation (cadastral systems). Hernando de Soto (2000), *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere else* (Black Swan). Also *see* United Nations–Economic Commission for Europe Working Party on Land Administration (2005), *Social and Economic Benefits of Good Land Administration* (HM Land Registry, 2nd ed,) 6; United Nations–Economic Commission for Europe (2005), *Land Administration in the UNECE Region: Development Trends and Main Principles* ECE/HBP/140 (United Nations,) 64; United Nations–Economic Commission for Europe, Geneva (1996), *supra* note 42, p. 7.

[52] Bengt Kjellson (2002). *What Do Americans Pay for Not having a Public Land Rights Information System?* (Paper presented at FIG Congress, Washington D C).

[53] *See* D C Wadhwa (2002), "Guaranteeing Title to Land" *Economic and Political Weekly*, Vol. 37, p. 4699.

[54] Milt Reimers (2009–2010), '"Stuck in No Man's Land": How Developing Countries Can Allocate Property Rights as a Means to Improve Their Citizens' Welfare and Grow Their Economies' *Loyola Journal of Public Interest Law,* Vol.11, 15–6 (citations omitted).

and land administration, and help land use planning.[55] These specific advantages of land registration systems could be said to be ultimately fostering sustainable development in the broadest sense.[56]

A cadastral system as a tool for formal property system, however, benefits society if it is carried out under appropriate conditions.[57] Fulfillment of good (land) governance conditions is one of the essential requirements for the success of a cadastral system.[58] This is because good governance has a critical role in terms of establishing successful land administration systems.[59] To begin with, land administration systems are components of a public infrastructure, and are provided by government. Indeed, a governmental structure that is responsible and accountable and which respects the fundamental rights of its own people can effectively provide this critical service.

It is a well-settled fact that democracies generally provide by far better property rights than other forms of governance such as autocracy and dictatorship.[60] On the other hand, democratic government can exist only if it is elected by the people to whom the land registration is set. Only a government that assumes power under the well-known democratic channels can clearly define land rights and effectively enforce them thereby serving the people fairly.

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[55] *See* e.g., Kaufmann, J. and Steudler, D. (1998), *Cadastre 2014 - A Vision for a Future Cadastral System* (FIG Commission 7, Switzerland); *See* also, Lemmen, C. *et.al*, (2005), *A Vision on the Development of the Urban Cadastre in Egypt*.; FIG–UN (1999), *Bathurst Declaration on Land Tenure and Cadastral Infrastructures for Sustainable Development* (Bathrust, Australia); FIG, *supra* note 47.

[56] Kaufmann and Steudler, *supra* note 55, p. 30.

[57] *Supra* note 13

[58] *See* Melkamu, *supra* note 13, pp. 78–102.

[59] Daron Acemoglu and James A Robinson (2012), *Why Nations Fail: the Origins of Power, Prosperity, and Poverty* (Crown Business New York, 1st ed) Ch 13; *See* also Helen McFarlane (2010), 'How Live Aid Got It Wrong: Land Law's Solution to Third World Poverty' *Galway Student Law Review*, Vol. 4, pp.74, 80; *See* also Gani Aldashev (2009), 'Legal Institutions, Political Economy, and Development' *Oxford Review of Economic Policy,* Vol. 25, pp. 257, 266; Michael Ochieng Odhiambo (2006), *Improving Tenure Security for the Rural Poor Kenya, Tanzania and Uganda–Case Study* (FAO), p. v; F G Snyder (1980), 'Law and Development in the Light of Dependency Theory' *Law and Society Review*, Vol. 14, p. 723 cited in Kevin E Davis and Michael J Trebilcock (2001), 'Legal Reforms and Development' *Third World Quarterly*, Vol. 22, pp. 21, 23.

[60] *See* generally Clague, Christopher *et al* (1996), *Property and Contract Rights in Autocracies and Democracies* (Munich Personal RePEc Archive), p. 51.

Bad governance is one of the main impediments against secure property rights of the people.[61] The FAO's guidelines of Good governance in land tenure and land administration[62] present the potential impact of weak/bad governance in land administration. The manifestations of the potential impact include poverty and social exclusion; negative social behavior; environmental degradation; constraints on economic development; reduced public revenues; tenure insecurity; weak land and credit markets; and abuse of compulsory purchase.

According to United Nations Food and Agriculture Organization, there are three major symptoms of bad governance: state capture, administrative corruption, and lack of capacity.[63] State capture occurs when public power is used to serve the interest of the powerful or those who are in power instead of the society on whose behalf they are supposed to act.[64] The peculiar examples of administrative corruption are bribery, the employment of 'facilitators', theft, fraud, extortion and blackmail, nepotism and favoritism, and misconduct in public office.[65] The common diagnoses of lack of capacity are lack of resources, lack of qualified or competent staff, and lack of institutional capacity, negligence, and mismanagement.[66]

Some of the causes of failures in governance are laws which may be poorly designed or implemented, inconsistent or outdated; inappropriate policies and procedures; complex institutional structures, where mandates are unclear, overlapping or duplicated; incorrect or inadequate information, especially spatial data, to support decision making; and inadequate civil service resources.[67]

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[61] Wolfgang Kasper (2007), *Secure Property Rights –The Foundation of Prosperity and Freedom in Africa* (Paper presented at The Institutional Framework for Freedom in Africa, Nairobi/Kenya, February 2007), p. 12.
[62] FAO, *supra* note 25.
[63] Id., p.13–14.
[64] Ibid.
[65] Mark David Agrast *et al* (2012–13), *The World Justice Project Rule of Law Index: 2012–2013* (WJP), p. 13.
[66] FAO, *supra* note 24, p. 17.
[67] Bell, *supra* note 17.

3. Evaluating Land Registration Governance in Ethiopia: Towards a Conceptual Framework

As highlighted in the preceding section, the concept of land management and its different components demonstrate various features of land governance and institutional capacity. This is because land governance involves processes related to the administration, development, and management of land. Some specific indicators or measures of these activities of good land governance are indicated in *Land Governance Assessment Framework* (LGAF) developed by Klaus Deininger *et al*.[68] LGAF indicators are quite relevant to measure Ethiopia's land registration governance.

The LGAF has identified five key areas or indicators of good land governance, namely; (i) a legal, institutional, and policy framework; (ii) arrangements for land use planning and taxation; (iii) management of state land and proper application of expropriation with payment of fair compensation; (iv) public provision of land information; and (v) dispute resolution and management.[69] As this study mainly focuses on land registration governance, the most relevant indicators are *public provision of land information*; and a *legal, institutional, and policy framework*. The following paragraphs will be devoted to the summary of several indicators relating to these broader indicators.[70]

With regard to *public provision of land information* four sub-indicators are identified. The first is completeness. *Completeness* entails that most records for privately held land registered in the registry are readily identifiable in maps in the registry or cadastre, relevant private and public encumbrances are recorded consistently and in a reliable fashion and can be verified at low cost by any interested party, the records in the registry can be searched by both right-holder name and parcel, copies or extracts of documents recording rights in property can be obtained by anyone who pays the necessary formal fee, if any, and copies or extracts of documents recording rights in property can generally be obtained within one day of request.

[68] *See* generally Klaus Deininger, Harris Selod, and Anthony Burns (2012), The Land Governance Assessment Framework Identifying and Monitoring Good Practice in the Land Sector).
[69] Id, pp. 27–36.
[70] For a concise presentation, *see* Id., pp. 40–45.

The second is *reliability*. It ensures that registry information is up to date and sufficient to make meaningful inferences on ownership, there are meaningful and published service standards, and the registry actively monitors its performance against these standards. The third is *cost-effectiveness, accessibility, and sustainability*. This indicator entails that land administration services are provided in a cost-effective manner; the cost for registering a property transfer is minimal compared to the property value; the total fees collected by the registry exceed the total registry operating costs; and there is significant investment in capital in the system to record rights in land so that the system is sustainable but still accessible by the poor. The fourth indicator is *transparency* which requires that fees are determined and collected in a transparent manner. Towards this end, clear schedule of fees for different services is publicly accessible, and receipts are issued for all transactions; and, mechanisms to detect and deal with illegal staff behavior exist in all registry offices, and all cases are promptly dealt with.

With regard to a *legal, institutional, and policy framework*, there are six indicators. The first indicator is recognition of a '*continuum*' of rights. This indicator entails that the law recognizes a range of rights to fully or partially individualize ownership and use of land held by individuals as well as groups (including secondary rights as well as rights held by minorities and women), and clear regulations exist regarding the internal organization and legal representation of groups. Existing legal framework should recognize rights held by most of the rural and urban population, either through customary or statutory tenure regimes.

The second indicator is *enforcement of land rights recognized by law* (including secondary rights as well as rights of minorities and women). This indicator envisages that most communal lands have boundaries demarcated and surveyed or mapped and communal rights registered; most individual properties in rural and urban areas are formally registered where a high percentage of land registered to physical persons is registered in the name of women, either individually or jointly; common property under condominiums is recognized; when loss of rights occurs as a result of land use change not involving expropriation, compensation in cash or in kind is paid such that these people have comparable assets and can continue to maintain prior social and economic status.

The third indicator is *existence of mechanisms for recognition of rights*. This indicator entails that the formal definition and assignment of rights, and process of recording of rights, accords with actual practice or, where it does not, provides affordable avenues for establishing such consistency in a non–discriminatory manner. In addition, it entails the following:-

- non-documentary forms of evidence are used to obtain full recognition of claims to property only when other forms of evidence are not available;
- legislation exists to formally recognize long-term, unchallenged possession and applies to both public and private land, although different rules may apply;
- the costs for first-time sporadic registration for a typical urban property is low compared to the property value;
- there are no informal fees that need to be paid to effect first registration;
- the requirements for formalizing housing in urban areas are clear, straightforward, affordable, and implemented consistently in a transparent manner;
- there is a clear, practical process for the formal recognition of possession, and this process is implemented effectively, consistently, and transparently.

The fourth indicator is *recognition of restrictions and responsibilities on rights*. This indicator implies that land rights are not conditional on adherence to unrealistic standards. There is a series of regulations regarding urban and rural land use, ownership, and transferability that are for the most part justified on the basis of overall public interest and that are enforced.

The fifth indicator is *clarity of institutional mandates*. Institutional mandates concerning the regulation and management of the land sector would be clearly defined, duplication of responsibilities is avoided, and information is shared as needed at reasonable cost and is readily accessible. There would be a clear separation in the roles of policy formulation, implementation of policy through land management and administration, and the arbitration of any disputes that may arise as a result of implementation of policy.

The sixth and final indicator of good land governance is *equity and non–discrimination* in the decision–making process. Land policies would be formulated through a legitimate and equitable decision-making process that draws on inputs from consultation of all concerned. The legal framework is non-discriminatory, and institutions to enforce property rights are equally accessible to all. Towards this end, a comprehensive policy exists or can be inferred by the existing legislation. Cost of implementation of land policy is estimated, expected benefits are identified and compared to cost, and there are sufficient budget, resources, and institutional capacity for implementation. Land institutions report on land policy implementation in a

regular, meaningful, and comprehensive way, with reports being publicly accessible.

The fulfilment or otherwise of these indicators and features could help us to see whether the land registration system is appropriately governed. The indicators are used to evaluate the land registration system of Ethiopia in the following section.

4. Governance of the Land Registration System in Ethiopia

4.1 Legislative framework for the land registration system

Ethiopia is a Federal state, currently, divided into 11 regional states and 2 city administrations. The Federal nature of governance in the country was introduced since 1991. Land management power is divided between the Federal Government and Regional Governments.[71] The Federal Government 'shall enact laws for the utilization and conservation of land and other natural resources, historical sites and objects'.[72] On the other hand, States have the power 'to administer land and other natural resources in accordance with Federal laws'[73] which may include the power to enact for the same purpose.[74]

At the federal level, the current applicable legislation is the Rural Land Administration and Land Use Proclamation No. 465/2005.[75] This legislation repealed and replaced the first law on land administration and use at the national level that became effective in 1997.[76] The current Proclamation has only one provision on land registration, Article 6, under the heading of 'Rural land Measurement, Registration and Holding Certificate'.

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[71] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. No 1/1995, *Fed Neg Gaz*, Year 1, No.1, Art. 50 (1) (hereinafter 'FDRE Constitution').

[72] I d., Art. 51(5).

[73] Id., Art. 52(2) (d).

[74] *See* the Rural Land Administration and Land Use Proclamation, 2005, Proc. No, 456/2005, *Fed. Neg. Gaz.*, Year 11, No.44, Art. 6 (hereinafter 'FRLAUP'), Art. 17 (1) and the Revised Rural Land Administration and Use Determination Proclamation, 2017, Proc. No 252/2017, *Zikre Hig*, Year 22, No 14, 4th Paragraph (hereinafter 'ARLAUP'). Also *see* Abiy Chelkeba (2018), 'Competing Water Resource Demands in Ethiopia's Federal System: Infancy of the Law toward Integrated Management' *Mizan Law Review*, Vol. 12, No.2, pp. 241–242. He argues that state administration power includes legislation-making.

[75] FRLAUP, *supra* note 74, Art. 6.

[76] Federal Democratic Republic of Ethiopia Rural Land Administration Proclamation No. 89/1997.

Article 6(1) of Proclamation No. 465/2005 provides that size, land use and level of fertility of rural lands under private, communal, governmental and non-governmental organizations shall be measured as appropriate using cultural and modern measurement equipment. Sub-Article 2 stipulates that the land holdings shall be given cadastral maps showing their boundaries. And Sub-Article 3 provides that holding certificate shall be given that indicates the size of the land, land use type and cover, level of fertility and boarders, as well as the obligations and rights of the land-holder.

Sub-Article 4 states that where land is jointly held by husband and wife or by other persons, the holding certificate shall be prepared in the name of all the joint holders. Sub-Article 5 puts the key principle of land registration by stating that the information that describes the holder of rural land, the holders of the bordering lands, the types of use, and the rights and obligation of the holder thereof shall be registered in a database and kept by the competent authority. The provision also implies the possibility of registering land rights other than landholding by mentioning, under Sub-Article 6 that any rural land that is held through lease or rental shall be registered.

However, as we shall see later, these rules are too brief to address matters of land registration in Ethiopia. The Draft Rural Lands Administration and Use legislation has taken more than a decade for enactment. The Draft covers various matters as compared with the existing national land registration legislation. For example, it defines of the concepts of 'land registration', 'cadastre', 'parcel', 'parcel map', 'cadastral surveying', and 'registrar'. It also embodies rules on the management of lands under the holding of pastoralists and semi-pastoralists. Thus, the Draft makes it mandatory for regions to have a land administration and use law for communal lands used by pastoralists and semi-pastoralists; prohibits the alteration of these lands to private holding; makes it possible for owners of such lands to rent the land out to others; and permits the use of customary ways of land management, use and dispute resolution.

At regional level, all regions have adopted rural land administration laws. For instance, Amhara region issued the first law on rural land administration in 2000 following the issuance of the Federal proclamation.[77] The region also issued the little known Land Administration and Land Use Policy in the same year.[78] Then the region issued the Revised Rural Land Administration

[77]Amhara National Regional Rural Land Administration and Usage Determination Proclamation No. 46/2000.

[78] በአማራ ብሔራዊ ክልል የገጠር መሬት አስተዳዳር እና አጠቃቀም ፖ/ሲ፣ 1992 ዓ.ም.

and Use Determination Proclamation No. 133/2006 that repealed the previous Proclamation No. 46/2000 and was in force until 2017.[79] At the moment, the governing land law in the region is the ARLAUP. The Revised Rural Land Administration and Use System Implementation, Council of Regional Government Regulation No. 159/2018[80] provides more details regarding the implementation of this Proclamation.

Article 33(1) of the Proclamation stipulates that a map is prepared for and issued to any rural land held in private, communally after measurement by traditional or modern means. Article 33(2) stipulates that a mark indicating the boundaries of each of these holdings must be made after being measured with different surveying materials. Article 34(1) stipulates that any measured rural landholding is registered in the land file which is established for this purpose. Article 35(1) states that a landholding certificate identifies the land, shall bear the name and photograph of the landholder, and shall be given to any rural landholder through the pertinent wereda rural land administration and use office. Specifically, Article 25(9) provides that communal landholders will be issued landholding certificate containing their names. According to Article 36(1), registration in ANRS is mandatory.

Other laws govern rural land administration, use, and land registration including in the regions of SNNP[81], Oromia[82], Tigray[83], Afar[84], Somali[85], and Benishangul Gumuz[86]. With a few differences in some specific issues

[79] Revised (Amhara) Rural Land Administration and Use Determination Proclamation No 133/2006.

[80] Revised Rural Land Administration and Use System Implementation, Council of Regional Government Regulation No. 159/2018 ('ANRS Regulation No. 159').

[81] Southern Nations, Nationalities and Peoples Land Administration and Use Proclamation No. 110/2007 and Rural Land Administration and Use Regulation No 66/2007.

[82] Oromia Rural Land Use and Administration Proclamation No. 130 /2007 and Oromia Rural Land Administration and Use Regulation No.151/2012.

[83] Tigray National Regional State Rural Land Administration and Use Determination Proclamation No. 239/2014 and Tigray National Regional State Rural Land Administration and Use Regulation No. 85/2014.

[84] Afar National Regional State Rural Lands Administration and Use Proclamation No. 49/2009.

[85] Somali Regional State Rural Lands Administration and Use Proclamation No. 128/2013.

[86] Benishangul Gumuz Regional State Land Administration and Use Proclamation No 85/2010 and Benishangul Gumuz Regional State Land Administration and Use Proclamation Implementation Regulation 2010.

such as land rental period, all regional laws have similar content and objectives.

4.2 Practical enforcement of the land registration system

The enactment of land registration laws is not an end by itself because they need to be further seen in light of the process of their enforceability or implementation. Thus the operations and effectiveness of the institutions in charge of land registration in Ethiopia in enforcing the land registration system accompanied by adequate provision of tools to operate the land registration process need to be examined. To this end, three practical mechanisms: setting land registration in motion, caveats and updating are addressed in this section. They are used as practical indicators of good land governance in land registration systems in light of the factors (highlighted in Section 3) to be used as measures of good land registration governance in Ethiopia such as efficiency and transparency.

4.2.1 Setting land registration in motion

As indicated in Section 4.1, the Federal rural land administration law, FRLAUP, consists of only a single provision regarding registration of land. According to Article 6(1) & (2), rural lands shall be measured, registered, and cadastral maps shall be given to land holdings. Land holding certificate that indicates size of the land, land use type and cover, level of fertility and borders, as well as the obligation and right of the holder shall be given to the land holder.[87] Where land is jointly held by husband and wife or by other persons, the holding certificate shall be prepared in the name of all the joint holders.[88] The landholding certificate is an evidence of the legally protected rights of the landholder; as such judges may not consider any documentary evidence or any witness before consulting the landholding certificate while there is one.[89] The land holding information shall be registered in database and kept by the competent authority.[90]

The problem is that there are no rules regarding the process of application with respect to rural land registration. However, with respect to urban land, the law addresses such issues. Thus, the FULRP provides that any person claiming to have an interest on a land holding may apply for registration by filling the forms prepared by the registering institution for this purpose and

[87] FRLAUP, *supra* note 74, Art. 6 (3).
[88] Id, Art. 6(4).
[89] *See* ARLAUP, *supra* note 74, Art. 35(2).
[90] FRLAUP, *supra* note 74, Art. 6 (5).

upon payment of the service fee. Such application shall clearly indicate the right, restriction and responsibility and shall be accompanied by supporting documents.[91]

The applicant shall be granted a landholding certificate from the registering institution within 30 working days or at any time upon payment of service fee and penalty from the date of receiving the proof that entitles him for registration.[92] Upon receiving applications for registration, the registering institution shall give the applicant the copy of the application with the seal of the institution, date, month, year, hour and minute written on the receipt of the application which shall constitute the basis for establishing the order of registration.[93]

Article 29 states that the registering institution shall verify that the applicant's request satisfies required formalities. Article 39 provides that notice of acceptance of registration shall be given to the applicant within five working days through the registered address of the landholder. Where an applicant is aggrieved by a decision of the registering institution that rejects a document presented by him during the adjudication process, he shall complain to a grievance handling body established for this purpose.[94] Because of the dichotomised rural-urban land administration system in the country, rules found in FULRP are not directly applicable to rural lands. This creates gap in the governance of land registration in the country.

4.2.2 System quality assurance and compliance mechanisms

The other aspect of the enforcement of the land registration systems in the context of the good governance of the system is the provision of the mechanisms of ensuring the quality of the system and compliance with the system. By quality, we mean the *integrity* of the land registration; and *compliance* refers to the existing land rights, restrictions, and responsibilities. Some of the most important mechanisms whereby land registration systems achieve these purposes are caveats, updating, and payment of compensation.

[91] FULRP, *supra* note 11, Art. 27 (1) & (2).
[92] Id., Art. 27 sub-arts. 3 & 4.
[93] Id., Art. 28 (1).
[94] Id., Art. 29(2).

a) *Caveats*

Caveats, cautions or precautions are used to protect land interests both before and after registration. Caveats could be considered as the principal effective methods of gaining protection for unregistered interests.[95] In Ethiopia, caveat provisions are scarce. The Federal and regional urban and rural land laws do not have caveat rules. Exceptions to this are found in the ANRS rural land laws.

These laws state that an aggrieved party may submit an objection or a complaint to a registering institution in writing within one month starting from the date on which the information was registered pending the final or complete entry of the information into the rural land record as a complete one.[96] The institution is duty-bound to provide a written response within one month from the date on which such complaint was submitted thereto.[97] The rules do not mention whether the institution shall let the registered proprietor know of such objection. Neither do they mention how the potential objector would be communicated. This scarcity of caveat provisions in Ethiopia creates gap in the governance of the land registration system.

In advanced land registration systems, caveats are given wide attention. Thus, in the Victoria (one of the states in Australia), there are three types of caveats –caveats against the bringing of land under the registration system; caveats against dealing with land, and caveats against granting title by adverse possession.[98] The Victorian land registration law has detailed rules on these.[99] With respect to the first type, following notice given by the Registrar prior to the creation of an ordinary folio or a provisional folio, any person claiming an estate or interest in the land in question may, before the creation of the folio for that land or the removal of the warning, lodge a caveat in an appropriate approved form forbidding the creation of the folio.[100] The Registrar must then notify the person who has applied for registration.[101] The Registrar must not proceed with the creation of the folio

[95] *See* generally Douglas Whalan (1982), *The Torrens System in Australia* (The Law Book Company Limited), pp. 223–268.
[96] ARLAUP, *supra* note 74, Art. 43 (3) cum. ANRS Regulation No.159, *supra* note 80, Art. 27.
[97] ANRS Regulation No.159, *supra* note 80, Art. 27(2).
[98] Whalan, *supra* note 95, pp. 223–68.
[99] *Transfer of Land Act* 1958 (Vic) (‘*TLA’*).
[100] Id., s 26R(1).
[101] Id., s 26R(3)(a).

until the caveat has been withdrawn or has lapsed, or a judgment or order in the matter has been obtained from a court as final settlement.[102]

Caveats against dealing with land may be used in two situations. Firstly, a caveat might be used by a person claiming an estate or interest in land which is the subject of a transaction to forbid the registration of any person as transferee or proprietor.[103] Following the caveat, 'the Registrar shall give to the registered proprietor of the estate or interest concerned notice of the caveat together with a copy of the caveat or of such particulars thereof as the Registrar deems material'.[104] The Registrar must duly consider the interest of the caveator and the registered proprietor and make all necessary amendments in the Register.[105]

Secondly, a caveat against dealing with land may be entered by the Registrar. Thus, the Act provides that the Registrar may record a caveat on behalf of the Crown, a minor or a person of unsound mind for the prevention of any fraud or improper dealing.[106] Third, in Victoria caveats may be used to protect against title by adverse possession. The Transfer of Land Act (*TLA)* provides that '[a] person claiming any estate or interest in the land in respect of which any such application [for adverse possession] is made may before the granting of the application lodge a caveat in an appropriate approved form with the Registrar forbidding the granting thereof'.[107]

In Sweden, before accepting the application for registration of land, the land registration authority is required to make all the necessary precautions. Thus, if there is reason to suppose that the acquisition invoked by the applicant is invalid or cannot be asserted or that the measure requested would otherwise encroach on the rights of another party, the land registration authority shall give the person whose rights are likely to be affected the opportunity of expressing his interest in writing; this mechanism is called communication.[108]The land registration authority shall then settle the matter itself or refer it to judicial settlement.[109]

[102] Id., s 26R(3)(b).
[103] Id., s 89(1).
[104] Id., s 89(3).
[105] Id., s 89A.
[106] Id., s 106(1)(a).
[107] Id., s 61(1).
[108] *Land Code* 1970 (Sweden), ch. 19 s 16.
[109] Ibid.

b) *Updating*

Updating is another mechanism which the government should use in order to secure the quality and benefits of the land registration system and thereby maximise the practice of good land governance. To make the system sustainable and viable, all the necessary land information that is different from the initial register data must be amended, corrected, or deleted following any appropriate activity.

The Federal rural land registration law does not have updating rules which creates huge gap in the governance of the land registration system. However, the urban land registration law has updating rules. Article 38 of the FRLAUP provides that the registering institution shall update the landholding information recorded in the register of legal cadastre. Further, Art. 45 provides for correction and cancellation of registration. Sub-Art. 1 provides that any entry in a register may be corrected based on the request of the person who caused its registration, by the judgment of a court or an appropriate organ or by the agreement of persons interested in ·the matter. According to Sub-Article 2, where the cancellation of registration is ordered by court or appropriate organ, the rights, restrictions and responsibilities entered in the register shall be cancelled therefrom. And, as stipulated under Sub-Art. 3, a registered right, restriction, or responsibility may be cancelled by the decision of the registering institution of its own motion only where the said right, restriction, and responsibility was created for a definite period and such period has lapsed.

ANRS land laws also have updating provisions. They state that the land registration document must be updated following changes with respect to the landholder or farm or both.[110] One of the powers and functions of the *Wereda* rural land administration and use office is the power to design a system whereby individuals transfer their holding rights through succession, rent, donation or exchange and update by periodically registering changes caused by these transactions.[111] Whosoever wishes that the rural land registration information be varied, updated or the holding thereof be transferred may, having attached his document thereto, submit a request in writing to the pertinent *Kebelle* or *Woreda* rural land administration and use office.[112]

[110] ARLAUP, *supra* note 74, Art. 43(1); ANRS Regulation No.159, *supra* note 80, Arts. 29 and 32.
[111] ARLAUP, *supra* note 74, Art. 48(5).
[112] ANRS Regulation No.159, *supra* note 80, Art. 29(1).

A notice describing such fact ought to be posted at the *Kebelle* land administration office, the *Kebelle* rural land administration and use office as well as any other suitable place thereof for the period of 15 consecutive days so that an opponent or party contending for a right would appear thereof.[113] If a request for updating is accepted, the registrar has a responsibility to correct the holding registration data as fast as possible.[114] The function of updating the rural land registration data is carried out by the *Kebelle* and *Wereda* land administration and use Committees.[115]

However, the law does not put strict obligations on the registrar to discharge its responsibility of registration and updating. For instance, it provides that 'when harm [occurs] on any person due to the fault of the registrar, the government body that committed the fault shall be accountable by both civil and criminal responsibility'.[116] This provision refers to fault in the process of registration. But, in practice, most problems occur due to the failure of the registration offices to keep register of updates on landholding. There is also no awareness on the part of land holders to submit application for registration of updated land holding.

In general, the updating mechanism may be carried out according to the power given to the Registrar upon his/her initiation, upon the application of an interested proprietor or upon court order.[117]

c) *Compensation*

The third mechanism whereby the land registration institutions enhance the quality of the land registration system and land governance is through provision of compensation during error or other reasons. Internationally, the Torrens system has a state-guaranteed system of compensation called Assurance Fund or Consolidated Fund based on the insurance principle.[118] The Swedish system also provides for the payment of compensation.[119] In Ethiopia, the Federal rural land registration law does not have compensation rules. On the other hand, Article 40 of FULRP provides that the registering institution shall be liable for damage caused to third parties who acted in good faith relying on the proof of registration of right, restriction or

[113] Id., Art. 29(2).
[114] ARLAUP, *supra* note 74, Art. 43(1) & (5).
[115] Id., Art.43 (1) & (2).
[116] Id., Art. 34 (6).
[117] Although the Ethiopian pertinent legislation is not detailed in this aspect, other countries' laws have clear provisions. *See* eg *TLA,* ss 26N(9), 103(1), 103 (1AA).
[118] Id*.,* ss 107–111).
[119] See *Land Code* 1970 (Sweden), ch 19 s 37; ch 18 s 5.

responsibility on a registered landholding. The regions may establish security fund to discharge such liability.[120] It provides that part of the security fund may be utilized for public developmental purposes as may be determined by the regions. The provision on utilisation of the security fund for other purposes is detrimental to the governance of the land registration system.

ARLAUP similarly provides that when harm occurs on any person due to the fault of the registrar, the government body that committed the fault shall be accountable to pay compensation for the victim.[121] But no provision exists for the creation of any compensation fund to be directly guaranteed by the state authorities.

Indeed, the laws at federal and regional state levels show adequate effort with regard to the land registration system. There are also attempts to establish the necessary legal and institutional mechanism in order to enforce the land registration system. But the Ethiopian land registration system has serious challenges with regard to good land governance as discussed in the following section.

5. Salient Land Governance Gaps in Ethiopia's Land Registration System

The first key source of bad land governance in Ethiopia is the existence of separate land management and registration institutions for rural lands and urban lands. I argue that Ethiopia is the only country with this model of land registration institutionalization. At the Federal level, the highest authority for rural land administration and use is vested in the Federal Ministry of Agriculture. It has the responsibility to implement the Federal rural land administration and use laws by providing the necessary professional support, coordinate the competent authorities, initiate development of new policy ideas and the amendment of the existing policy, conduct monitoring and evaluation, and create the system for the exchange of information among regions and the Federal Government.[122]

[120] FULRP, *supra* note 11, Art. 41(1).
[121] ARLAUP, *supra* note 74, Art. 34(6) and (7).
[122] Id., Art. 16.

Towards this end, the Rural Land Administration and Utility Directorate ('RLAUD') was established in 2009 under the Ministry of Agriculture.[123] It has three departments, namely, the registration of land, land use plan development, and other modern technology implementations. The RLAUD aspires to provide technical help for the regional offices such as training, developing projects, soliciting funds to implement modern registration of land and certification processes, and researching law and policy matters concerning land administration and use.[124]

As indicated earlier, the regions have the power to administer land and other natural resources. Regions are required to 'establish institutions at all levels that shall implement rural land administration and land use systems, and shall strengthen the institutions already established'.[125] Bureaux are established in each region for this purpose. There are four hierarchical levels of land administration, namely, region/head office or Bureau, Zone Office, Woreda Office and *Kebelle* office. Each has its own functions.

With regard to urban land, there are distinct land administration and registration institutions. The responsible Federal ministry is the Ministry of Urban Development and Housing. Article 49 of FULRP provides the functions of the Ministry. Accordingly, it shall have the powers and duties to follow up and ensure the proper implementation of the urban land holding Proclamation and regulations, directives and standards issued thereunder, to provide technical support and training assistance to regions, and to serve as a national information resource center on urban land registration and related information.[126] A separate body, the Federal Urban Real Property Registration and Information Agency ('FURPRIA'), was established at the Federal level to supervise urban landholding and information registration institutions.[127] The registering institutions are established under FURPRIA, being accountable to it, to undertake registration of urban land and immovable property information.[128]

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[123] Federal Democratic Republic of Ethiopia - *Options for strengthening land administration* (English,Amharic). Washington, D.C.: World Bank Group. https://documents1.worldbank.org/curated/en/428401468252886112/pdf/616310ESW0AMHA0DMINISTRATION0REPORT.pdf. Accessed on 28 May 2021.

[124] Daniel Behailu (2015), *Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework* (eleven international publishing, Hague, Netherlands), p.90.

[125] FRLAUP, *supra* note 74, Art 17(2).

[126] FULRP, *supra* note 11, Art. 49.

[127] Id., Art. 2(19).

[128] Id., Art. 2(20).

At the regional level too, each region shall establish an equivalent supervising institution to FURPRIA as well as landholding registration and information institution at urban level for the implementation of the urban land holding and registration legislations.[129] The regions have also the duty to ensure the proper enforcement of regulations and directives which they may issue in accordance with the Federal legislative framework.[130] Urban administrations are in charge of urban landholding registration and information. They must serve as the sole information producing centers for legal cadastre registration and they have the power to own, organize and manage legal cadastre data.[131] They must also forward registered information to the appropriate regional supervising body and to the FURPRIA.[132]

The existence of separate institutional and legal framework for rural and urban lands has led to the establishment of fragmented institutions for land administration and registration. For instance, in Bahir Dar a separate land holding and registration office is established for rural lands in the city within the Bahir Dar City Administration. The urban territory is steadily expanding and as a result it encloses rural land holdings. Then the question of which land management institution and which land law is going to regulate this newly enclosed rural land becomes a question. The urban land administration and the rural land administration offices also compete with each other on issues such as entitlement to compensation in the case of expropriated land.

As Fitzpatrick notes, in circumstances of institutional pluralist relations, state agencies 'are more likely to pursue their own interests by pandering to a constituency, increasing tax revenues, or implementing a rent-seeking development agenda'.[133] The land holders also consume much time finding and choosing between the institutions to receive land registration service especially relating to obtaining land holding information to submit to courts during land dispute resolution. These circumstances would ultimately give birth to disputes between land holders and land management institutions which proves bad governance.

[129] Id., Art. 50(1).
[130] Id., Art. 50(2).
[131] Id., Art. 51(1) & (3).
[132] Id., Art 51(2).
[133] Fitzpatrick, *supra* note 32, p.1041 (citation omitted).

The rural-urban land administration dichotomy also produces inconsistency in ideas and concepts regarding land rights. For instance, the urban land administration is mainly based on 'leasehold' whereas the rural land administration considers a specific land tenure as 'landholding'. Leasehold was introduced by the Urban Lands Lease Holding Proclamation No.80/1993.[134] This Proclamation was repealed and replaced consecutively by two laws.[135] The terminological difference between the 'land-holding' tenure of rural lands and the 'leasehold' tenure of urban lands is not clear enough. This is especially because FULRP specifically considers urban leasehold as a type of 'land-holding' of urban lands.[136] In addition, leasehold is one type of land tenure in rural areas too. This application of inconsistent language with respect to rural and urban lands becomes a source of bad land governance.

Third, the rural-urban land administration dichotomy opens a wide room for different application of rules on land registration enforcement. As discussed earlier, the rural and urban land administration laws have different scope with respect to addressing these functions of land management and governance. In general, land registration legislation in Ethiopia is dispersed, undetailed, incomprehensive, unstable, incongruent and incoherent. For instance, the rural land administration legislation, unlike urban land administration legislation, does not regulate how registration applications are submitted to the land registration offices when there is one or the form of transaction such as sale, lease, gift, inheritance, land exchange, and mortgage that induces updating. Everything is done customarily rather than based on prescribed rules. That has caused many disputes which have engulfed the courts.

In one case still pending in a *woreda* court,[137] the plaintiff sued the defendant in order to get back the land which she believes is hers acquired through inheritance (now unlawfully possessed for long time). The defendant responded that he got the land in dispute from another person who, consequently, was made to be a party to the case. The defendant argued that he got the land from the guarantor through land to land exchange but the exchange contract was done orally or traditionally and it was not

[134] Urban Lands Lease Holding Proclamation No.80/199

[135] Re-enactment of Urban Lands Lease Holding Proclamation No. 272/2002; Urban Lands Lease Holding Proclamation No 721/2011.

[136] FULRP, *supra* note 11, Art. 2 (3).

[137] Mamey Worke vs. Dessie Chalachew, *South Achefer Worea Court*, File No. 244576, 2020.

registered and authenticated. The land registration offices usually focus on initial registration, and as stated earlier, legislation on updating is inadequate.

Similarly, the Federal-State land governance dichotomy has imposed its own challenges for sound land governance in the country. For instance, the proper meaning of the constitutional provisions regarding the Federal-State sharing of power with regard to land management are not easy to understand. First, when the rule says 'utilization and conservation' does it include 'administration', 'use' and 'registration'? If the answer is in the affirmative, and, as we indicated, if the regional states can enact laws, what is the difference between the lawmaking power of the federal government and the regional states? Second, if the answer is in the negative, does it mean that the federal government may not enact laws for the administration and use of land and is it the case that this power is left to the regional states?

Addressing these issues needs to consider principles such as 'coherence' and 'clarity'. But first, we need to recall that in practice the Federal Government is making legislation both for the 'conservation', 'utilisation' and 'administration and use' of land and other natural resources.[138] A typical example for this is the Federal Proclamation for the Rural Land Administration and Use Proclamation No. 456/2005 that is enacted for the administration and use of land including the 'conservation'. Regional states are also making legislation for land administration and use under claiming that they are constitutionally empowered 'to administer' land and other natural resources.

The FDRE Constitution vests power in the federal government to enact legislation for the proper management, administration, conservation and utilisation of land. In particular, this refers to the enactment of legislation that creates land rights, restrictions and obligations. The creation of the land rights, restrictions and responsibilities apparently envisages the subsequent acts of enforcing or implementing or administering those clearly defined property interests.

A national legislative framework is expected to create sustainable land administration and cadastral system where there is uniformity, consistency, coherence, equality, fairness and rationality in the system. This will also enhance good governance in land administration by reducing the chances of existence of discriminatory property rights in the country.

[138] It seems that the words 'utilization' and 'use' have the same meaning as used in the FDRE Constitution and other national and regional legislations.

We can illustrate this by mentioning three examples. First, we can raise duration of property use rights. Duration is different across regions such as differences in the duration for lease and rental contracts and so on.[139] As a second example, we can raise the use of the term 'possession' and 'land-holding'. Oromia region uses the term 'possession' while other regions and the national legislation use the word 'landholding'.[140] But the former concept has another meaning in the Ethiopian Civil Code.[141] Possession means the actual control which a person exercises over property or land. But 'landholding' right refers to various rights and interests on land where possession is just one of them.[142] As a third case of incoherence, we can mention that mortgage of rural land is not clearly mentioned in the national land registration legislation and in many regions; but in Amhara region mortgage is clearly permitted.[143]

These problems are the result of lack of an overarching national legislative and land policy framework creating property rights, restrictions and responsibilities. As Williamson correctly states, land policy principles are one of the best practices to establish a good and sustainable land registration governance system and enhance the values of completeness, uniformity, consistency, coherence, equality, fairness and rationality in the system.[144] In the meantime, the federal government needs to maintain its task of creating uniform property rights, restrictions and responsibilities whereas regions should focus on enforcing these property interests.

Likewise, it is very important to ensure that the urban land administration follows this course. It is to be noted that the Federal urban land holding and registration legislation enacts all rights, restrictions and responsibilities[145] whereas the regional governments are vested with the power to ensure the proper implementation of this legislation which does not include enacting

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[139] For example, according to Article 10(2) of the Oromia Rural Land Use and Administration Proclamation No. 130 /2007, "duration of the agreement shall not be more than three years for those who apply traditional farming, and fifteen years for mechanized farming". In Amhara region, the maximum lease year of rural land for agricultural investment is 30 years. ARLAUP, *supra* note 67, Art. 22(6).

[140] Oromia Rural Land Use and Administration Proclamation No. 130 /2007, Art 2(7).

[141] *See* Ethiopian Civil Code (1960), Arts. 1140–1150.

[142] FRLAUP, *supra* note 74, Art. 2 (4).

[143] ARLAUP, supra note 74, Art.19.

[144] Ian P Williamson, 'Land Administration "Best Practice" Providing the Infrastructure for Land Policy Implementation' (2001) 18(4) *Land Use Policy* 297, 303–5.

[145] *See* generally FULRP, *supra* note 11.

legislation in the pretext of administration of urban lands within the regions.[146]

The other problem relates to objectives. Unlike Victoria and Sweden, Ethiopia's laws on the land registration system do not express their objectives clearly and directly. This is true starting from the cadastral system legislation. The first national law on land administration and use, i.e., the Federal Rural Land Administration Proclamation became effective in 1997.[147] Regional states adopted related legislations subsequently or almost around the same time. However, none of the provisions in these laws mentioned the term 'land registration' or its equivalent.

For example, the first Land Administration Proclamation No. 46/2000 of the Amhara regional merely stated that 'so long as the land users utilize the land according to the established rules, this proclamation assures and secures their holding and use rights' and that tenure security enables 'the peasant to work for sustainable development'.[148] The term 'tenure security' seemed to have implied land registration, and carrying out land registration on this basis is arguably not wrong. Therefore, although these first generation land laws did not clearly address land registration, the practice of land certification began soon after their adoption.[149] That means, actually, these laws led to the issuance of a 'Primary Book of Land Holding' to the land holders merely tacitly.

As indicated in the introduction of this article, the issuance of land certificates began in the regional states at different periods since 1998. And in due course, the idea of land registration came to be relatively clearly expressed in what can be referred to as the second generation land registration legislations. Although the land certification and registration process in Ethiopia initially lacked clear focus, direction and objective, there have been improvements. In spite of such improvements, however there are various gaps which include scarcity of rules of application for land registration, updating, and payment of compensation. These gaps have caused negative impact on the governance of land registration in Ethiopia.

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[146] *See* Id., Art. 50.

[147] Federal Land Administration Proclamation No. 89/1997, *supra* note 76.

[148] Amhara Land Proclamation No. 46/2000, *supra* note 77, Art. 6(3).

[149] In Amhara region, the ANRS Rural Land Administration and Use Determination Proclamation No. 133/2006 and ARLAUP were adopted subsequently which directly address the practice of land registration, and legislation is improving in the region from time to time. But at federal level legislation improvement is relatively slow.

6. Concluding Remarks

Good land governance plays a critical role in the success of land registration systems and in order for the systems to bring full benefits to society in terms of sustainable development. Ethiopia's land registration governance features a few key gaps which posit serious challenges in the success of its land registration system. *First*, the structural issue of urban-rural dichotomy of land administration has been a problem. This in turn has resulted in bifurcated land management legislations and institutions for urban and rural lands. *Second*, the absence of clear practice regarding division of the federal-state land management power has been a problem. At the level of proclamation (and to some extent at the level of constitution), there is the practical problem of distinguishing and interpreting 'legislating' and 'administering' powers with respect to the utilization, conservation, and development of the country's land resource.

These two problems have resulted in the prevalence of incomplete and varied legislative rules, and inconsistent understanding and implementation of existing rules. Besides, they have resulted in fragmented enforcement institutions with inconsistent, incoherent, and incompetent practices in the handling of land registration in all levels. Thus, these gaps in land governance are clearly observed while commencing the land registration following any land related transaction such as will, donation, rent, mortgage, in the addressing of caveats and compensation instruments and in updating.

As a result, almost every measure of good land governance in Ethiopia especially with respect to the land registration system can be contested. It is thus essential and timely that Ethiopia works towards enhancing its land registration governance by the provision of, among other things, adequate legislative and policy framework and working standards, land registration institutional machinery and efficient enforcement of the system through laying down appropriate land registration procedures, quality control mechanisms and judicial enforcement mechanisms. ■

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From Digital Authoritarianism to Platforms' Leviathan Power:
Freedom of expression in the digital age under siege in Africa

Yohannes Eneyew Ayalew ♣

Abstract

The right to freedom of expression on the internet is under constant siege in Africa due to the actions of States and social media platforms. Many African States have been implementing various authoritarian techniques to trammel freedom of expression in the digital age, including internet shutdowns, repressive national security laws, internet censorship and digital surveillance. Social media companies, on the other hand, exert unbridled power over user-generated contents on their platforms. Their discretionary power to moderate content continues to threaten the right to freedom of expression in Africa. For example, the tug of war between the Nigerian government and Twitter following Twitter's removal of President Buhari's speech epitomises how social media platforms are policing free speech in Africa. I argue that African States must end the practice of digital authoritarianism and robustly respect and protect freedom of expression on the internet based on a human rights-based approach in limiting speech. Beyond superficial human rights vocabulary, platforms must also take human rights seriously and ensure that content moderation practices are guided by human rights-based approach.

Key terms:

Freedom of expression · Digital age · Content moderation· Human rights · Digital authoritarianism · African human rights law

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Contents

Abstract

1. Introduction

2. Origins and Justifications for the Protection of Freedom of Expression in Africa
   2.1 A brief account to the origins of freedom of expression in Africa
   2.2 Justifications for the protection of freedom of expression

3. Dimensions of Human Rights-based Approach for Gauging States and Social Media Platforms
   3.1 Components of the substantive dimension
   3.2 *Process* of actions and the *procedure* dimension
   3.3 Caveats against the perception of the approach as silver bullet

4. Freedom of Expression on the Internet under Siege in Africa
   4.1 Digital authoritarianism in Africa
      a) Internet shutdown
      b) Internet censorship
      c) Repressive national security legislation
      d) Digital Surveillance
   4.2 Leviathan power of social media platforms

5. The Content of the Right to Freedom of Expression on the Internet under African Human Rights Law
   5.1 Regional standards
   5.2 Sub-regional standards

6. Conclusion

Frequenly used Acronyms

ACmHPR	The African Commission on Human and Peoples' Rights
ECOWAS	Economic Community of West African States
UNGPs	UN Guiding Principles on Business and Human Rights

> "Today, a few private companies, driven to expand shareholder value, control social media. And yet the rules of speech for public space, in theory, should be made by relevant political communities, not private companies that lack democratic accountability and oversight. If left alone, the companies will gain ever greater power over expression in the public sphere." David Kaye, *Speech Police* (2019)

1. Introduction

The use of the internet is speedily increasing across the African continent. Millions of Africans are using social media platforms for varying purposes including political discourse, social development and self-expression.[1] However, freedom of expression in the digital age faces a number of challenges in Africa, such as threats from States and social media platforms.

The advent of the internet in Africa is a recent phenomenon. The first network in sub-Saharan Africa was created in 1988 at Rhodes University in South Africa.[2] In 1991, the first data packet transmitted from sub-Saharan Africa was sent from South Africa to the US, which in turn, heralded the arrival of the internet in Africa.[3] In the past two decades, African countries have experienced a steady growth in internet penetration from 0.78% in 2000 to 43% in 2020 with an estimated 590 million people using the internet.[4] As of 31 December 2020, the number of internet users in Europe was estimated at around 87.7% of the population. This translates to about 727.5 million people, almost two times higher than the number in Africa.[5]

[1] Special Rapporteur on Freedom of Expression and Access to Information in Africa, Commissioner Lawrence M. Mute, *Inter-Session Activity Report*, Presented to the 65th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia (21 October to 10 November 2019) para 34. *See* also African Declaration on Internet Rights and Freedoms, launched at the 18th annual Highway Africa Conference at Rhodes University in Grahamstown, South Africa on 7th September 2014).

[2] Towela Nyirenda-Jere and Tesfaye Biru (2015), Internet Development and Internet Governance in Africa, (Internet Society) at 6.

[3] Ibid.

[4] International Telecommunications Union, Global and Regional ICT Data <https://bit.ly/3EgSDLE > (accessed 20 July 2021). *See* also Internet World Stats, Internet Penetration in Africa (31 December 2020), <https://bit.ly/3EbhW1J > accessed 21 July 2021.

[5] Internet World Stats, Internet in Europe stats in 2020, < https://bit.ly/3yHV4pv > accessed 21 July 2021

Thus, Africa is still lagging behind the rest of the world in internet penetration since it is still well below the global average of 64.2%.[6]

In Africa, the digital divide –where individuals and communities experience uneven distribution of access to the internet– is still too high. The African Union has launched Agenda 2063 as a noble initiative to tackle the socio-economic challenges facing the continent in its efforts to achieve development under the tenets of Pan-Africanism.[7] The Agenda includes goals to create a digital economy and connect Africa through high-speed internet.[8] Parallel to this, universal access to the internet is one of the aspirations that States commit under the UN Sustainable Development Goals (SDGs).[9] African States must redouble their efforts to achieve these goals and bridge the digital divide.

However, the increasing internet penetration in Africa has not been without challenges. Freedom of expression in the digital age is coming under siege. Various measures by States and social media platforms are muzzling individuals' speech on the internet.[10] For example, several African governments are turning to authoritarian practices, including internet shutdowns, repressive national security legislation, digital surveillance and internet censorship to control political narratives and consolidate their power.[11] From the outset, it shall be noted that the problem of digital

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[6] Ibid.

[7] African Union, *Agenda 2063: The Africa We Want*. (African Union Commission, 2015).

[8] Ibid, Goal 72 (g) 'ICT: a continent on equal footing with the rest of the world as an information society, an integrated e-economy where every government, business and citizen have access to reliable and affordable ICT services by increasing broadband penetration by 10% by 2018, broadband connectivity by 20 percentage points and providing access to ICT to children in schools and venture capital to young ICT entrepreneurs and innovators and migration to digital TV broadcasting by 2016.'

[9] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, goal 9 target 9.c.

[10] *See,* for example, Admire Mare (2020), 'State-Ordered Internet Shutdowns and Digital Authoritarianism in Zimbabwe, 14 *International Journal of Communication* 4244–4263; and Yohannes Eneyew Ayalew (2019) 'The Internet shutdown muzzle(s) freedom of expression in Ethiopia: competing narratives' 28 *Information & Communications Technology Law,* 208-224.

[11] Fredrik Erixon and Hosuk Lee-Makiyama, (2011) 'Digital Authoritarianism: Human Rights, Geopolitics and Commerce', *The European* Centre *for International Political Economy (ECIPE),* ECIPE Occasional Paper No. 5/2011, at 1. See also Charlotte Cross (2021), 'Dissent as cybercrime: social media, security and development in Tanzania,' 15 *Journal of Eastern African Studies* 442.

authoritarianism does not mean the same thing the world over, both in democratic and non-democratic countries.

Sometimes, democratic countries may find themselves in digital authoritarianism. For example, as shall be shown below, South Africa was accused of implementing digital surveillance despite the country being ruled by a democratic government. Democracies elsewhere like India are notorious for shutting down the internet frequently. It is to be noted that all states have at least three types of duties, namely the duty to *respect*, *protect*, and *fulfil* rights.[12] These obligations universally apply to all rights, including freedom of expression on the internet and entail a combination of negative (respect) and positive (protect and fulfil) duties.[13] When the States implement digital authoritarianism, it entails dereliction of their duty to respect and protect the right to freedom of expression on the internet.

While social media platforms (like Facebook, Twitter, and YouTube) have been lauded by many for being open spaces for self-expression,[14] there is no doubt that their arbitrary content moderation practices are also problematic.[15] The recent row between Nigerian government and Twitter following the latter's takedown measure of the President's post is a case in point.[16] It illustrates how platforms are providing to themselves enormous powers to moderate content and police freedom of expression in the digital age.

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[12] *See,* for example, Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), Economic, Social, and Cultural Rights: A Textbook, (*Kluwer Law International*, 2001) 23-28.

[13] UN Human Rights Committee (HRC), *General Comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, paras 7-8.

[14] *See* for example, Terje Skjerdal and Sintayehu Gebru, (2020), 'Not quite an echo chamber: ethnic debate on Ethiopian Facebook pages during times of unrest', 42 *Media, Culture & Society*, 365–379; and Edward Orehek and Lauren J. Human (2017), 'Self-Expression on Social Media: Do Tweets Present Accurate and Positive Portraits of Impulsivity, Self-Esteem, and Attachment Style?' *43(1) Personality and Social Psychology Bulletin,* 60-70.

[15] Tomiwa Ilori (2020), 'Content Moderation is Particularly Hard in African Countries,' (Slate, August 12, 2020) <https://bit.ly/3peub9K> accessed 21 July 2021. See generally Emily B. Laidlaw, (2015) *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press), at 12-35.

[16] Yusuf Alli *et al*. (2021), 'Twitter ban: Buhari, Atiku, 98 others to lose 160m followers,' (*The Nation*, June 6, 2021) <https://bit.ly/3smDypO> accessed 21 July 2021.

Freedom of expression may embrace speech that offends, shocks or disturbs a State or a section of the society under the established case law of the African Court on Human and Peoples' Rights.[17] It follows that a high degree of tolerance is required from African States and social media platforms in a democratic society unless a given speech crosses the threshold of hate speech and stirs up imminent violence. However, this article does not assume that the same level of obligations for States and social media platforms exist under international human rights law, as explained under the third section. I argue that African States and platforms should robustly respect and protect freedom of expression in the digital age by aligning their actions with the substantive, process and procedural pillars of the human rights-based approach to limiting rights.

The next section highlights the origins and justifications of freedom of expression in Africa. In so doing, it briefly unpacks the development of freedom of expression in pre-colonial, colonial and post-colonial times. This is followed by a discussion on four theoretical justifications of freedom of expression: discovery of truth, self-fulfilment, participation in a democracy and critique of the government. The third section considers whether, and to what extent the human rights-based approach is an antidote to the various limiting measures on freedom of expression in the digital age. The fourth section interrogates how freedom of expression in the digital age is under siege in Africa from digital authoritarianism by African States and leviathan power of platforms. The content of the right to freedom of expression under African human rights law, including its dimension in the digital ecosystem is examined at great length under the fifth section.

2. Origins and Justifications for the Protection of Freedom of Expression in Africa

2.1 A brief account to the origins of freedom of expression in Africa

Freedom of expression has evolved across different stages in African history. The degree and level of development of the concept varies in pre-colonial, colonial and post-colonial times. Some have argued that pre-colonial Africa had no concept of human rights nor any culture of freedom of expression, and therefore these communities were not practicing human

[17] *Ingabire Victoire Umuhoza v. Republic of Rwanda*, African Court on Human and Peoples' Rights (ACtHPR), Application 003/2014 (judgement) 24 November 2017, Paras 143-162.

rights.[18] But Fernyhough has refuted these claims and argues that much of Africa was characterised by a "preoccupation with law, customary and written, and with legal procedure."[19] He points out, for example, in Ethiopia, through the system called '*Beleha-Le beleha*' has historically relished litigation, self-expression and debate, and the lengthy cross-examination of witnesses.[20] For these reasons, the protection of individual rights was quite important to many societies in Africa.[21] Nevertheless, the protection of freedom of expression in pre-colonial Africa is not well documented.[22]

During the colonial period, most Africans were denied their fundamental rights and freedoms.[23] Colonialism caused devastating moral harm, material plunder and loss of countless lives because the colonialists took the natives' land, and exploited their resources.[24] These aspects of colonialism along with slavery and forced labour resulted in political domination and in gross violations of human rights[25] including apartheid, and inhumane and

[18] *See* for example, Jack Donnelly (1982), 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions', 76 *American Political Science Review,* 303; *See* also Jack Donnelly(1984), 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly,* 400-419; Rhoda E. Howard and Jack Donnelly (1986), 'Human Dignity, Human Rights, and Political Regimes,' 80 *American Political Science Review,* 802; and Rhoda E. Howard (1992) 'Dignity, Community and Human Rights' in Abdullahi A An-Na'im (ed.) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press), at 81-102.

[19] Timothy Fernyhough (1993), 'Human Rights and Precolonial Africa', in Ronald Cohen, & et al (eds) *Human Rights and Governance in Africa* (University Press of Florida) 56. *See* also A.J.M. Milne (1986), *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (State University of New York Press), at 115.

[20] Fernyhough *supra* note 19, at 62.

[21] Makau Mutua (1995), 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', 35 *Virginia Journal of International Law* 351.

[22] William E. Adjei (2012), *The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of The African Charter on Human and Peoples' Right* (Unpublished PhD thesis, the University of Aberdeen), at 51.

[23] *See* generally Ndabaningi Sithole (1968), *African Nationalism*, (Oxford University Press).

[24] Thomas Hodgkin (1957), *Nationalism in Colonial Africa*, (New York University Press), at 5.

[25] Minasse Haile (1984), 'Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality', 24 *Virginia Journal of International Law* 591-592.

degrading treatments, torture and the denial of local self-determination.[26] In many African colonised States, due to the repressive colonial policy of divide and rule, there were dichotomies of 'citizens' and 'subjects' and 'superior' and 'inferior' racial groups.[27] Due to these policies, the large majority of Africans were deprived of the enjoyment of their fundamental rights,[28] including the right to freedom of expression.

The post-colonial era, especially during the 1960s, signalled the end of colonialism across the continent and pointed to an optimistic dawn of human rights in general, and freedom of expression in particular. However, there was a lack of practical protection of rights in the newly independent African States. A feature of the colonial legacy brought to Africa was authoritarian survival, which meant that governments of independent States often times applied the same rules of engagement as used by the colonialists.[29] As a result, post-colonial Africa is replete with stories of regimes which, having acquired unrestrained powers in the interest of public welfare, have proceeded to abuse State powers in furtherance of their personal interests and in disregard of every concept of legality and human rights.[30] In this regard, Asante contends that sedition laws enacted by colonial governments provided handy models for their African successors to fetter freedom of expression in Africa.[31] The colonial heritage of sedition laws in Nigeria, for example, had the effect of silencing dissent and freedom of expression.[32]

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[26] For further explanation on the effects of colonialism, see U.O. Umozurike (1971), 'The African Slave Trade and the Attitudes of International Law Towards It', 16 *Howard Law Journal,* 334; and S.K.B. Asante (1969) *infra* note 29,

[27] Mahmood Mamdani (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press), at 11.

[28] Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal (1979) reprinted in Christof Heyns (ed.) (1999) Human Rights Law in Africa: Martinus Nijhoff. An address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal from 28 November to 8 December 1979.

[29] S.K.B. Asante (1969), 'Nation Building and Human Rights in Emergent African Nations', 2 *Cornell International Law Journal* 88, at 103.

[30] Ibid.

[31] Id., at 88. *See* also Tomiwa Ilori (2020), 'Stemming digital colonialism through reform of cybercrime laws in Africa,' *Yale Law School Information Society Project Blog*, (June 19, 2020) <https://bit.ly/3plhJ8d> accessed 21 July 2021, and Justine Limpitlaw (2016), 'It's time for Africa to throw off its colonial legal shackles,' *DW Akademie* **(**28 April 2016) <https://bit.ly/32gfEBc> accessed 21 July 2021.

[32] *See the Director of Public Prosecutions v. Chike Obi* (Supreme Court of Nigeria, FSC 56/1961) [1961] 10 (06 April 1961).

Yet, post-colonial Africa saw the rise of human rights-friendly constitutions and regional human rights treaties protecting the freedom of expression in Africa, as expounded under the fifth Section. For example, a number of African States have incorporated provisions regarding the protection of freedom of expression in their constitutions. These include the Central African Republic (CAR),[33] Egypt,[34] Ethiopia,[35] Ghana,[36] and South Africa.[37] However, the right to freedom of expression continues to be shackled in many authoritarian African countries.[38] Now, the unbridled and leviathan power of social media platforms has brought another menace for the protection of freedom of expression in the digital age. As a result of these illegitimate interferences by States and social media platforms, the right to freedom of expression remains under incessant siege in post-colonial Africa.

2.2 Justifications for the protection of freedom of expression

There are at least four jurisprudential justifications for the protection of the right to freedom of expression.[39] *First*, freedom of expression enables the discovery of truth. Throughout history, this has been the strongest argument for free speech based on the importance of open discussion to the discovery of the truth.[40] Drawing on the views of John Stuart Mill, truth may be regarded as an autonomous, and an essential good, or its value may be supported by utilitarian considerations concerning progress and the development of society.[41] The other conception of the truth argument is the 'marketplace of ideas' doctrine. The theory of the marketplace of ideas is

[33] Central Africa Republic's Constitution of 2016*,* art 15.
[34] Constitution of the Arab Republic of Egypt [Egypt], 18 January 2014, art 65.
[35] Constitution of the Federal Democratic Republic of Ethiopia, 21 August 1995, art 29(2).
[36] Constitution of the Republic of Ghana [Ghana], 7 January 1993, art 21(1).
[37] Constitution of the Republic of South Africa [South Africa], 10 December 1996, art 16 (1).
[38] Saskia Brechenmacher & Thomas Carothers (2019), *Defending Civic Space: Is the International Community Stuck?* Carnegie Endowment for International Peace Working Paper, (October 22, 2019), at 1.
[39] Frederick Schauer (1982), *Free speech: a philosophical Enquiry* (Cambridge University Press), at 7-10.
[40] J. S. Mill: *On Liberty* and other Writings, Edited by Stephan Collini (Cambridge University Press, 1989), at 53-115.
[41] Ibid.

expressed in the famous US Supreme Court dissenting opinion of Justice Oliver W. Holmes.[42]

A *second* justification for freedom of expression is that it enhances individual self-fulfilment. This means that freedom of expression is an *intrinsic*, independent good, leading to the development of more reflective and mature individuals thereby benefiting the entire society.[43] This theory inclines to a rights-based approach.[44] The African Declaration on Freedom of Expression and Access to Information underlines the importance of freedom of expression for self-fulfilment, and it states that "freedom of expression is crucial and indispensable for the free development of the human person".[45]

Third, freedom of expression enables citizens to participate in a democracy.[46] Alexander Meiklejohn has suggested that the primary purpose of the First Amendment of the United States Constitution, which protects freedom of speech,[47] is to protect the right of all citizens to understand political issues in order to participate effectively in the working of democracy.[48] Similarly, Cooray argues that freedom of speech is the *sine qua non* of a democratic society.[49]

Freedom of expression is considered as a foundational stone for every democratic society under the established case law of the African human

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[42] *Abrams v. United States,* Supreme Court 250 U.S. 616 (1919) P. 250 U. S. 630.

[43] Tom Campell (1994), 'Rationales for Freedom of Communication', in Tom Campbell and Wojciech Sadurski (eds) *Freedom of Communication* (Aldershot) 33-34.

[44] General Comment No 34, supra note 13, para 2 'freedom of expression is indispensable conditions for the full development of the person.'

[45] Declaration of Principles on Freedom of Expression and Access to Information in Africa, *Lawrence Mute, the Special Rapporteur on Freedom of Expression and Access to Information in Africa report* (2019) Principle 1(1)

[46] General Comment No 34(2) *supra* note 13, para 2 'freedom of expression constitutes the foundation stone for every free and democratic society.'

[47] The Constitution of the United States, (1791) Amendment 1, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

[48] Alexander Meikeljohn (1948), *Free Speech and Its Relation to Self-Government* (Harper and Brothers Publishers), at 26-94.

[49] Leonard James Mark Cooray (1988), *The Australian Achievement: From Bondage to Freedom* (ACFR Community Education Project).

rights law.[50] As a result, freedom of expression exercised through the new media, such as the internet in new democracies, has been praised as the "oxygen of democracy."[51] In this respect, Benedek postulates that "If freedom of expression is the oxygen of democracy then the internet is the atmosphere, where people are living, breathing and exercising their freedom of expression."[52] This claim is compelling in the sense that there is a growing reliance on the internet in the digital age. Given this growing reliance, its importance as a conduit for free expression and thus for democratic engagement is arguably greater than ever before.

The *fourth* theoretical justification for freedom of speech is based on the assumption that there are reasons to be suspicious about the government.[53] This means freedom of expression acts as a litmus test to assess and critique the way a government operates in governance, administration, human rights protection, and other socio-economic issues. Freedom of expression can also play a valuable role as an instrument for social development. As Amartya Sen argues, the right to freedom of expression and to a free press is not only compatible with the right to development, but complementary to it.[54] Sen suggests that "no country that vigorously ensures freedom of expression will experience famine."[55] According to Sen, open debate, discussion, and a critical press are essential in any society, both in normal or turbulent times, and countries with a good record of free press and freedom of expression will not sustain famine because the press can report the government's inaction or failure.[56]

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[50] *See Kenneth Good v Botswana*, ACmHPR Communication 313/05, 26 May 2010, para 197; *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, ACmHPR Communication 323/06,12 October 2013, para 246; and Lohé Issa Konaté v. Burkina Faso, ACtHPR, Application 4/2013, Judgment, 5 December 2014, para 145.

[51] Freedom of expression and information is the oxygen of democracy – say Council of Europe leaders at meeting of Council of Europe, European Union and OSCE leaders on promoting and reinforcing freedom of expression and information at the pan-European level in Luxembourg (1 October 2002). *See* Benedek *infra* note 52.

[52] Wolfgang Benedek (2013), *Freedom of Expression and the Internet* (*Council of Europe*), at 24.

[53] Schauer *supra* note 39, at 85-86.

[54] Amartya Sen (1999), *Development as Freedom* (Oxford University Press), at 153; and *see* generally Amartya Sen (1989), 'Food and Freedom', 17 *World Development* at 769.

[55] Sen (1989), Id., at 776.

[56] Ibid.

In sum, there are a number of reasons why freedom of expression is important, including its significance in the discovery of truth, self-fulfilment, participation in a democracy, and critique of the government. These positive outcomes help us understand why the right must be defended.

3. Dimensions of Human Rights-based Approach for Gauging States and Social Media Platforms

The human rights-based approach is the oldest approach to assess the lawfulness of any restrictions on human rights, including freedom of expression in the digital age.[57] When it comes to evaluating digital authoritarianism and content moderation, this approach serves as a frame to interrogate the actions of States and social media platforms.

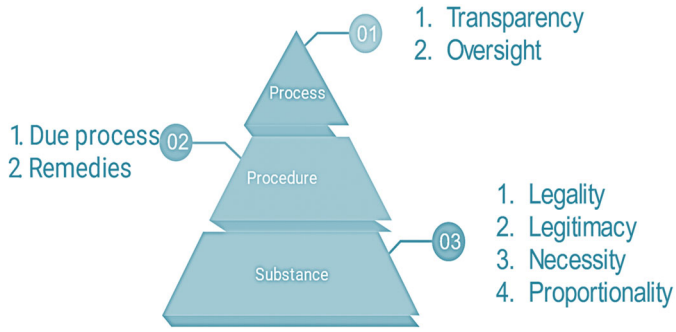

Figure 1: Pyramid of the Human Rights Based Approach

(Source: -Center for Advancement of Rights and Democracy (CARD) Research report 'Rights Deplumed' (2021) p.29)

Human rights-based approach is incorporated under various instruments in African human rights law.[58] The African Commission on Human and Peoples' Rights (commonly referred as the quasi-judicial body) recommends a human rights-based approach as one mechanism to alleviate threats in the

[57] *See* Barrie Sander (2020), 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation,' 43 *Fordham International Law Journal* 939; and Thiago Dias Oliva (2020), 'Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression,' 20:4 *Human Rights Law Review*, 607–640; and Giovanni De Gregorio (2020), 'Democratising Online Content Moderation: A Constitutional Framework', 36 *Computer & Security Law Review,* 1-17.

[58] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), arts 9 and 27.

digital age.[59] It has also adopted specific Guidelines addressing internet shutdowns in Africa –which sets out a number of non-binding expectations for States and private actors.[60]

Human rights-based approach hinges on three inter-related dimensions. These are: substantive, process and procedural dimensions.[61] The *substantive dimension* has four components, namely legality, legitimacy, necessity and proportionality, which dictates States and platforms to align their various limiting measures with African human rights law.[62] The *process dimension* encompasses transparency and oversight mechanisms that States and platforms should follow before implementing limiting measures on the right. The *procedural dimension* embraces due process and remedial measures that guide States and platforms before and after imposing limiting measures.

3.1 Components of the substantive dimension

The first component of the substantive dimension is *legality*. The principle of legality refers to the requirement that any limiting measures imposed upon the right to freedom of expression by States and platforms should be provided by law. This implies States must enact a clear, accessible and unambiguous law before implementing authoritarian techniques as discussed below in Section 4.1.

The African Charter on Human and Peoples' Rights clearly incorporates the legality standard as: "Every individual shall have the right to express and disseminate his opinions within the law."[63] The phrase 'within the law' is a claw-back clause under the African Charter which restricts the enjoyment of

[59] African Declaration, *supra* note 45, Principles 9 and 39,

[60] The African Guidelines on Access to Information and Elections in Africa (the Guidelines) adopted by the African Commission on Human and Peoples' Rights on 10 November 2017, during its 61st Ordinary Session in Banjul, The Gambia, Principle 27.

[61] The application of human rights-based approach in the digital age is widely discussed in the landmark report of the former UN Special Rapporteur on freedom of expression and opinion, David Kaye –addressing the regulation of user-generated online content, (Content moderation report) A/HRC/38/35 (2018).

[62] For detailed analysis on substantive dimensions, *see* generally Yohannes Eneyew Ayalew (2020) 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' 20 *African Human Rights Law Journal* 315-345.

[63] African Charter, *supra* note 58, art 9(2).

the right.[64] The African Commission[65] has interpreted this clause contained in article 9(2) to mean that any restrictions on freedom of expression has to be 'provided by law'[66] and also must conform to international human rights norms and standards relating to freedom of expression and should not jeopardise the right itself.

Thus, the phrase 'within the law' must be interpreted with reference to international norms which can provide grounds for the limitation on freedom of expression.[67] Recently, in *Amnesty International Togo et al v. Republic of Togo*, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) expounded on the legality requirement by ruling that an internet shutdown made without clear legal procedure was illegal.[68]

While human right law creates a vertical obligation on States parties to a treaty in relation to individual rights holders, this does not mean that social media platforms are not required to be responsive to human rights commitments.[69] Platforms are under social expectation to respect freedom of expression on the internet on the basis of the UN Guiding Principle on

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[64] *See, for example,* Richard Gittleman (1982), 'The African Charter on Human and Peoples' Rights: a Legal Analysis,' 22 *Virginia Journal of International Law* 691; Gino J Naldi (2001), 'Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights,'17 *South African Journal on Human Rights* 110, and Sandhiya Singh (2009), 'The impact of clawback clauses on human and peoples' rights in Africa,' 18 *African Security Studies* 100.

[65] *Scanlen & Holderness v. Zimbabwe, ACHPR* (2009) para 112, the Commission notes that the meaning of the phrase 'within the law' in Article 9(2) must be considered in terms of whether the restrictions meet the legitimate interests, and are necessary in a democratic society. In addition, the concept of "within the law" employed in the Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

[66] *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, at the 34th Ordinary Session of the ACmHPR held from 6th to 20th November 2003, in Banjul, Communication 250/02, paras 59-60.

[67] Malawi Africa Association and Others v. Mauritania, ACmHPR Communications No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para 102.

[68] *Amnesty International Togo et al v. Republic of Togo,* ECOWAS Community Court of Justice, JUD No. ECW/CCJ/JUD/09/20 (June 25, 2020), para 45.

[69] UN Human Rights Committee (HRC), General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 8. *See* John H. Knox (2008), 'Horizontal Human Rights Law', 102 *The American Journal of International Law* 1-47.

Business and Human Rights (UNGPs).[70] Although the UNGPs has an authoritative value in providing guidance for the activities of non-state actors, including social media platforms, its normative rules are considered as soft laws bereft of legally binding force. Yet, platforms are required to make their community standards and terms of service accessible to users, and their bylaws must be clear and unambiguous in their formulations.[71]

For example, Facebook Oversight Board has recently upheld Facebook's decision on January 7, 2021, to restrict former President Donald Trump's access to posting content on his Facebook page and Instagram account.[72] Despite this, the Board expressed its concerns on Facebook's imposition of an 'indefinite' restriction, which is seemingly vague and undefined in its Community Standards.[73]

The second limb of substantive dimension is *legitimacy*. This implies that any measures taken by States and platforms that restrict the right to freedom of expression have to be in conformity with communal interest such as national security, public health and morality or the right of others.[74] The African Charter, while delineating the limits of the right to freedom of expression under article 9, implicitly lists the limitation grounds.

However, article 27(2) of the Charter states that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.[75] In *Amnesty International Togo et al* case, the ECOWAS Court indicated that there are few legitimate grounds from which the right to freedom of expression could be limited. These include public interest, national security, public health, and public order.'[76]

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[70] UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5. *See* United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (Geneva, United Nations, 2011) principle 4.

[71] General Comment No 34 *supra* note 13 para 25.

[72] Donald Trump case, Facebook Oversight Board, Case decision 2021-001-FB-FBR (2021), part 8.3 (I) at 28.

[73] Ibid.

[74] Sander, *supra* note 57, at 973.

[75] African Charter, *supra* note 58, art 27.

[76] Amnesty International Togo *et al* case, *supra* note 68, para 45

The third component of substantive dimension is *necessity*. This means that the right to freedom of expression on the internet can be limited by States and platforms only if it is *necessary* in order to protect one of the legitimate objectives set out above. While this standard is implicit under the African Charter, the African Declaration provides useful guidance as to the necessity requirement by providing that a limitation has to originate from a pressing and substantial need.[77] In *Ingabire Umuhoza v. Republic of Rwanda*, the ACtHPR found that the conviction of the applicant was not necessary in a democratic society[78] although the court agreed on the Rwandan government's prayers to apply the principles of margin of appreciation, including criminalising denial of genocide.[79]

The last substantive touchstone is *proportionality*. States and platforms can restrict rights if the restriction is proportional to the objective such a restriction seeks to achieve. This means States and platforms have to demonstrate that the tools chosen to achieve legitimate objectives are proportionate so as to protect the rights or reputations of others, national security, public order, public health or morals.[80] Applied to the right to freedom of expression online, while this test allows for some restrictions of internet access, it does not give States and platforms exorbitant leverage to muzzle the right holder.[81]

3.2 *Process* of actions and the *procedure* dimension

In addition to the above substantive standards, States and platforms should address concerns regarding *process* of actions leading up to restriction, notably transparency and oversight.[82] For example, internet shutdown or digital surveillance measures must be transparent and such actions must be reviewed by an oversight body. Non-transparent orders will thus jeopardise the lawfulness of the process.[83] The content moderation process (transparency and oversight) of platforms should establish a policy commitment to meet their responsibility to respect and carry out ongoing

[77] African Declaration, *supra* note 45, Principle 9(4) (a-b).
[78] Ingabire case, *supra* note 17, paras 162.
[79] Id., para 145.
[80] African Declaration, *supra* note 45, Principle 9(4) (b-c).
[81] Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Republic of Zimbabwe, ACmHPR Communication 284/03, para 178.
[82] Id., Principle 39(3).
[83] *See* The Santa Clara Principles on Transparency and Accountability in Content Moderation (2018), Principle 1-3.

human rights due diligence through for example, clear rule-making, and decision making.[84]

The UNGPs require platforms, among other things, to conduct due diligence to meaningfully 'identify, prevent, mitigate and account for' actual and potential human rights impact throughout the company's operations and to provide for, or cooperate in, the remediation of adverse human rights impacts associated with their business.[85] This means platforms' potential impacts should be addressed through prevention or mitigation.[86] Importantly, platforms should allow participation from stakeholders (users, civil society and marginalised groups) when they make rules governing content. However, this is the most problematic area where platforms are criticised for surreptitious rule making.[87]

The final dimension of human rights-based approach is *procedure*. This implicates the duty of States and platforms to devise some procedural guarantees for right holders.[88] These include the provision of due process of law and remedial measures. Under UNGPs, actual impacts of platforms that have already happened should be a subject for remediation.[89] When platforms erroneously suspend, remove or terminate users, they should institute robust remediation programmes, which may range from reinstatement and acknowledgment to settlements related to reputational or other harm.[90] The UNGPs, and in particular Pillars Two and Three, provide detailed guidance as to what this means in practical terms and are thus a source of guidance for content moderation practices of social media platforms.

3.3 Caveats against the perception of the approach as silver bullet

In general, a human rights-based approach may help us to circumscribe digital authoritarianism by States and platform's leviathan power. However, it is not a silver bullet for tackling all challenges that unfold in the digital age.[91] Firstly, both States and platforms are not always amenable to the three-pillars of human rights-based approach. Social media companies may

[84] Sander, *supra* note 57, at 990.
[85] UN Guiding Principles, *supra* note 70, principles 16-24.
[86] Id., principle 17 commentary.
[87] Sander, *supra* note 57, at 989.
[88] UN Guiding Principles, *supra* note 70, principle 39(4).
[89] Id., principle 22.
[90] Content moderation report, *supra* note 61, para 59.
[91] Id., at 968.

also try to commit (and seemingly a lip service) to the vocabulary of human rights to aggrandise their petty deeds. This is in part the result of what Barrie Sander has described as "marketised conception of human rights law" –that places emphasis on the negative obligation of States to refrain from unjustifiably interfering with the right to freedom of expression on the internet.[92] Thus, the prevailing marketised conception of human rights amongst social media platforms and the general public is a stumbling-block to a more structural enforcement of human rights during content moderation.[93]

Finally, apart from the human rights based approach, there are other regulatory frames such as data protection laws, criminal laws, electoral and administrative laws, antitrust and competition laws.[94] The next section discusses how the right to freedom of expression on the internet is under siege in Africa due to the actions of States and platforms.

4. Freedom of Expression on the Internet under Siege in Africa

4.1 Digital authoritarianism in Africa

Digital authoritarianism has become a growing challenge in many African countries and continues to pose a threat to freedom of expression in the digital age. It is a situation where authoritarian regimes embrace and adjust digital communications and technologies for political ends including repressive practices such as censorship, panopticon form of surveillance and blocking or shutting down internet services completely.[95] "Networked authoritarianism", an earlier version of digital authoritarianism refers to a situation whereby a single regime controls wide ranging conversations about the country's problems on websites and social media platforms.[96]

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[92] Barrie Sander (2021), 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law,' 32 *European Journal of International Law* 176. On market-friendly paradigm of human rights, *see* generally Upendra Baxi (2008), *The Future of Human Rights* (Oxford University Press, 3rd ed), at 276.

[93] Ibid.

[94] Sander, *supra* note 57, at 1006.

[95] Mare (*supra* note 10) 4248 and *see* Rebecca MacKinnon (2011), 'Liberation technology: China's "networked authoritarianism', 22 *Journal of Democracy*, 32–46. *See* also Arne Hintz and Stefania Milan (2018), 'Through a glass, darkly: Everyday acts of authoritarianism in the liberal West', 12 *International Journal of Communication*, 3939–3959.

[96] MacKinnon, Id., at 33.

Digital authoritarianism is manifested in many African countries through a global infrastructure project called the Belt and Road Initiative (BRI) which is sponsored by the Chinese government. Through the BRI, China transfers technology which advocates its vision of a government-supervised internet across the globe including to Africa.[97] With regard to its repercussions on freedom of expression, the BRI project has influenced many African States in at least three ways: (1) by advocating the Chinese model of 'internet sovereignty' in African nations; (2) by exporting authoritarian surveillance technology to African States;[98] and (3) by deploying artificial intelligence technology and data-mining techniques across Africa.[99]

In 2019, the former African Commission Special Rapporteur on Freedom of Expression and Access to Information in Africa highlighted several authoritarian practices that may amount to digital authoritarianism.[100] These include, internet shutdowns, internet censorship, repressive national security legislation and digital surveillance. This article briefly discusses them below.

a) *Internet shutdown*

It is the hallmark of authoritarian governments around the world.[101] This claim is true in 22 African countries where internet shutdowns were imposed from 2014-2019; 77% of them are authoritarian and the rest are hybrid or semi-authoritarian governments.[102] AccesNow, a digital rights organisation based in the United States, has documented that the internet was intentionally switched off in twelve African countries in 2020. Justifications

[97] Willem Gravett (2020), 'Digital neo-colonialism: The Chinese model of internet sovereignty in Africa', 20 *African Human Rights Law Journal* 125-146; Paul Mozur *et al* (2019), 'Made in China, exported to the world: The surveillance state' (*The New York Times* 24 April 2019) <https://nyti.ms/32ggduO> accessed 21 July 2021.

[98] Alina Polyakova and Chris Meserole (2019), 'Policy brief: Exporting digital authoritarianism: The Russian and Chinese models' (*Brookings Institution*), <https://brook.gs/3J2mk6X> accessed 21 July 2021.

[99] Arthur Gwagwa and Lisa Garbe (2018), 'Exporting repression? China's artificial intelligence push into Africa' 17 December 2018 *Council on Foreign Relations*, <https://on.cfr.org/30JIbP7 > accessed 21 July 2021. *See* eg, Angola, Ethiopia and Zimbabwe.

[100] African Commission Special Rapporteur, *supra* note 1, paras 36-44.

[101] Evgeny Morozov (2011), *The Net Delusion: how not to liberate the world* (Public Affairs), at 93.

[102] *See* Collaboration on International ICT Policy in East and Southern Africa (CIPESA) report (2019), *Despots and Disruptions: Five Dimensions of Internet shutdowns in Africa*, at 4.

given by States included fighting fake news or hate speech, maintaining public order and national security and keeping the integrity of national exams.[103] More worryingly, the aggressive behaviour of social media companies in content moderation, have sometimes prompted African governments to shut down some platforms. In the wake of the removal of President Buhari's post, for example, Twitter's operation in Nigeria has been suspended indefinitely since 5 June 2021.[104]

The African human rights law has copious normative standards that forbids internet shutdowns. For instance, the 2017 African Commission Guidelines on Access to Information and Elections in Africa unequivocally prohibits internet shutdowns during elections.[105] Similarly, the 2019 African Declaration of Principles on Freedom of Expression and Access to Information prohibits any disruption of access to the internet.[106] Despite being non-binding instruments, these norms prohibit internet shutdown.

In the case of *African Freedom of Exchange and 15 others v. Algeria and 27 others*,[107] civil societies brought a strategic litigation before the African Commission on Human and Peoples' Rights against 28 African countries who deliberately shutdown the internet between 2016-2019.[108] However, African Commission struck down the case by reasoning that the matter was brought based on general and vague allegations.[109] In *Amnesty International Togo et al* case,[110] the ECOWAS Court in 2020 held that the government of Togo violated individuals' rights to freedom of expression on the internet when it shut down the internet in 2017. This makes the African human rights law very progressive in terms of having a norm prohibiting internet

[103] AccessNow (2021), *Shattered Dreams and Lost Opportunities, A year in the fight to #KeepItOn*, (3 March 2021), at 2. The African countries that implemented shutdown in 2020 include: Algeria, Burundi, Chad, Egypt, Ethiopia, Guinea, Kenya, Mali, Sudan, Tanzania, Togo, and Uganda. *See* also Tomiwa Ilori (2021), *Life Interrupted: Centering the Social Impact of Network Shutdowns in Advocacy in Africa*, (Global Network Initiative (GNI) report), at 12.

[104] The Federal Ministry of Information and Culture, Nigeria, *Press release on Suspension of Twitter*, (5 June 2021), <https://bit.ly/3Fg50ca> accessed 21 July 2021.

[105] African Guidelines, *supra* note 58, principle 26.

[106] African Declaration, *supra* note 47, principle 38(2).

[107] *African Freedom of Exchange and 15 Others v. Algeria and 27 others*, African Commission on Human and Peoples' Rights (ACHPR) Communication 742/20 (7 August 2020) paras 43-45.

[108] Ibid, para 3

[109] Ibid.

[110] Amnesty International Togo *et al* case, *supra* note 68, para 45.

shutdown and would be a bulwark for the protection of human rights in the continent where internet shutdowns are common.[111]

b) *Internet censorship*

It is another growing threat to the free speech rights of bloggers, journalists and individuals online.[112] Internet censorship refers to the use of technology that blocks pages by reference to certain characteristics, such as traffic patterns, protocols or keywords, or on the basis of their perceived connection to content deemed inappropriate or unlawful.[113] The former African Commission Special Rapporteur indicated in his report that African States were applying content blocking techniques which restrict access to particular sites or applications.[114]

The first recorded case of internet censorship in sub-Saharan Africa occurred in Zambia in 1996. The Open Net Initiative (ONI) observed the presence of technical Internet filtering in four sub-Saharan African countries in 2008-2009 –Ethiopia, Nigeria, Uganda, and Zimbabwe. However, Ethiopia has unblocked hundreds of websites since 2018 as part of political reforms under a new government.[115]

c) *Repressive national security legislation*

Despite repeated pushbacks from civil societies and rights groups, repressive national security laws are still used to drown out individuals who speak truth to power, including political dissenters, bloggers, journalists, and individuals in some African countries. Although African courts continue to play a role in pushing back national security legislation, they are still used in countries such as Burkina Faso[116], Egypt[117], Kenya[118] and Rwanda.[119]

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[111] Yohannes Eneyew Ayalew (2020), 'Public International Law and Internet Shutdowns: Time to unpack emerging norms?' *Groningen Journal of International Law (GROJIL) Blog* (July 13, 2020) <https://bit.ly/3spJFcK> accessed 21 July 2021.

[112] African Commission Special Rapporteur, *supra* note 1, para 37.

[113] ARTICLE 19 (2016), *Freedom of Expression Unfiltered: How blocking and filtering affect free speech*, (Policy Brief), at 7.

[114] African Commission Special Rapporteur, *supra* note 1, at para 37.

[115] Berhan Taye et al., (2018) 'Ethiopia: Verifying the unblocking of websites', <https://bit.ly/3pbYMoc> accessed 21 July 2021.

[116] Adopted by Burkina Faso's National Assembly on 21 June, the law provides for harsh penalties for online fake news and for "reporting on terrorism or on the security forces whose consequences could compromise public order and the conduct of security operations." *See* Reporters without Borders, (2019) 'Burkina Faso: legislative threat to press freedom must be declared unconstitutional' <https://bit.ly/3FdT0YF> accessed 21 July 2021.

d) *Digital Surveillance*

This is another mechanism commonly implemented by States to intrude into individual's privacy and freedom of expression in Africa. The 2019 African Declaration expressly prohibits any form of digital surveillance undertaken by States unless authorised by law.[120] More recently, the 2021 African Commission Resolution requires States to align their use or development of artificial intelligence (AI), robotics or other digital technologies with African human rights law. This is a significant step to discourage digital surveillance and to further uphold privacy and freedom of expression in the digital ecosystem.[121] For example, the South African government's practice of bulk surveillance activities and foreign signals interception –to interfere with the privacy and speech rights of anyone, including South Africans– was declared unlawful and invalid by the High Court in 2019.[122] The Constitutional Court affirmed this judgement in 2021.[123]

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[117] In Egypt the Law No. 180 of 2018 obliges personal social media accounts with 5,000 followers to come under media regulations. *See* ARTICLE 19 (2018), *Egypt: 2018 Law on the Organisation of Press, Media and the Supreme Council of Media: Lega; Analysis*, at 1. There is a similar concern under Article 7(4) the Ethiopian Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/2020, which can ultimately create a chilling effect on the individual's free speech.

[118] On 31 July 2019, the Kenyan High Court declared Section 84D of the Information and Communications Act unconstitutional for criminalizing publishing of obscene information in electronic form. The Court found that the provision was drafted in an ambiguous and overly broad manner that will limit freedom of expression. See Kiruti Itimu, (2019) 'High Court Declares Section of the Kenya Information and Communication Act as 'Unconstitutional' (Techweez, July 31, 2019) <https://bit.ly/3FhlJff> accessed 21 July 2021.

[119] Kelly Rwamapera, (2019), **'**Rwanda's Supreme Court decriminalizes cartooning, except for president.' (The Independent, April 25, 2019) <https://bit.ly/3e7iDyn> accessed 21 July 2021. See also African Commission Special Rapporteur *supra* note 1 para 20.

[120] African Declaration, *supra* note 47, Principle 41.

[121] The African Commission on Human and Peoples' Rights (ACmHPR), 473 Resolution on the need to undertake a Study on human and peoples' rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa - ACHPR/Res. 473 (EXT.OS/ XXXI) 2021, 25 February 2021, para 1.

[122] Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others, *High Court of South Africa, Gauteng Division*, (25978/2017) [2019] ZAGPPHC 384 (16 September 2019) para 165.

[123] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others, South African Constitutional Court, 279/19* ZACC 3 (2021) paras 135.

Overall, many African governments more than ever before, find themselves in the digital authoritarianism track. They are using digital technologies (and often with the succour of private contractors) to cut, censor, suppress and surveille the internet and digital communication. This has the effect of gagging freedom of expression of their people.

4.2 Leviathan power of social media platforms

Like sovereign States, social media companies are asserting leviathan power over user-generated contents in their platforms. Their ever-increasing power is now evident from the arbitrary and controversial take down decisions they make in their spaces.[124] They are applying unruly standards on user-generated contents and invariably employ aggressive practices of content moderation similar to what Nicholas Suzor described 'the lawless rule of tech'.[125] This article seeks to forward some options on how this unbridled power of platforms over user-generated contents can be tamed.

There is no comprehensive definition to the concept of content moderation despite some earlier attempts.[126] The recent glossary of the UN Committee on the Rights of the Child in General Comment No 25 (2021) defines moderation as: "[t]he practice of monitoring and reviewing user-generated content against pre-determined rules to remove content deemed impermissible, either automatically or using human moderators."[127] This implies that content moderation is a practice by content moderators (be it humans or artificial intelligence (AI)) who can review and monitor a certain

[124] The Economist, (2017) 'Internet firms face a global techlash' (12 August 2017), <https://econ.st/3GZUMgw> accessed 21 July 2021. See also Jack M. Balkin (2011) 'Free Speech is a Triangle'*, 118 Colombia Law Review 2035* and Gregory P Magarian (2021), 'The Internet and Social Media,' in in Adrienne Stone and Frederick Schauer (eds) *The Oxford Handbook of Freedom of Speech* (Oxford University Press), at 354.

[125] *See* generally Nicolas P. Suzor, (2019), *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge: Cambridge University Press), at 89-102.

[126] For example, Sarah Roberts defines content moderation as the organised practice of screening user-generated content (UGC) posted to Internet sites, social media and other online outlets, in order to determine the appropriateness of the content for a given site, locality, or jurisdiction. See Sarah T. Roberts (2016), 'Commercial Content Moderation: Digital Laborers' Dirty Work' *Media Studies Publications* 12, at 1-11. *See* also Sarah T. Roberts (2017), Content moderation, in *Encyclopedia of Big Data*. *UCLA* e-scholarship, <https://bit.ly/3qajfZJ> accessed 21 July 2021.

[127] See UN Committee on the Rights of the Child (CRC) General Comment No. 25 (2021) 'Children's rights in relation to the digital environment' Glossary (12 February 2021).

content by social media users against pre-determined rules, including community standards or policies, and will be removed if deemed to be illegal. Ultimately, content moderation aims to achieve certain objectives. It protects one user (or group) from another through removing offensive, vile or illegal contents. Moreover, platforms want to present their best face to new users, partners, advertisers and the general public.[128]

The *modus operandi* of content moderation varies from platform to platform depending on the size, resource, purpose and organisational practices.[129] In this regard, Robyn Caplan, distinguishes three major approaches to content moderation: artisanal, community-reliant and industrial approaches.[130] The *artisanal* approach involves smaller-scale case-by-case curation of content by teams of handful human moderators executed manually.[131] Platforms like *Medium* and *Vimeo* use this approach. This approach is commended for its attention to local contexts.[132] The second one is *community-reliant* approach which typically combines overarching policy decisions by a small team of company employees with a larger group of volunteer human reviewers.[133] Platforms such as *Wikimedia* and *Reddit* are cases in point. This approach engages its users in the actual moderation.[134]

The third track is an *industrial approach* which typically relies upon large-scale bureaucracies of tens of thousands of human reviewers to enforce community standards that are defined by separate policy teams.[135] *Facebook*, *Twitter* and *YouTube* are examples of platforms that use this approach. The industrial approach is increasingly using algorithmic tools to flag hate speech and illegal contents.[136]

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[128] Tarleton Gillespie (2018) *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press), at 5.

[129] Robyn Caplan (2018), 'Content or Context Moderation: Artisanal, Community-Reliant, and Industrial Approaches', *Data and Society,* 15; and *See* generally Kate Klonick (2018), 'The New Governors: The People, Rules, and Processes Governing Online Speech', 131 *Harvard Law Review* 1598.

[130] Caplan, Id., at 16.

[131] Id., at 17.

[132] Id., at 18.

[133] Id., at 20.

[134] Id., at 21.

[135] Id., at 23

[136] Id., at 23.

Content moderation is a challenging undertaking, and undeniably, it is a tightrope act.[137] On the one hand, when platforms are hypersensitive about removing potentially harmful content, particularly in the absence of any oversight, due process and accountability mechanisms, they may end up policing speech.[138] This has been the case, for example, when YouTube removed several channels documenting human rights and humanitarian law abuses in Syria.[139] While proactive takedown efforts and an increase in granularity and detail in the provision of individualised notices to users for their impugned contents is commendable, aggressive *–at times* partisan– curation of contents chills freedom of expression in Africa. Frustrations towards platforms are on the rise in many African countries over aggressive, arbitrary content removals.

On the other hand, if platforms are less aggressive and less sensitive, they run the risk of leaving hateful content to spread, potentially contributing to the outbreak of mass violence offline. Critics have noted several instances where platforms were inactive in moderating content that helped foment mass violence.[140] Myanmar can be an example.[141] In this respect, an independent UN Fact-Finding Mission found that Facebook had not done enough to prevent the spread of hate speech targeting the Rohingya ethnic minority in Burma, leaving them vulnerable to attack by the public at a time

[137] *See* Yohannes Eneyew Ayalew (2021) 'Uprooting hate speech: The challenging task of content moderation in Ethiopia', *Center for International Media Assistance (CIMA) Blog*, 27 April 2021, <https://bit.ly/3GPVflw> accessed 23 July 2021.

[138] David Kaye (2019), *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports), at 112-126.; *See* generally Jillian C. York (2021), *Silicon Values: The Future of Free Speech under Surveillance Capitalism* (Verso Publishing).

[139] Abdul Rahman Al Jaloud *et al*. (2019) Caught *in the Net: The Impact of "Extremist" Speech Regulations on Human Rights Content* (A joint report of Electronic Frontier Foundation, Syrian Archive and Witness), at 1-11. A similar concern was also raised before when Facebook deleted a famous Vietnam war photo from its platform. *See* generally Alice Ross and Julia Carrie Wong (2016), 'Facebook Deletes Norwegian PM's Post as "Napalm Girl" Row Escalates', *The Guardian* (9 September 2016), <https://bit.ly/3qfneo3> accessed 23 July 2021.

[140] Barrie Sander (2019), 'Mass Atrocities in the Age of Facebook–Towards a Human Rights-Based Approach to Platform Responsibility, Part-I' (*OpinioJuris Blog*, 16 December 2019), <https://bit.ly/32ecPRx> accessed 23 July 2021.

[141] Steve Stecklow (2018), 'Hatebook: Why Facebook Is Losing the War on Hate Speech in Myanmar', *Reuters Special Report* (15 August 2018) <https://reut.rs/3ebYfw6> accessed 23 July 2021.

when the military was perpetuating human rights violations against them.[142] Now, there is growing concern that a similar pattern is unfolding in some African countries, such as Ethiopia.[143] Poignantly, the Ethiopian Human Rights Commission recently found that the spread of unregulated hate speech on the social media –in the wake of the assassination of Hachalu Hundessa– effectively abetted crimes against humanity in Ethiopia.[144]

Reverting to the row between the Nigerian government and Twitter, the saga has sparked debates on the propriety and legality of content removal in Africa and beyond. On 1 June 2021, the Nigerian President Muhammadu Buhari posted his views on Twitter account threatening punishment for regional secessionists blamed for attacks on government buildings.[145] He said: "Many of those misbehaving today are too young to be aware of the destruction and loss of lives that occurred during the Nigerian Civil War. Those of us in the fields for 30 months, who went through the war, will treat them in the language they understand." Twitter removed the President's post claiming that such speech violates the platform's abusive behaviour policy.

When we look at Twitter's policy on abusive behaviour, it reads: "You may not engage in the targeted harassment of someone, or incite other people to do so. We consider abusive behaviour an attempt to harass, intimidate, or silence someone else's voice."[146] While the platform believes in freedom of expression and open dialogue, the rationale for this policy is to protect individuals or groups from being silenced or intimidated.[147] This policy aims to facilitate healthy dialogue on the platform, and empower individuals to express diverse opinions and beliefs. As such, the platform seeks to prohibit behaviour that harasses, intimidates, otherwise shame or degrade others, and risk people's safety.[148]

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[142] *See* UN Human Rights Council*, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, A/HRC/39/CRP.2, (17 September 2018) para 697.

[143] Jamelle Bouie (2020), 'Facebook Has Been a Disaster for the World,' The New York Times (18 September 2020), <https://nyti.ms/3EbbibF> accessed 23 July 2021.

[144] Ethiopian Human Rights Commission, (2021) "It Did Not Feel Like We Had a Government": Violence & Human Rights Violations following Musician Hachalu Hundessa's Assassination, *Investigation Report*, p. 2

[145] Aljazeera (2021), 'Twitter removes Nigerian president's 'abusive' civil war post,' (2 June 2021) <https://bit.ly/3mmRCM9> accessed 23 July 2021.

[146] *See* Twitter Rules, *Abusive Behavior* <https://bit.ly/3J7ekBo>, accessed 23 July 24, 2021.

[147] Ibid.

[148] Ibid.

Buhari's tweet was made after series of attacks on Nigerian government offices and buildings in Rivers State, South East region allegedly by banned separatist group, the Indigenous People of Biafra (IPOB).[149] When we assess the impugned speech against the above policy of Twitter, it contains law enforcement languages that may suggest the government's actions as he warned that their force shall be met with force. Simply put, Buhari's speech is not unexpected in the Nigerian context where the country since the infamous Civil War era has faced national unity and security challenges.[150]

As explained in Section 2.1 above, African States have since independence been struggling to maintain national unity owing to the impact of colonialism.[151] This has been the case in the Nigerian Civil War (also called 30 months war) which ended in 1970. Thus, before removing the above tweet, content moderators of Twitter should have understood the historical context of the speech by considering the trauma of the civil war and the nation's continued struggle in sustaining national unity. Of course, the literal meaning of the post seems to be a statement commonly used in law enforcement and security service.

The subtle meaning of the post indicates that the government will take stern military offensive measures against the rebels. The phrase [we] "will treat them in the language they understand" seems to target the separatists. Immediately after Buhari's post, the leader of IPOB, Namndi Kanu, took on Twitter on 2 June 2021 reacted aggressively saying that "Any army they send to Biafraland will die there. None will return alive even if it means sacrificing my people." This post was removed after three days on 5 June 2021.[152] Some observers criticised President's post before it was removed. They accused him of targeting Igbo people of Nigeria's southeast region where IPOB efforts to revive sentiments over Biafra have prompted a crackdown from government forces in recent years.[153]

Under the established case law of African Court on Human and People's Rights, the content of freedom of expression is wide-ranging. It includes speech that is not only favourable or inoffensive, but also those that "offend,

[149] Ibid.

[150] Ousman Murzik Kobo (2020), '"No Victor and No Vanquished" - Fifty Years after the Biafran War', (Origins: Current Events in Historical Perspective, Ohio State University) <https://bit.ly/3H0aDvw> accessed 24 July 2021.

[151] Minasse, *supra* note 25, at 593.

[152] Yusuf Alli et al, *supra* note 16.

[153] Aljazeera, *supra* note 145.

shock or disturb" a State or any section of the population.[154] Importantly, in the Malawian case of *Harry Nakandawire et al,* the High Court found that: "The right to freedom of expression should not be restricted to speaking about only those things that delight those in power but also those things that have the potential to displease, indeed annoy them".[155] It follows that, therefore, the removal of Buhari's post violates the right to freedom of expression under African human rights law.

It is important to mention the recent statement regarding the concerns of UN Human Rights on this issue stating that "having transparent rules around content moderation and ensuring different views are reflected is also a question of trust in institutions –one of the most precious commodities in democratic societies."[156] Thus, social media platforms must respect the right of speakers unless the impugned speech crosses the threshold of prohibited speech and foments imminent violence. For this reason, Buhari's speech should have been tolerated as it did not pass the threshold of prohibited speech in a democratic society. Moreover, the decision and process of the removal were not transparent and even-handed.[157]

Overall, the saga of Nigerian President and Twitter raise many questions than answers and will continue to spur controversies. It shall be recalled that content moderation is a tightrope act. Nevertheless, the removal of the post by Twitter will arguably stifle vibrant debate in a democratic society. Hence, this takedown measure is the tip of the iceberg that platforms are wielding leviathan power through policing freedom of expression in Africa or beyond.

[154] Ingabire case, *supra* note 17, para 143.

[155] *Republic v. Mkandawire & Another* (5 of 2010) [2010] MWHC 5 (08 October 2010) 9-10.

[156] *See* the statement of Peggy Hicks, Director of Thematic Engagement for UN Human Rights, moderating online content: fighting harm or silencing dissent? (23 July 2021), <https://bit.ly/3J2CoW9> accessed 24 July 2021.

[157] Yusuf Alli et al, *supra* note 16, at 14.

5. The Content of the Right to Freedom of Expression on the Internet under African Human Rights Law

5.1 Regional standards

The right to freedom of expression under the African Charter[158] can be understood as a basic right –vital to an individual's personal development, and to their participation in the conduct of public affairs.[159] It includes 'the right to seek, receive and impart information and ideas of all kinds regardless of frontiers'.[160] The right can be exercised through several means and modes of expression.[161] It is also described as a meta or multiplier right since it enables individuals to enjoy many other rights.[162] For instance, as indicated in the democratic rationale for the right to freedom of expression in Section 2.2 (above), political participation rights would be worthless without the conversation of ideas.[163] The rights to assembly, peaceful demonstration, and association would also be superficial if they do not include an entitlement to express ideas.[164]

The right to freedom of expression is found under civil and political rights part of the African Charter.[165] Article 9(1) provide that "[e]very individual shall have the right to receive information." And according to Article 9(2), [e]very individual shall have the right to express and disseminate his opinions within the law". Importantly, the phrase the right

[158] African Charter, *supra* note 58, art 9(2).

[159] Media Rights Agenda & Others v Nigeria (2000) AHRLR 227 (ACHPR 1999) para. 36.

[160] General Comment No 34, *supra* note 13, para 11.

[161] Sarah Joseph and Melissa Castan (2013), The *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press), at 594.

[162] Michael O'Flaherty (2012), 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34,' 12 *Human Rights Law Review* 631.

[163] UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para 12.

[164] Kevin Boyle (2010), 'Thought, Expression, Association, and Assembly', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law* (Oxford University Press), at 266.

[165] Oji U. Umozurike (1997), *The African Charter on human and Peoples' Rights*, (Brill: Martinus Nijhoff Publishers), at 34.

'to express and disseminate' under the African Charter embraces a plethora of means and forms of expression.[166]

A comparison of the African Charter provision on freedom of expression to its articulation under other regional and international human rights instruments reveals that the right in the African Charter does not have the explicit breadth of scope, specificity and clarity[167] found in other instruments[168] such as the Universal Declaration of Human Rights (UDHR),[169] the International Covenant on Civil and Political Rights (ICCPR),[170] the European Convention of Human Rights (ECHR),[171] and the American Convention on Human Rights (ACHR).[172]

When we compare the African Charter with the European and the American Conventions, the former is quite limited in how it refers to the content of the right, by referring only to the right to 'express and disseminate' opinions, without references to the right to 'seek' them. Indeed, the African Charter mentions the right to receive information under Article 9(1), but it remains unstated as to whether this incorporates a right also to seek information. By contrast, Art. 10(1) of the ECHR states the right to freedom of expression includes freedom "to receive and impart information and ideas without interference by public authority and regardless of frontiers." The American Convention, like the ICCPR, provides one of the broadest possible descriptions of the right to freedom of expression since it states the right to seek, receive and impart information. Moreover, Article 13(1) of American Convention broadly describes the protected means and modes of expression.

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166 Rachel Murray (2019), *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press), at 266.

167 Adjei, *supa* note 22, at 237.

168 Kolawole Olaniyan (2008), 'Civil and Political Rights in the African Charter: Articles 8–14' in Malcolm Evans and Rachel Murray(eds), *The African Charter on Human and Peoples' Rights* the System in Practice 1986–2006 (Cambridge University Press), at 220.

169 *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217 A (III) art 19.

170 UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations Treaty Series (UNTS), vol. 999, p. 171, art 19(2).

171 *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, art 10.

172 *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, art 13.

However, the African Charter's failure to mention any specific medium may bring its own benefits, since it could be interpreted to embrace new and emerging mediums, including the internet. In addition, and importantly, the 2019 African Declaration clearly provides that the right to freedom of expression shall be protected both offline and online.[173] Hence, freedom of expression as formulated under the African Charter refers to conveying thoughts using any means. The 2019 African Declaration was adopted by the African Commission to complement the African Charter and seeks both to explain how the right to freedom of expression extends to its exercise on the internet and to provide deeper nuance as to the nature of that right in the digital ecosystem.[174] The 2019 African Declaration addresses the role of new digital technologies in the realisation of the right to freedom of expression.[175] It also affirms that the same rights that people have offline should be protected online in accordance with international human rights law.[176]

Furthermore, the right to freedom of expression is confirmed within a number of specific instruments of the African Union (AU). For instance, the African Youth Charter set out that young persons have the right to seek, receive and disseminate information and ideas of all kinds, either orally, in writing, in print, in any form of art or through any media of their choice subject to the restrictions as prescribed by laws.[177] This means African youth are entitled to enjoy freedom of expression, subject to relevant claw-back clauses. Also, the right can be exercised through any medium, be it offline or online.[178] The African Charter on Democracy, Elections and Governance[179] also provides for freedom of expression. This Charter maps the commitment of African States in relation to constitutional democracy, elections and unconstitutional changes of government. Similarly, the African Charter on the Rights and Welfare of the Child also acknowledges that the right to freedom of expression should be extended to children in Africa.[180] Thus, the

[173] African Declaration, *supra* note 45, Principle 5.
[174] African Declaration, *supra* note 45, introduction para 1.
[175] Id., preamble para XV.
[176] Id., preamble para XVI, and *see* principle 5.
[177] African Union, *African Youth Charter*, 2 July 2006, art 4.
[178] Ibid.
[179] African Union, *African Charter on Democracy, Elections and Governance*, 30 January 2007, art 27(8).
[180] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), art 7.

content of the right generally extends to all forms of expression thereby covering all platforms of speech, both offline and online.

5.2 Sub-regional standards

Regional economic communities (RECs) have been primarily formed to facilitate regional integration through closer economic cooperation and the harmonisation of policies rather than fostering human rights at sub-regional level.[181] Yet, there is a strong link between the objectives of integration and human rights, such as the ways in which improving civil and political rights are often implicated within goals of economic integration. For example, when regional economic integration reaches the phase of a common market, citizens can exercise a number of civil and political rights such as free movement of persons.[182]

Given their different focus, the constitutive treaties of most RECs lack express or extensive provisions on human rights, both in general and in terms of specific rights. The Treaty for the Establishment of the East African Economic Community (EAC) refers to 'human rights' in general terms a few times.[183] As a result, cases involving claims of human rights violations, including violations of freedom of expression, have been referred to its Tribunal citing the violations of good governance and rule of law clauses.[184] Similarly, the rule of law clause of the EAC Treaty dictates that Partner States must abide by the principles of rule of law, democracy, social justice and the maintenance of universally accepted standards of human rights.[185]

In *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi,* the East African Court of Justice (EACJ), citing these provisions,

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[181] *See* Frans Viljoen (2012), *International Human Rights Law in Africa* (Oxford University Press), at 481; Solomon T Ebobrah (2013), 'Human Rights Developments in African Sub-Regional Economic Communities during 2012', 13 *African Human Rights Law Journal* 178; Frans Viljoen (1999), 'Realisation of Human Rights in Africa through Sub-Regional Institutions,' 7 *The African Yearbook of International Law*, 185-216, and Frans Viljoen(2011), 'Human rights in Africa: normative, institutional and functional complementarity and distinctiveness' *18 South African Journal of International Affairs* 196.

[182] Assembly of Heads of State and Government, *Agreement Establishing the Inter-Governmental Authority on Development (IGAD),* IGAD/SUM-96/AGRE-Doc, Nairobi, 21 March 1996, art 13 A(o), and East African Economic Community (EAC), *Treaty for the Establishment of the East African Economic Community (EAC),* (as amended on 14th December 2006 and 20th August 2007, art 104.

[183] EAC Treaty, Id., arts 3(3)(b), 6(d), 7(2), 27(2) and 123(3)(c).

[184] Id., arts 6(d) and 7(2).

[185] Id., art 7(2).

held that the government of Burundi's Press Law No. 1/11, mandating an arbitrary accreditation scheme that compels journalists to obtain a press card before exercising their profession, violated the right to freedom of expression.[186] The EACJ reasoned that "there is no doubt that freedom of the press and freedom of expression are essential components of democracy."[187] The Court further noted that 'under Articles 6(d) and 7(2), democracy must of necessity include adherence to press freedom'[188] and a 'free press goes hand in hand with the principles of accountability and transparency which are also entrenched in articles 6(d) and 7(2).'[189]

The EACJ took a similar position in the case of *Media Council of Tanzania v. Attorney General*. In this case, it held that numerous provisions of Tanzania's Media Services Act violated the Treaty for the Establishment of the East African Community as they infringed the right to freedom of expression.[190] The Court found that the Tanzanian government failed to demonstrate that the limitations to the right in the law were legitimate under African human rights law, and held that the impugned provisions therefore violated the Treaty by infringing the right to freedom of expression protected by the African Charter on Human and Peoples' Rights.[191]

In Western Africa, the Revised Treaty of ECOWAS recognises the importance of the press in a drive towards a regional integration process.[192] The ECOWAS Court in *Ogwuche v. Nigeria*[193] thus held that a new regulation imposed by the Nigerian Government against a human rights group was tantamount to censorship and violated the group's freedom of expression.[194] The National Broadcasting Commission had issued a regulation requiring Festus Ogwuche, as well as all broadcasting houses, to have any proposed live programming vetted by the Commission 48 hours

[186] *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, EACJ Ref. No. 7 of 2013 (2015), para 123.
[187] Id., para 80.
[188] Id., para 82.
[189] Id., para 83.
[190] *Media Council of Tanzania v. Attorney General*, Case No. 2 of 2017, EACJ Judgement, March 28, 2019.
[191] Id., para 118.
[192] Economic Community of West African States (ECOWAS), *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 24 July 1993, art 66.
[193] *Ogwuche v. Federal Republic of Nigeria*, December 11, 2018, ECW/CCJ/JUD/31/18.
[194] Id., paras 60 and 66.

prior to airing, on the grounds that some programs were broadcasting content which threatened the peace and unity of the country.[195] The Court examined international and regional human rights instruments to find that the Government of Nigeria had failed to establish proof that Ogwuche's media programs constituted a sufficient threat to justify the restriction and that the restriction, as such, was an excessive burden.[196] Therefore, the Court ordered that the Regulation be withdrawn.[197]

Over the years, the ECOWAS Court has reviewed complaints of human rights violations pertaining to the unlawful arrests, disappearances, and illegal killings of journalists with the view of protecting the right to freedom of expression in the cases of *Chief Ebrimah Manneh v. The Gambia*[198], *Musa Saidykhan v. The Gambia*[199], and *Federation of African Journalists & others v. The Gambia*.[200] Most importantly, the ECOWAS Court has set an important precedent in *Amnesty International Togo et al* case concerning freedom of expression on the internet.[201]

To sum up, sub-regional courts in Africa such as the EACJ and ECOWAS Court have an enormous potential to be guardians of human rights, including freedom of expression on the internet. Moreover, their jurisprudence elaborates upon the contours of the right to freedom of expression on the internet in the African context.

6. Conclusion

This article has demonstrated how digital authoritarianism by States and the leviathan power of social media platforms continues to pose enormous threats to the enjoyment of freedom of expression in the digital environment in the African continent. States' *restrictions* on freedom of expression on the internet in Africa include internet shutdowns, internet censorships, repressive national security legislation and digital surveillance. When the States implement one of these measures, they flout a cocktail of negative and

[195] Id., para 4.
[196] Id., para 65.
[197] Id., para 71.
[198] *Manneh v. Gambia*, Judgment, ECW/CCJ/APP/04/07 (ECOWAS, June 5, 2008), para 43.
[199] *Musa Saidykhan v. The Gambia*, ECW/CCJ/JUD/08/10, (16th Dec. 2010) para 46.
[200] *Federation of African Journalists & others v. The Gambia* (Judgment No: ECW/CCJ/JUD/04/18, March 13, 2018) p. 61.
[201] Amnesty International Togo case, *supra* note 68.

positive duties concerning the right to freedom of expression on the internet. Most of these measures are *incompatible* with the African human rights law.

I argue that illegitimate limitations of the right fall short of a human rights-based approach. As a result, these limitations violate freedom of expression on the internet. In light of the discussion in the preceding sections, African States must end the practice of digital authoritarianism and should robustly respect and protect the right to freedom of expression on the internet by aligning their actions with the three pillars of human rights-based approach: substantive, process and procedural touchstones.

Likewise, while proactive removal of content by social media platforms is understandable, their arbitrary, unruly decisions during content moderation equally gag the right to freedom of expression on the internet. As illustrated in this article, the removal of President Buhari's post by Twitter epitomises how platforms are policing the right to freedom of expression in Africa. Beyond their superficial human rights vocabulary, social media platforms must seriously commit to human rights law standards by incorporating them into their community standards and terms of services to fully ensure that content moderation practices are guided by human rights-based approach.

In order to whittle down the unbridled leviathan power of social media platforms, African States should consider regulating their behaviour through initiating a human rights-friendly binding instrument.[202] Given Africa's diverse cultural, ethnic and social contexts, social media platforms must also diversify their content and policy team in order to enable the application of local or subject-matter expertise to content issues. ■

[202] A similar call has been advanced in the context of the right to development in Africa. *See* generally, Tamo Atabongawung (2021), 'A legally binding instrument on business and human rights: Implications for the right to development in Africa', *African Human Rights Journal*, 262-289.

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The Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths

Tecle Hagos Bahta ♣

Abstract

Ethiopia's ratification of the New York Convention for the recognition and enforcement of foreign arbitral awards and arbitration agreements is a welcome development. The Convention has been greatly facilitating cross-border mobility of arbitral awards and arbitration agreements in international commercial transactions. The entry into force of the New York Convention (as of 13 March 2020) and the enactment of the Arbitration and Conciliation Proclamation No.1237/2021 have ushered a relatively new era of modern arbitral regime in Ethiopia. In this regard, the necessary legal and formal infrastructure should be laid down for the proper implementation of the New York Convention. This article examines the ramifications of the three reservations registered by Ethiopia under the Convention; namely, the reciprocity, commercial and the non-retroactive application of the Convention. Furthermore, the multiplicity of enforcement regimes in the Ethiopian arbitral system related to these reservations are expounded. The formality requirements enunciated under the New York Convention are elaborated and the need for setting out the legal and institutional framework for contextualization thereof are dealt with. The possibility for award-creditors to resort to the more favourable local law or treaty other than the New York Convention and the recent trend of recognizing and enforcing arbitral awards, which are set aside or annulled in the place of arbitration are highlighted.

Key terms:

New York Convention · Arbitration · Reciprocity · Recognition and enforcement · Foreign arbitral awards

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Contents

Abstract

1. Introduction

2 The Multiplicity of the Enforcement Regimes
  2.1 Nationality of arbitral awards
  2.2 Multiple enforcement regimes: *à la carte*

3. 'Reservations' under the New York Convention
  3.1 Retroactive application of the Convention
  3.2 Date of entry into force of the New York Convention in Ethiopia
  3.3 Reciprocity reservation
  3.4 Commercial reservation
  3.5 Formality requirements and national treatment of foreign arbitral awards

4. The Enforcement of Annulled Arbitral Awards in Their Country of Origin

5. Conclusion

1. Introduction

International trade and investment cannot be contemplated without speedier, less costlier, impartial and independent dispute resolution mechanisms. Arbitration and conciliation/mediation have been significantly featuring in the dispute settlement processes of international commercial and investment disputes. Of these two, arbitration has been the most acceptable and widely recognized dispute settlement mechanism. As Samuel K.B. Asante stated:[1]

Frequently used acronyms

BITs	Bilateral investment treaties
COMESA	Common Market for Eastern and Southern Africa
ICSID	International Center for the Settlement of Investment Disputes
MIAs	Multilateral investment agreements
UNCITRAL	United Nations Commission on International Trade Law

[1] Amazu A. Asouzu (2001), *International Commercial Arbitration and African States: Practice, Participation and Institutional development*, CUP, p. xiii.

> […] African governments and private parties involved in negotiating international business transactions such as loan agreements, petroleum and mining agreements, industrial joint ventures, management agreements, international procurement contracts, international supply contracts, bilateral or international trade agreements and bilateral investment agreements have come to the realization that foreign parties to these transactions, i.e., foreign governments, transnational corporations, international banks, foreign investors, international suppliers and contractors, all insist on an appropriate dispute settlement mechanisms, which is invariably international arbitration.

He further stated:[2]

> Such parties predominantly prefer international arbitration because of the strong perception that an international forum for settling disputes provides some insurance against possible bias by a national judiciary. Thus, African countries caught in the web of a plethora of international transactions recognize the virtual inevitability of accepting international commercial arbitration. Indeed, the acceptance of international arbitration has become an invariable ingredient of the liberalization packages which African countries, and developing countries elsewhere, provide as a *sine qua non* of their strategies to attract foreign investment and technology, international finance and foreign trade.

Arbitration, therefore, has been preferred to conciliation/mediation particularly because arbitral awards have been successful in their mobility across borders. Notwithstanding the recent efforts to make conciliation/ mediation more effective through the Singapore Convention on Mediation,[3] their efficacy in terms of their international enforceability has been limited. In contrast, international mobility has enabled arbitral awards to be recognized and enforced with ease not only because arbitration has been accepted as the favourable dispute settlement for trade and investment but also because of the coming into effect of the New York Convention for the

[2] Ibid.

[3] *See* United Nations Convention on the international Settlement Agreements Resulting from Mediation (The Singapore Convention on Mediation), available at <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> Last accessed on 20/12/2021.

Recognition and Enforcement of Foreign Arbitral Awards of 1958.[4] The New York Convention has been hailed as the most successful convention relative to commercial matters.

Ethiopia has become party to the New York Convention since March 2020.[5] This is aimed to facilitate the inflow of foreign direct investment into Ethiopia and lubricate the wheels of commercial arbitration agreements and the reciprocal recognition and enforcement of foreign arbitral awards.[6] This effort is also accompanied by a new arbitration and conciliation proclamation,[7] which is believed to help the country become a hub for arbitration.

In this respect, this article generally deals with the essential underpinning legal infrastructure that are requisite for the smooth application of the New York Convention in the Ethiopian legal system. It also highlights the context in Ethiopia under which the New York Convention is to operate. It is not intended to deal with all the requirements (conditions) for the refusal of foreign arbitral awards, which are put in place under the New York Convention; the grounds for refusal, as set out under Article V of the New York Convention, are better dealt with in the light of their practical applications in the future aided by judicial and arbitral cases.

The article introduces the New York Convention in the first two sections. The various applicable set of rules competing for application owing to the coming into force of the New York Convention in Ethiopia are introduced and analyzed. The reservations registered by Ethiopia in the process of accession are discussed and their implications in Ethiopia are explored in the third section. The fourth section deals with the recognition and enforcement

[4] The New York Convention on the Recognition and Enforcement of Arbitral awards of 1958 (hereinafter referred to as 'New York Convention'; see text available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (Last accessed on 20/12/2021).

[5] The New York Convention Ratification Proclamation No.1184/2020, *Fed. Neg. Gaz*., Year 26, No.11, 11 March 2020.

[6] For the pros and cons of ratifying the New York Convention by Ethiopia, *see* Fekadu Petros (2014), 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Advantages, Disadvantages and some Remarks on Ethiopia's Course of Action Ahead', *Mizan Law Review*, Vol. 8, No. 2, pp. 470-483 (*Comment* in Amharic); and Mesfin Beyene (2019), 'Towards a Better Commercial Arbitration: Should Ethiopia Ratify the New York Convention', *Mizan Law Review*, Vol. 13, No.1, pp. 123-152.

[7] The Arbitration and Conciliation Working Procedure Proclamation No.1237/2021, *Fed. Neg. Gaz*., Year 27, No.21, 2 April 2021 (hereinafter 'Arbitration and Conciliation Proclamation No.1237/2021').

of foreign arbitral awards which are set aside in their country of origin, followed by conclusion.

2. The Multiplicity of the Enforcement Regimes

2.1 Nationality of arbitral awards

The determination of the nationality of an arbitral award is crucial as the concept and practice of recognition and enforcement of the arbitral award is based on the nationality thereof. There are several bases upon which the nationality of arbitral awards are determined. Under the Civil Procedure Code of Ethiopia. A 'foreign judgment' is defined as the judgment of a foreign court.[8] By analogy, a 'foreign arbitral award' is meant to be an arbitral award, which is rendered outside of Ethiopia.

This definition is obviously too simplistic. However, for practical purposes, Ethiopian courts did not need to belabour on the issue for two reasons; *first*, it is required that 'a certificate signed by the President or the registrar of the court having given judgment to the effect that such judgment is final and enforceable' should be submitted to the enforcing court in Ethiopia.[9] This is what is generally referred to as an 'enforcement order' or *exequatur* granted by the court of the place where the arbitral award is rendered. *Second*, judicial practice[10] shows that the award-creditor is obligated to prove that there exists reciprocity between the two countries as stipulated under Art. 461(1)(a) of the Civil Procedure Code.

Currently, with the promulgation of the new Arbitration and Conciliation Proclamation No.1237/2021, it is set out that the place (seat) of the arbitration is deemed to be where the arbitral award is made.[11] In this regard, the Proclamation provides the following definition for 'foreign arbitral awards':

> […] an arbitral award which is deemed to have been rendered in a foreign country in accordance with international treaties acceded and ratified by Ethiopia or *a decision in which the seat of*

[8] *See* Civil Procedure Code of Ethiopia of 1965 (hereinafter referred to as 'Civil Procedure Code'), art.3 *sub verbo* "foreign court" and "foreign judgment".

[9] Id., art. 457(b).

[10] Tecle Hagos Bahta (2011), 'Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia', *Mizan Law Review*, Vol. 5, No.1, pp. 105-139.

[11] Arbitration and Conciliation Proclamation, *supra* note 7, art. 2(8).

> *arbitration is mentioned to be outside of the Ethiopian territory*. [Emphasis added].

As indicated in the first limb, conventions (treaties) may determine the nationality of arbitral awards. The second limb of the afore-said legal provision clearly states that an arbitral award is 'foreign' if the seat of arbitration is outside of Ethiopia. The approach is further entrenched under Art. 44(3) of the Proclamation. It provides thus:

> The award shall state the claim, the material facts in dispute, the name, address and, where necessary, the citizenship of the contracting parties, grounds for rendering the award, the costs of and mode of payment of costs of arbitration, the date of the award, and place of the arbitral award as stipulated under Article 30 of this Proclamation.

The afore-cited legal provision stipulates that it is imperative for the arbitral award to state the place of the arbitral award. Nevertheless, it does not bind foreign arbitral proceedings. It is, therefore, of little help. It is, however, indicative of the deliberate choice by the redactors to deploy the seat of arbitration as the determining criterion for nationality.[12] This is the geographical criterion. In this regard, as per Article I of the New York Convention, the application of the Convention brings about three types of arbitral awards, namely: foreign, nondomestic and domestic awards. A *foreign award* is one that falls under the New York Convention and is made outside of Ethiopia; a *nondomestic award* is an award made in Ethiopia and falls under the Convention;[13] and, a *domestic award* is one made in Ethiopia, and, thus, does not fall under the Convention.

The *nondomestic awards* are a class of arbitral awards, which may be eventuated due to the fact that some states accord nationality not only on the basis of the geographical criterion but also on a procedural basis. The latter means that arbitral awards made in a convention state may be considered 'foreign arbitral award' for the purpose of recognition and enforcement of arbitral awards under the New York Convention. This is because the arbitral

[12] *See* Id., art.30.

[13] Art. I(1) of the New York Convention defines 'foreign arbitral awards' as awards which are made in the territory of a state other than the state in which recognition and enforcement is sought. It also stipulates that the Convention 'shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.

proceeding took place under the procedural rules of another state. This is the procedural criterion. Rubino-Sammartano aptly noted that:[14]

> Confirmation of the procedural criterion can be found in the New York Convention, which, in addition to the first class of awards (those made in other states) treats as foreign a second class of awards, even if made in a state, are the results of proceedings governed by a procedural law different from the law of that state.

Indeed, this is not unheard of as arbitrating parties may choose arbitration rules of a state other than the state where the arbitration proceedings take place. In other words, the *lex loci arbitri,* apart from its mandatory procedural rules, may not necessarily be the curial law (the *lex arbitri).* The contracting parties may find it more suitable to have their arbitration proceedings governed under the law of arbitration of a third-country of which nationality some states are willing to accord to the arbitral award. One would, thus, expect that the new Arbitration and Conciliation Proclamation should have encapsulated when and how international commercial arbitrations which take place in Ethiopia may, under certain circumstances, be considered as *nondomestic* awards and hence falling under the ambit of the New York Convention for their recognition and enforcement in Ethiopia.

The application of the New York Convention seems to have been restrained to the recognition and enforcement of arbitral awards '*made only in the territory of another contracting state'*.[15] [Emphasis supplied]. Thus, the possibility of ascribing nationality on the basis of the procedural criterion is ruled out.

2.2 Multiple enforcement regimes: *à la carte*

Currently, subsequent to the coming into force of the New York Convention and the Conciliation and Arbitration Proclamation No. 1237/2021 in Ethiopia, an award-creditor may resort to either of the following recourses for the recognition and enforcement of a foreign arbitral award:

(a) *Recourse in accordance with the terms of the New York Convention*

It should be noted that the terms of the New York Convention are only applicable in relation to an arbitral award concerning commercial matters.

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[14] Mauro Rubino-Sammartano (2014), *International Arbitration: Law and Practice*, 3rd Ed., Kluwer Law International, p. 956.

[15] Art.2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No.1184/2021 (hereinafter also referred to as the 'ratification proclamation'.)

This is because the 'commercial reservation' has been registered to the Convention in Ethiopia;

(b) *Recourse in accordance with the Arbitration and Conciliation Proclamation No.123/2021*

It is worthy to note that this Proclamation is only applicable for arbitral awards concerning commercial matters as stipulated under Art. 3 of the Proclamation.[16]

(c) *Recourse in accordance with the Civil Procedure Code provisions under Arts. 458-461*

These provisions find application for any arbitral award irrespective of its being civil or commercial matter. Article 461 of the Civil Procedure Code, which deals with the recognition and enforcement of foreign arbitral awards, is repealed by the new Arbitration and Conciliation Proclamation No.1237/2021. However, the new Proclamation only applies to commercial matters. It is not, therefore, clear whether the application of Art. 461 will survive in relation to the recognition and enforcement of foreign arbitral awards relative to civil matters. It is submitted that it should continue to apply lest the recognition and enforcement of foreign arbitral awards on civil matters should be left in limbo. Indeed, the arbitral rules in Civil Procedure Code, including Art. 461, will continue to apply for some time to come. This is envisaged with no equivocation under Art. 77 of the Arbitration and Conciliation Proclamation. Art. 77 of the Proclamation stipulates thus:

> (1) Any arbitration agreement signed before the coming into force of this Proclamation shall be governed by the law that had been in force before the effective date of this Proclamation.
>
> (2) Arbitral proceedings initiated before the coming into force of this Proclamation or cases of arbitration pending before courts, ongoing proceedings and execution of decisions shall be governed by the law in force before the coming into force of this Proclamation.
>
> (3) Contracting parties who have concluded arbitration agreement or in the process of concluding an agreement before the coming

[16] Art. 3(1) of the Arbitration and Conciliation Proclamation No.123/2021 provides thus:

> Without prejudice to the international treaty to which Ethiopia is a signatory, this Proclamation shall apply to commercial related national arbitration, international arbitration whose seat is in Ethiopia and national conciliation proceedings.

into force of this Proclamation may agree to be governed by this Proclamation.

Art. 77 of the Proclamation is indeed a signpost for arbitrating parties to cautiously pay heed of the date on which the Proclamation enters into force, which is 2 April 2021. The 2nd day of April 2021 is an important cutoff date for all arbitration agreements and arbitral awards which straddle the dates prior to and post the entry into force of the Arbitration and Conciliation Proclamation No.1237/2021.

This also shows that Art. 461 of the Civil Procedure Code will have far-reaching repercussions in the future not only in its application to commercial matters, as enunciated under Art. 77 of the Proclamation, but also insofar as non-commercial matters are concerned. Thus, unless the conditions for the recognition and enforcement of foreign arbitral awards on civil matters are set out by legislative dispensation in the foreseeable future, there is no doubt that Art. 461 of the Civil Code will continue to apply.

In this regard, the debate on whether it is the federal or the regional states which possess the legislative jurisdiction to enact on the *modus operandi* of dispute settlement mechanisms in relation to civil matters lingers on. This extends, *inter alia*, to issues of arbitrability or non-arbitrability and the recognition and enforcement of both domestic and foreign arbitral awards concerning civil matters. Furthermore, the courts will find a leeway under Art. 79 of the Arbitration and Conciliation Proclamation for so applying. Article 79 stipulates: 'The provisions of the Civil Code that may help the implementation of the conciliation and arbitration proceedings or related to the proceedings and not contravene this Proclamation shall be applicable'.

(d) *Recourse in accordance with the terms of a convention* to which the country is a party by virtue of Art. 458(1) of the Civil Procedure Code

Article 53(1) of the Arbitration and Conciliation Proclamation states: '[w]here a foreign arbitral award falls under international treaties ratified by Ethiopia, it may be recognized or enforced in accordance with such treaties'.[17] These conventions can be those that are already ratified by Ethiopia or the conventions which might be ratified in the future. Such bilateral and/ or multilateral conventions have not been ratified by Ethiopia to-date save the Treaty of Judicial Assistance between the Djibouti and

[17] *See* Arbitration and Conciliation Proclamation, *supra* note 7, Art. 53(1).

Ethiopia.[18] It is not, however, clear whether the recognition and enforcement of foreign arbitral awards are encapsulated under the terms of the said Treaty of Judicial Assistance. The Treaty deals with reciprocal recognition and enforcement of judgments and other evidence related assistances between the two countries.[19] Thus, seldom has Art. 458(1) of the Civil Procedure Code found application in Ethiopia in terms of both the recognition and enforcement of foreign arbitral awards and judgments.

Moreover, as alluded to above, international conventions are given deference in their applications to the recognition and enforcement of foreign arbitral awards under Art 3 of the Arbitration and Conciliation Proclamation. In this regard, the application of Article VII(1) of the New York Convention is worth noting. It reads:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor *deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.* [Emphasis supplied].

Thus, Article VII of the New York Convention allows the award-creditor to choose more favourable terms stipulated under domestic law than those of the New York Convention in the state where the recognition and enforcement is sought. Whether the terms for the recognition and enforcement of foreign arbitral awards enunciated under Art. 53 of the Arbitration and Conciliation Proclamation are more favourable than the terms of the New York Convention for award-creditors who wish to benefit therefrom are yet to be seen in practice.

In the light of this, an award-creditor may have a spectrum of choices based on which the party may seek for the recognition and enforcement of an arbitral award. In this regard, the following options should be carefully trodden upon by the award-creditor:

(a) For arbitral awards made prior to 22 November 2020 (the date of entry into force of the New York Convention in Ethiopia), one has to rely solely on Arts. 458-461 of the Civil Procedure Code on the recognition and enforcement of foreign arbitral awards.

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[18] A Proclamation to Ratify the Treaty on Judicial Assistance between the Transitional Government of Ethiopia and the Republic of Djibouti, 31 May 1995.

[19] For more on this, *see* Tecle Hagos Bahta, *supra* note 10, pp.126-127.

(b) For arbitral awards made post 22 November 2020, an award-creditor may have the option of resorting to the provisions of the New York Convention or to the domestic rules on the recognition and enforcement of foreign arbitral awards, where the latter are more favourable terms for the party seeking recognition and enforcement of the arbitral award.

(c) For arbitral awards made post 2 April 2021 (the date of entry into force of the new Arbitration and Conciliation Proclamation No.1237/2021), an award-creditor may have the options of choosing between enforcement under the terms of the New York Convention or under the terms of the new Arbitration and Conciliation Proclamation, whichever is the more favourable regime for the enforcement and recognition of the arbitral award.

In order to examine which of the afore-cited two set of rules, under paragraph (c) above, are more favourable for the party, it is good to take note of the grounds of refusal provided for under the Proclamation. Art. 53(2) of the Proclamation provides:

> Without prejudice to sub-article (1) of this Article, a foreign arbitral award shall not be recognized or enforced only on the following grounds:
> (a) Where it is not based on reciprocity;
> (b) Where the arbitral award is based on invalid arbitration agreement or rendered by a tribunal which is not established in accordance with the law of the country in which such award is rendered;
> (c) The arbitral award rendered cannot be enforced in accordance with the Ethiopian law;
> (d) Where the parties have not had equal rights in appointing the arbitrators or [] in presenting their evidence and getting heard in the course of the proceedings;
> (e) Where the matter on which the award is rendered is not arbitrable under Ethiopian law;
> (f) Where the arbitral award contravenes public policy, moral and security.

As it presently stands, the first *alinea* of Article VII(1) of the New York Convention barely finds application as there are currently no bilateral or multilateral agreements which Ethiopia has entered into for the purpose of recognition and enforcement of foreign arbitral awards.

Prior to the coming into force of both the ratification Proclamation and the Arbitration and Conciliation Proclamation, recognition and enforcement of all categories of foreign arbitral awards were sought under Arts. 458-461

of the Civil Procedure Code. In particular, Art. 461 of the CPC titled "Enforcement of Foreign Awards", under its first sub-article provides the following:

(1) Foreign arbitral award may not be enforced in Ethiopia unless:
   (a) Reciprocity is ensured as provided for by Art. 458(a);
   (b) The award has been made following a regular arbitration agreement or other legal act in the country where it was made;
   (c) The parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings;
   (d) The arbitration tribunal was regularly constituted;
   (e) The award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to public order or morals; and
   (f) The award is of such nature as to be enforceable on the condition laid down in Ethiopian laws.

Apart from these requirements, the Civil Procedure Code[20] also requires that 'the provisions of the preceding Articles shall apply by analogy when the enforcement of a foreign award is sought'. These provisions to which cross-reference is made through Art. 461(2) are Arts. 456-457 and Arts. 459-460 of the Civil Procedure Code. The provisions, in addition to the substantive criteria, set out the procedural and/or formal requirements for the recognition and enforcement of foreign judgments in Ethiopia under the Civil Procedure Code.

These substantive and procedural requirements for the recognition and enforcement of foreign arbitral awards and foreign judgments have been sufficiently dealt with in other previous works elsewhere.[21] However, Art. 456(1) of the Civil Procedure Code draws our attention as particularly relevant in this context. Art. 456(1) provides "[u]nless otherwise expressly provided for by international conventions, foreign judgments may not be executed in Ethiopia except in accordance with the provisions of this Chapter".

Art. 456(1) is applicable to execution of foreign arbitral awards owing to the cross-reference made under Art. 461(2); and the first limb of Art. 456(1)

[20] Civil Procedure Code, *supra* note 8, art. 461(2).

[21] Ibrahim Idris Ibrahim (1989), 'Ethiopian Law of Execution of Foreign Judgments', *Journal of Ethiopian Law*, vol. 19, pp. 17-34; Tecle Hagos Bahta, *supra* note 10, pp. 105-140

finds application due to the ratification of the New York Convention. Thus, foreign arbitral awards can now be classified into those that should be executed on the basis of the New York Convention and those of Art. 461 of the Civil Procedure Code. The New York Convention finds application only in relation to foreign and non-domestic arbitral awards –concerning commercial matters– made in another convention state. This is owing to the fact that Ethiopia has entered both the commercial and reciprocity reservations.

As indicated above, because of the 'commercial reservation' entered into in Ethiopia, commercial arbitral awards are divided into three; namely, 'foreign arbitral awards', 'non-domestic arbitral awards' and 'domestic arbitral awards'. Domestic arbitral awards find no application under the New York Convention. Therefore, domestic arbitral awards (concerning both commercial and civil matters), foreign and non-domestic arbitral awards concerning civil matters, and foreign arbitral awards made in non-convention states (concerning both commercial and civil matters) are subject to the conditions set out either under the Civil Procedure Code or the Arbitration and Conciliation Proclamation. This is due to the international nature of the New York Convention and the two reservations registered by Ethiopia in ratifying the Convention.

The second recital of the preamble to the ratification Proclamation sets out the objective of ratifying the New York Convention. It highlights the objective of ratifying the Convention in no uncertain terms that it is to enhance 'foreign investment by boosting [the] country's goodwill in enforcing contracts of foreign parties'. This particular mention of laying down the necessary infrastructure for enforcing foreign contracts in order to boost the country's goodwill with a view to enhance foreign investment merits some discussion here. Indeed, the significance of ratifying international instruments as a means of encouragement for foreign investments has been pointed out under the Common Market for Eastern and Southern Africa (COMESA) Treaty.[22] Art. 162 of the Treaty provides:

> The Member States agree to take necessary measures to accede to multilateral agreements in investment resolution and guarantee arrangements as a means of creating a conducive climate for investment promotion. To this end, the Member States undertake to accede to:

[22] Available at < https://www.comesa.int/comesa-treaty-english/ > Last accessed on 20/12/2021.

(a) The International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965;
(b) The Convention Establishing the Multilateral Investment Guarantee Agency; and,
(c) Any other multilateral agreements designed to promote or protect investment.

In the area of investment dispute settlement, arbitration has obviously received the accolades that it is "the most independent and impartial forum in which to make accountable host state abuses, a government's lack of transparency and state discretionary policies that have a negative impact on investors' assets".[23]

It should be noted that Ethiopia has signed about 30 bilateral investment treaties (BITs) and several multilateral investment agreements (MIAs). Such BITs and MIAs provide for substantive and procedural protections to the rights of investors, which in turn, promote and encourage the inflow of capital into the country. The procedural protection includes the dispute settlement mechanisms between investors and the host states; such dispute settlement mechanisms are incorporated in the BITs and MIAs through which the substantive protections are enforced. In this connection, of significant import is the reference of disputes to arbitration under the auspices of the International Center for the Settlement of Investment Disputes (ICSID).[24]

Ethiopia has not yet ratified the ICSID Convention although it has been signatory since 1967. However, the relevance of its ratification of the New York Convention is of paramount importance as it will facilitate the recognition and enforcement of arbitral awards rendered on the basis of the Additional Facility (AF) Rules of ICSID.[25] It is to be noted that whilst ICSID awards do not invoke the New York Convention for their enforcement, ICSID (AF) awards call for the application of the New York Convention for their recognition and enforcement.

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[23] Bernardo M Cremades (2006), 'Resurgence of the Calvo Doctrine in Latin America', 7 *Bus. L. Int'l*. 53, 72

[24] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or the Washington Convention of 1965). Available at https://icsid.worldbank.org/ > Last accessed on 20/12/2021.

[25] The Additional Facility (AF) Rules authorize, since 1978, the ICSID Secretariat to administer, *inter alia*, arbitration and conciliation for the settlement of disputes between states and foreign nationals that fall outside the jurisdictional ambit of the ICSID rules. The AF Rules cater for investment cases in which either the investor's home state or the host state is not a party to the ICSID Convention.

A scrutiny to the country's bilateral investment treaty (BITs) reveals that the ICSID Additional Facility is invariably placed second amongst the venues for investment arbitration by an investor-claimant whose national state is a party to the ICSID Convention. As noted by Dolzer and Scheurer 'the enforcement of non-ICSID awards, including Additional Facility awards, is subject to the national law of the place of enforcement and to the New York Convention on the Recognition and Enforcement of foreign Arbitral Awards'.[26] ICSID Convention awards are final and binding as if they were judgments of the national court and cannot be subject to review by national courts. The ICSID Additional Facility awards are, however, fully amenable to the provisions of the New York Convention. Such awards emanate from investment arbitrations and impose pecuniary obligations against the respondent states.

In this regard, the question of state immunity from execution remains in limbo in Ethiopia as there are no judicial or legislative dispensations in this respect. It should be noted that 'the procedure for the enforcement of ICSID awards is governed by the law on the execution of judgments in each country'.[27] States are classified in their approach to immunity from jurisdiction or execution.[28] Some states adhere to the absolute immunity – that is, immunity for all acts carried out by or on behalf of the state, and others subscribe to the restricted immunity, that is, immunity only for acts *jure imperii* –acts in its capacity as a state as opposed to those acts in its commercial capacity (acts *jure gestionis*). The Ethiopian position in this respect is not clear.

3. 'Reservation' under the New York Convention

3.1 Non-retroactive application of the Convention

Article 3 of the ratification Proclamation seems ambiguous. This category of reservation is dubbed as the 'i' reservation under the Convention. It allows countries to register a reservation with regards to the (non-) retroactive application of the Convention.[29] Art. 3 states:

[26] Rudolf Dolzer and Christoph Scheruer (2008), *Principles of International Investment Law*, OUP, p. 288.

[27] *Ibid.*

[28] Nigel Blackaby *et al* (2009), *Redfern and Hunter on International Arbitration*, 5th ed., OUP, p. 667.

[29] The convention states, which have registered such reservation include: Serbia, Croatia, Slovenia, Republic of Moldova, North Macedonia, Montenegro, Bosnia and

> The Convention only applies in the Federal Democratic Republic of Ethiopia with respect to *Arbitration Agreements concluded and Arbitral Awards rendered after the date of its accession to the Convention*. [Emphasis supplied].

The afore-said legal provision is not devoid of equivocation at least in relation to one aspect. It might have been intended to prescribe that Article II of the Convention finds application only if the arbitration agreements had been concluded prior to the entry into force of the Convention in the country. It is also clear (from the reading of the legal provision) that only arbitral awards which are rendered after the entry into force of the Convention would be amenable to the New York Convention in Ethiopia. It should not, however, be interpreted to mean that the Convention finds application in the country only in relation to arbitration agreements, which have been entered into after the coming into effect of the Convention should recognition and enforcement of a Convention award, which is based on such an agreement, is sought.

Insofar as the recognition and enforcement of Convention awards are concerned, it should not matter whether the arbitration agreement, based on which the said Convention award was rendered, had been entered into prior or after the entry into force of the Convention. It should also be borne in mind that Convention awards –whose arbitral proceedings straddle the period preceding and following the ratification of the Convention– are not adversely affected under Art. 3 of the ratification Proclamation. In other words, Art. 3 should only find application insofar as Article II of the Convention is concerned; that is to say, Ethiopian courts should only grant anti-suit injunction or decline jurisdiction in support of an arbitration proceeding which is based on an arbitration agreement concluded by the parties after the entry into force of the Convention in the country.

It is unfortunate that all arbitration agreements concluded prior to the coming into effect of the Convention in Ethiopia are rendered ineffective in this respect. This is particularly worrisome in the sense that there are plenty of arbitration clauses in commercial, construction and other investment agreements which are concluded between Ethiopian parties [governmental or otherwise] and foreign parties prior to the said date. Ethiopian courts will find it difficult to enforce Article II of the Convention should either of the parties seek to litigate its case in the courts, notwithstanding the valid arbitration agreement between the parties.

Herzegovina, Tajikistan, Seychelles, Sierra Leone, Malta, Malawi. To this list, Ethiopia has been added.

This could even be more critical as it may also apply *apropos* arbitration cases pending outside of Ethiopian courts' jurisdiction. The pendency rule in the Civil Procedure Code of Ethiopia is not devised in a manner that can help obviate parallel proceedings in judicial or arbitral litigations. According to Art. 8(2) of the Code "[t]he pendency of a suit in a foreign court shall not preclude the courts in Ethiopia from trying a suit founded on the same cause of action." The above conclusions notwithstanding, it would be grossly unfair to refuse recognition and enforcement of Convention awards merely because an arbitration agreement, on the basis of which the Convention award was granted, was concluded prior to the entry into force of the Convention in Ethiopia.

3.2 Date of entry into force of the New York Convention in Ethiopia

For proper and clear implementation of the New York Convention, it is, first of all, necessary to determine the exact date on which it has entered into force. The date on which the New York Convention has entered into force in Ethiopia could be either of the following dates; namely, the date on which the ratification of the Convention was gazetted in the *Federal Gazatte,* which is 13 March 2020. In this connection, Art. 6 of the said Proclamation states that '[t]his Proclamation shall come into force upon publication in the *Federal Negarit Gazette'*.

Indeed, it has been a long-established practice, save a few exceptions, that legislative enactments in Ethiopia enter into force upon being officially gazetted.[30] The deferral of the coming into force of the National Building Proclamation No. 624/2009 was, for instance, mainly necessitated by the need to lay the necessary foundations on the ground for its implementation. The setting up of the institutional mechanisms and the setting out of

[30] In this regard, the National Building Proclamation No.624/2009 is worth noting in that it entered into force *after one year from the date of its publication* on the gazette. The said Proclamation initially contained the usual provision proclaiming that it would come into force on the date of its publication on the official gazette. However, it was immediately rectified by means of *Corrigendum No.4/2009*, which read thus:

> "In this Proclamation the statement under Article 60 stated as 'This Proclamation shall come into force upon the date of its publication in the Federal Negarit Gazeta' shall be read as 'This Proclamation shall come into force after one year from the date of its publication in the Federal Negrit Gazeta'."

particulars for the *modus operandi* of these institutions might have called for a moratorium in its application.[31]

One may also question whether the New York Convention might require the necessary preconditions for its implementation in Ethiopia. In this regard, it is evident that Art. 5 of the Proclamation is intended to cater for such eventualities. Art. 5 of the Proclamation provides that the Federal Attorney General (currently Ministry of Justice) "is hereby authorized to undertake, in collaboration with the Ministry of Foreign Affairs and other Government Organs, *all acts necessary for the implementation of the Convention*." [Emphasis supplied].

Of particular import in this regard is the requirement stipulated under Article XII(2) of the New York Convention. It reads: "For each State ratifying or acceding to this Convention […], this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession."

In other words, in order for the New York Convention to enter into force in any ratifying or acceding state, the state must deposit its instrument of ratification or accession to the Secretary-General of the United Nations as per Article IX(2) of the Convention. Secondly, there is a waiting period of 90 days before the Convention will have entered into force in the territory of the ratifying or acceding state. If one takes the assumption that Ethiopia deposited its instrument of ratification on 13 March 2020, the Convention enters into force on 13 June 2020. However, even leaving aside bureaucratic red tapes, this sounds too ambitious.

Art. 5 of the Proclamation entreats the Office of the Attorney-General (currently Ministry of Justice) to, in addition to the Ministry of Foreign Affairs, collaboratively engage unidentified government departments.[32] In so doing, the legislative provision does not provide for any direction whatsoever as to which departments are to be consulted. Nor is there any mention of the specific matters concerning which collaboration is sought for. It is, therefore, left to be decided by the Ministry of Justice at will. No wonder, thus, that the date of deposit of the instrument of ratification of the Convention for Ethiopia is flagged as 24 August 2020. In essence, it literally

[31] In fact, the Council of Ministers Building Regulation No.243/2011, which contained the essential requisites for executing the Proclamation, only came into force on 24 May 2011; it should be noted that those regulations came into force two years later. *See* Council of Ministers Building Regulation No.243/2011, *Federal Negarit Gazeta*, Year 17, No.71, 24 May 2011.

[32] *See* the Ratification Proclamation, *supra* note 15, art.5.

took four months and a half to deposit the instrument of ratification.[33] Consequently, the official date of ratification is set as of 22 November 2020, which is precisely 90 days from the date of deposit of the instrument of ratification.

Given the variation in the date of entry into force of the New York Convention in Ethiopia, therefore, it is imperative to question as to which date prevails in the application of the New York Convention (that is to say, 13 March 2020 –the date of publication on the official gazette– or 22 November 2020 –official date of registration of the ratification as per the Convention's requirements. The interest at stake is whether an award-creditor seeking for the recognition and enforcement of an arbitral should be entitled to benefit from the legislative commitment embodied under Art. 6 of the ratification Proclamation No.1184/2020, which proclaimed 13 March 2020 as the effective date of the New York Convention in Ethiopia. A similar concern arises on the part of a disputing party seeking for anti-suit injunction on the basis of a valid arbitration agreement under Article II(3) of the Convention.

There are three reasons to be advanced in favour of the application of the ratification Proclamation. *First*, the long-held 'pro-enforcement bias' of the New York Convention might cater for this. *Secondly*, the second recital of the preamble to the Proclamation clearly enunciates the motivations for ratifying the Convention, i.e., boosting the country's goodwill in enforcing international contracts, which, in turn, enhances foreign investment. Apparently, building goodwill amongst foreign investors and international contracting parties presupposes the fulfillment of commitments made in public. One can, therefore, safely argue that the legitimate expectations of international contracting parties will be respected. In this regard, Art. 6 of the ratification Proclamation underpins the legitimate expectation of the parties to international commercial or investment contracts. And *thirdly*, parties should also be entitled to benefit from the more favourable domestic law.

In this regard, the Ministry of Justice should do more in laying down the precise and necessary infrastructure for the recognition and enforcement of foreign arbitral awards. It should, for instance, identify and address the issues surrounding the production of documents under Article IV of the New York Convention. Article IV sets forth the documentation requirements,

[33] *See* < https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 > Last accessed on 20/12/2021.

which should be submitted by the award-creditor to the court in the recognition and enforcement forum. These documents must be attached to the application by the award-creditor. These documents are essentially three:[34] (i) the duly authenticated original award or a duly certified copy of it; (ii) the original arbitration clause or submission, or a duly certified copy of it; and (iii) a duly certified translation of them into the language of the country where permission to enforce is sought.

On the face of it, the afore-stated requirements may appear to be simple. However, such seemingly simpler provision has given rise to some difficulties in its implementation. One would, for instance, wonder whether, in submitting an arbitration clause, the applicant should produce only the arbitration clause or the entire contract which incorporates it.[35] The latter approach would mean not only the submission of bulky documents involving complex commercial transactions (for instance, technology transfer agreements or construction contracts or public-private partnership (PPP) agreements or even any mining or petroleum concession contracts) but also the prolix task of translation into the language of the enforcement court. Secondly, there is a need for clearly defining the words 'duly authenticated' and 'duly certified' for the purpose of recognition and enforcement of foreign arbitral awards under the New York Convention. This is so as such terms may convey different meanings and practices from one jurisdiction to another.[36]

For example, the position in India has been stated that the production of a mere photocopy of the award is acceptable provided that this is cured by subsequently filing a duly authenticated copy.[37] In this respect, Mcllwrath and Savage state that 'authentication' and 'certification' mean different things but both address 'concerns about the genuineness of documents in which enforcement proceedings are based'.[38] They stated:

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[34] Article IV of the New York Convention; Art. 35(2) of the UNCITRAL Model Law on International Commercial Arbitration. Available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> Last accessed on 20/12/2021. See also Art. 51(2) - (4) of the Arbitration and Conciliation Proclamation.

[35] *See* also Mauro Rubino-Sammartano, *supra* note 14, p. 952.

[36] Id., p. 954 (wherein Rubino-Sammartano states that such requirements are unfamiliar in an English context save that 'the appropriate form is an affidavit deposing to its authenticity, accuracy as a copy or truth as a translation as the case may be').

[37] Id., p. 955

[38] Michael Mcllwrath and John Savage (2010), *International Arbitration and Mediation: A Practical Guide*, Kluwer Law International, p. 350.

> Authentication is the process designed to confirm that the original signed document is genuine by having someone of sufficient authority attest to the authenticity of the original [and] certification is similar, but is designed to confirm that a copy faithfully reflects the existence and content of the original.[39]

3.3 Reciprocity reservation

Article I(3) of the New York Convention provides that: "[w]hen signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards *made only* in the territory of another Contracting State." [Emphasis supplied]. The import of this reservation, referred to as the 'reciprocity reservation', is precisely summed up thus:[40]

> To the extent that States take advantage of it, the reciprocity reservation has the effect of narrowing the scope of application of the New York Convention. Instead of applying to all foreign awards wherever they are made, the scope of the New York Convention may be limited to 'Convention awards', that is, awards made in a state which is a party to the New York Convention.

Ordinarily, the New York Convention is intended to apply to the recognition and enforcement of foreign arbitral awards made in the territory of any state other than the state where the recognition and enforcement of such awards are sought and of arbitral awards made within the state of enforcement that are not considered by its laws to be domestic awards.

The doctrine of reciprocity is not a new concept in Ethiopia. It has been rearing against those judgment creditors seeking enforcement of foreign judgments in Ethiopia. Its application straddles both the recognition and enforcement of foreign judgments and foreign arbitral awards as per Art. 459(a) and Art. 461(a) of the Civil Procedure Code respectively.[41] The need for preserving the doctrine of reciprocity has also been expounded by Robert A. Sedler:

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[39] Ibid.

[40] Nigel Blackaby *et al*, *supra* note 28, p. 635.

[41] For more on the concept and application of the reciprocity requirement for the recognition and enforcement of foreign judgments and foreign arbitral awards in Ethiopia respectively, see Ibrahim Idris Ibrahim, *supra* note 21 and Tecle Hagos Bahta, *supra* note 10.

> If the courts of [a foreign] country refuse to execute Ethiopian judgments, the Ethiopian court must, in turn, refuse to execute their judgment. In as much as most countries will execute the judgment of other countries, it should be presumed that any country will execute an Ethiopian judgment unless the contrary is proved.[42]

Another writer, however, points out that the doctrine of reciprocity is aimed at retaliation against a state as its basis, but which may simultaneously victimize innocent individuals.[43] Ironically, the victims of this exercise by certain states may be their own nationals or individuals and bodies corporate domiciled in those countries. It is noted that the doctrine is less pronounced in the recognition and enforcement of foreign arbitral awards than it is in relation to foreign judgments. As Michael McIlwrath and John Savage stated, '[g]iven the large number of states now party to the Convention, this is not as meaningful a restriction as it once was'.[44]

The adoption of the United Nations Commission on International Trade Law (UNCITRAL) as Model Law on International Commercial Arbitration by many states now has rendered the application of reciprocity insignificant. The UNCITRAL Model Law dispenses with the reciprocity requirement for the recognition and enforcement of arbitral awards.[45] Furthermore, a perusal on the status of the New York Convention reveals that a substantial number of Convention states have ratified the Convention without the reciprocity requirement. Out of the 169 states, 82 have ratified the Convention with the reciprocity reservation. The rest of the member states accord recognition and enforcement of foreign arbitral awards irrespective of whether or not it has been rendered in a convention state.

3.4 Commercial reservation

The second reservation permits an acceding or ratifying state to reserve the applicability of the Convention "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration".[46] Albert Jan van den Berg states that the inclusion of this reservation was necessary in order to accommodate the interests of the civil law countries. He notes that "[t]this reservation was inserted because at the New York

[42] Robert A Sedler (1968), *Ethiopian Civil Procedure*, HSIU, p. 394.
[43] Ibrahim Idris, *supra* note 21, p. 24
[44] Michael McIlwrath and John Savage, *supra* note 38, p. 347
[45] *See* UNCITRAL Model Law on International Commercial Arbitration, *supra* note 34, art. 36.
[46] New York Convention, *supra* note 4, Article I(3).

Conference of 1958 it was believed that, without this clause, it would be impossible for certain civil law countries, which distinguish between commercial and non-commercial transactions, to adhere to the Convention".[47]

This holds true for Ethiopia not only because it is a civil-law country but also because the compartmentalization of commercial and non-commercial transactions is so important in demarcating the legislative, executive and judicial powers between the federal government and the federated states. This process of demarcation remains yet the uncharted territory in the Ethiopian federal system.

Given the fact that it is not constitutionally clear as to which organ is entitled to define the scope of economic activities to which 'commercial matters' extend, it can be observed that there are three circumstances which militate in favour of wrapping up more activities under the umbrella of 'commercial matters'. Firstly, the federal legislatures' attempt to capture as many economic activities as they arise from time to time. This is done by way of legislative definitions in legal instruments concerning commercial law.[48]

Secondly, the fact that the Federal Supreme Court's Cassation Division is bestowed with the power of cassation over all federal and state matters may tip the scale in favour of the Federal government expanding on its legislative influence on as much economic activities as possible. Thirdly, the power of the Federal government to ratify all treaties (or convention, be it civil or commercial) broadens the scope of the federal legislative power.

In this regard, the Arbitration and Conciliation Proclamation defines 'commercial arbitration' in an illustrative manner. Art. 2(7) of the Proclamation provides:

> 'commercial related' includes business relationship for the supply and exchange of goods or service, agreement for distribution, commercial agent, lease, construction, consultancy, engineering, license for commercial purpose, investment, finance, bank, insurance, mining, joint venture and other business organizations that are not prohibited by this Proclamation, transportation of persons and goods by air, sea and land includes similar businesses

[47] Albert Jan van den Berg (2005), *ICCA*: *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, p. 319.

[48] It is noted that, as per art. 55(4) of the Federal Constitution, the power to enact laws relative to 'commercial matters' is expressly provided to the Federal government.

> arising from contractual and extra-contractual relations of a commercial nature.

This illustrative (rather than an exhaustive) listing approach to the definition of 'commercial' matters is an innovative devise in order to expand the scope of application of the arbitration law to those economic activities which are evolving as commercial from time to time.[49] In this regard, the UNCITRAL Model Law on International Commercial Arbitration,[50] which is placed in a footnote, reads:

> The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transactions for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

The Egyptian approach to defining 'commercial' matters seems comparable with Ethiopia's Arbitration and Conciliation Proclamation. Both approaches are also, to a great extent, inspired by the UNCITRAL Model Law on International Commercial Arbitration. And yet this Egyptian Arbitration Law of 1994[51] is said to have expanded the definition of 'commercial 'matters enunciated under the UNCITRAL Model Law. It provides:[52]

> An arbitration is commercial within the scope of this Law when the dispute arises over a legal relationship of an economic nature, whether contractual or non-contractual. This comprises for

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[50] *See* the text of UNCITRAL Model Law on the International Commercial Arbitration, available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> Last accessed on 20/12/2021.

[51] Law Concerning Arbitration in Civil and Commercial Matters, Law No. 27 of 1994, which came into force on 22 May 1994.

[52] Id., art. 2.

> example the supply of commodities or services, commercial agencies, construction and engineering or technical know-how contract, the granting of industrial, touristic and other licenses, technology transfer, investment and development contracts, banking insurance and transport operations, and operations relating to the exploration and extraction of natural wealth, energy supply, laying of gas or oil pipelines, building of roads and tunnels, reclamation of agricultural land, protection of the environment and establishment of nuclear reactors.

Two important observations can be made from the afore-said definition of 'commercial' disputes. Firstly, unlike the UNCITRAL Model Law, the definition of 'commercial matters' in the Ethiopian Arbitration and Conciliation Proclamation is a substantive provision and is meant to be merely illustrative and intended to be all-inclusive.[53] Secondly, unlike the Ethiopian Arbitration Law and the UNCITRAL Model Law, in the Egyptian law the word 'commercial', which is used to describe the nature of the legal relationship covered by it, is replaced with the more expansive word 'economic'.[54]

3.5 Requirement of formality and national treatment of foreign arbitral awards

Two important steps in the liberalization of arbitration in the international commercial arbitration are reflected under Articles III and IV of the New York Convention. Article III establishes the national treatment principle for foreign arbitral awards in convention states. In this regard, Article III states:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. There should not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

[53] Arbitration and Conciliation Working Procedure Proclamation No. 1237 /2021, Article 2(7).

[54] Amazu Asouzu (1996), 'The Egyptian Law Concerning Arbitration in Civil and Commercial Matters', 8 *RADIC,* p. 145

This provision sets foreign arbitral awards on equal footing with domestic arbitral awards in terms of the enforcement of the foreign arbitral award 'in accordance with the rules of procedure' of the enforcement state. Furthermore, There can be no 'substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition and enforcement of domestic arbitral awards'.[55]

One of the successes of the New York Convention is believed to be the abolishing of the double *exequatur*. Such a practice necessitated the approval or certification by the rendition forum of the arbitral award of its status as 'final and enforceable' in the place where it is made.[56] In this regard, Article IV of the New York Convention provides:

1. […] the party applying for recognition and enforcement shall, at the time of the application, supply
   (a) The duly authenticated original award or a duly certified copy thereof;
   (b) The original agreement referred to in Article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

In a similar vein, Art. 51 of the Arbitration and Conciliation Proclamation sets out the required documentations accompanying an application for the recognition and enforcement of foreign arbitral awards. An award-creditor should, thus, produce: (a) the arbitration agreement based on which the arbitral award have been rendered; (b) the original award or an authenticated copy of the award; and (c) where the award is rendered in a language different from the language of the executing court, a translation of these documents into the language of the court shall be produced.

It is also required under Art. 51(3) of the Arbitration and Conciliation Proclamation that all documents should be authenticated by the relevant organs. Seen altogether, therefore, it is hoped that the requirements will be interpreted by the enforcing courts in line with the wording and

[55] New York Convention, *supra* note 4, Art. III.
[56] *See* Civil Procedure Code, *supra* note 8, Art. 457(b).

interpretation accorded to Article IV of the New York Convention or Art. 35(2) of the UNCITRAL Model Law on International Commercial Arbitration.

Art. 457 of the Civil Procedure Code renders the double *exequatur* requirement mandatory. It states:

> An application for the execution of foreign judgment shall be in writing and shall be accompanied by:
> (a) A certified copy of the judgment to be executed; and
> (b) A certificate signed by the President or the registrar of the court having given judgment to the effect that such judgment is final and enforceable.

The written application for recognition and enforcement of a foreign judgment must be accompanied by a certified copy of the judgment to be executed and a certificate signed by the court attesting that the judgment is 'final and enforceable'. This equally applies on the recognition and enforcement of foreign arbitral award. One of the main import of the New York Convention is the abandonment of the double *exequatur.* It is, indeed, a step taken in the right direction that Articles 51-53 of the new Arbitration and Conciliation Proclamation have also abolished the double *exequatur*.

4. The Enforcement of Annulled Arbitral Awards in Their Country of Origin

In the modern practice of arbitration under the New York Convention, none has given rise to a rancorous controversy as to whether there is a possibility of enforcing arbitral awards which are annulled or set aside in the rendition forum. In this regard, Article V(1)(e) of the New York Convention reads:

> Recognition and enforcement of the award may be refused … only if [the party against which the award is invoked] furnishes to the competent authority where the recognition and enforcement are sought, proof that:
> …
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made …

This should have given the simple answer to the controversy. However, the recourse to Article VII of the New York Convention by the award-creditor has opened a window of opportunities in the recognition and enforcement of arbitral awards. As Blackaby *et al* stated, '[t]he New York

Convention has long been regarded as being of fundamental importance to the recognition and enforcement of international arbitral awards [and] it remains so'.[57] However, the possibility of obtaining recognition and enforcement of an award that has been set aside in its place (seat) of arbitration or by applying a more favourable local law has mustered momentum in some jurisdictions. Article VII(1) of the New York Convention provides:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

An award-creditor is, thus, entitled to resort to more favourable conditions for recognition and enforcement under a treaty or domestic law of the recognition or enforcing state. Such practices have been successfully made in some jurisdictions.[58] The United States and France take the lead in this regard.[59] An award-creditor may, therefore, find it of significant import to peruse the grounds of refusal enunciated under Art. 53 of the new Ethiopian Arbitration and Conciliation Proclamation No. 1237/2021[60] in

[57] Negel Blackaby *et al*., *supra* note 28, p. 652.

[58] Georgios C. Petrochilos (1999), 'Enforcing Awards Annulled in Their State of Origin under the New York Convention', 48 *Int'l & Comp. L. Q*. 856-888.

[59] In the matter of the Arbitration of Certain Controversies Between Chromalloy AeroServices and the Arab Republic of Egypt (Chromalloy), 939 *F. Supp.* 907 (D.D.C., 1996), the U.S. District Court for the District of Columbia recognized and enforced an arbitral award, which was set aside by the Cairo Court of Appeal at its place of arbitration. Subsequently, France has recognized three arbitral awards which were set aside in their place of origin; namely, the Chromalloy case, *Hilmarton* (which was set aside in Switzerland) and *Putrabali* (which was set aside in England). For more on this, *see* Georgios C. Petrochilos, *supra* note 58; Blackaby *et al*., *supra* note 28, pp. 652-653; Georges R. Delaume (1997), 'Enforcement against a Foreign State of an Arbitral Award Annulled in the Foreign State', *Int'l Bus. L.J.,* 253-254.

[60] Art. 53(2) of the Proclamation sets out the grounds for refusal as follows:
"(a) where it is not based on reciprocity;
(b) where the arbitral award is based on invalid arbitration agreement or rendered by a tribunal which is not established in accordance with the law of the country in which such award is rendered;
(c) the arbitral award rendered cannot be enforced in accordance with Ethiopian law;

contradistinction to the grounds of refusal under Article V of the New York Convention.

5. Conclusion

Ethiopia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This indeed opens a new window in the concerted effort towards making Ethiopia an arbitration hub. The ratification of the Convention, coupled with the new Arbitration and Conciliation Proclamation, is indeed a good step in the right direction.

However, there are several challenges in the implementation of the New York Convention. Such challenges include the cleavages in the types of arbitral awards and multiplicity of the enforcement regime owing mainly to the three reservations Ethiopia has registered in the accession to the Convention; namely, the reciprocity reservation, the commercial reservation, and the non-retroactivity reservation. Furthermore, laying the necessary legal and institutional ground for its implementation is imperative. To this effect, the Ratification Proclamation has bestowed the mandate to the Office of the Federal Attorney-General (currently Ministry of Justice).

Finally, due to Article VII of the New York Convention, at least three competing set of rules will find application for the recognition and enforcement of foreign arbitral awards in Ethiopia. These are (i) the New York Convention, (ii) Article 53 of the Arbitration and Conciliation Proclamation, –whenever the award-creditor believes that such set of rules are more favourable to him than the New York Convention; and (iii) Article 361 of the Civil Procedure Code will continue to apply for the recognition and enforcement of foreign arbitral awards that were made prior to the coming into force of both the New York Convention and the Arbitration and Conciliation Proclamation. The Civil Procedure Code will also continue to apply for all civil matters regardless of when such awards are made as neither the New York Convention nor the Arbitration and Conciliation Proclamation applies to civil matters. ■

(d) where the parties have not had equal rights in appointing the arbitrators or in presenting their evidence and getting heard in the course of the proceedings;
(e) where the matter on which the award is rendered is not arbitrable under Ethiopian law;
(f) where the arbitral award contravenes public policy, moral and security."

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COMMENT

The Mystery of the GERD Negotiations: From Coercion to Obligation of Treaty Conclusion

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Abstract

This comment examines the use of coercive power in the negotiations between Ethiopia, Egypt, and Sudan on the filling and annual operation of the Grand Ethiopian Renaissance Dam (GERD). There has been deliberate use of coercive power (the use of military, economic and political coercion) by Egypt, Sudan, and their geopolitical allies mainly since November 2019. Coupled with the use of coercion, the lower riparian negotiating parties perceive that concluding an agreement over the subject matter is a legal duty imposed on Ethiopia, not just a volitional dealing that could emanate from the spirit of cooperation and good faith. Careful interpretation of the international law regime unveils that all forms of coercion are unlawful despite the difference in the degree of illegality between military, economic and political coercion. The existence of coercion, in all its forms, would thus absolve Ethiopia's duty (if any) to conclude an agreement with the two downstream states. I argue that, Ethiopia –as victim of an unlawful coercion– has the right to withdraw from the GERD negotiations and to unilaterally proceed with the filling and operation of its sovereign dam while at the same time respecting the principles of *equitable utilization* and *not causing significant harm* which can be facilitated by a basin-wide water governance treaty rather than trilateral negotiation on a single dam project.

Key terms

Nile · GERD · GERD Negotiations · Coercion · Treaty conclusion · Hegemony

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Contents

Abstract

1. Introduction

2. The GERD Negotiations: From Unwarranted Encroachment to Coercion

3. Coercion as a Driving Force in the GERD Negotiations: Adducing Evidence

4. The Legal Contours of Coercion

5. The Duty to Conclude Treaty: With or Without Coercion

6. Concluding Remarks

1. Introduction

Despite the discursive narratives about the GERD negotiations and polarized polemics, a critical turn is badly needed to truly understand the what, why and how of the GERD negotiations proceeded. A critical augury can help to illuminate the details of the GERD politics. The flawed narratives behind the GERD and its negotiations calls for the need to look the Nile politics in general and the GERD negotiations in particular from critical vantage points.

The critical insight, as discussed in this comment, unveils that Egypt is exercising its unmediated power of coercion with no restraint. Egypt keenly uses international law as a hegemonic instrument[1] under the guise of '*historic rights*' by disregarding fundamental changes of circumstances (*rebus sic stantibus*) thereby downplaying the principle of *equitable utilization* which is among the core contemporary international principles of trans-boundary water resources.

Frequently used acronyms

GERD	Grand Ethiopian Renaissance Dam
ICJ	International Court of Justice
IPoE	International panel of experts
VCLT	Vienna Convention on the Law of Treaties

[1] Egypt's use of international law as a tool for hydro-hegemony aims at economic and geo-political hegemony. Economic imperialism, hegemonic international law and coercive diplomacy have a symbiotic relationship. The policy of hegemony in international relations was condemned by the UN General Assembly, GA Resolution 34/103, UN Doc A/RES/34/103 (14 December 1979).

Signing an agreement with Ethiopia relating to the filling and the operation of the GERD is a pretext and an instrumental handcuff so that Ethiopia becomes obliged to negotiate with upper riparian states rather than use its sovereign rights toward equitable utilization. Ethiopia's resistance, once outmaneuvered, to Egypt's move for the preservation of an unjust status quo is clogged through the coercion Egypt has exerted in the process.[2]

Egypt is invoking 'acquired rights' and 'current uses' over the Nile River, and it has been using colonial treaties to sustain its hegemony over Nile waters.[3] The negotiation from Egypt's perspective is merely reluctance to accept fundamental change of circumstances in the need for equitable utilization by preserving its hegemonic control of the Nile waters. To this end, it is trying to instrumentalize negotiations and colonial treaties, and, in effect, legitimize its factual or actual hegemony over the River Nile.[4]

The next two sections of this comment discuss the (il)legality of subjection of the GERD for a trilateral negotiation. In this regard, military economic and political coercion are explored. Legality test is made (in Section 4) on each form of coercion in the eyes of international law. The fifth section discusses the duty of conclusion of treaties, under international law by employing critical approach to international law (CATIL). Finally, conclusions are drawn from the analysis.

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[2] Egypt has evaded basin-wide agreements, and seeks to retain the hegemonic status quo. Egypt's refusal to sign the 2010 Nile Basin Cooperative Framework Agreement (CFA) verifies Egypt's reluctance to accept the principle of *equitable utilization*. Egypt's strategic use of international law to extend its hegemonic posture. *See*, for example, Joyeeta Gupta (2016), 'The Watercourses Convention, Hydro-hegemony and Transboundary Water Issues, ' *The International Spectator*, 51:3, 118-131,

[3] The colonial era agreements that provided Egypt with leverage and upper-hand in the Nile politics are the Agreements between colonial powers (the Anglo-Italian protocol of 1891, the 1906 agreement, the 1925 Anglo–Italian agreement, and the 1934 agreement between Britain and Belgium); Agreements between colonial powers and the basin states and between Egypt and Sudan (After their Independence). The 1902 Anglo-Ethiopian agreement, the 1929 agreement between Britain and Egypt, and the 1959 agreement between Egypt and Sudan. Under the 1902 Anglo-Ethiopian Agreement, different arguments on the basis of language and treaty interpretations are pervasive. Ethiopia did not (in 1902) agree not to construct any hydro-project, and it had only agreed not to totally block the Nile waters.

[4] Egypt has never dropped its claim of 'historic', 'acquired' and 'current use' rights over the Nile River. Egypt is negotiating the GERD without dropping such claims that violate the principle of *equitable utilization*. This longstanding stance clearly reveals hydro-hegemony. For a detail understanding of the interface of hydro-hegemony and international law, read Melvin Woodhouse (2008), 'Hydro-hegemony and international water law: grappling with the gaps of power and law', *Water Policy*, 103-119

2. The GERD Negotiations: From Unwarranted Encroachment to Coercion

GERD is Ethiopia's self-funded sovereign project which is expected to provide some 5600 megawatt of energy upon its full operation.[5] Sudan will clearly benefit from the GERD because it reduces harm from rainy season floods, and as a border dam (to Ethiopia) it is Sudan rather than Ethiopia that would benefit from the dam for stable irrigation. That was why Sudan had at various occasions expressed its neutrality until Egypt's geo-political manoeuvres and hegemony ultimately triumphed over its genuine national interests.

The project, since its announcement on 2nd of April 2011, has attracted negative reaction from Egypt. Understandably, the anxiety came from the hegemonic ego that is nurtured and entrenched by a century old exclusive exploitation of a shared resource. Awkwardly, Egypt's aggressive reaction and Ethiopia's misguided entrance into the entrapment have contributed the GERD to be treated as an international matter of concern as such.[6]

Egypt has perceived GERD as a counterhegemonic advent that could counter its hegemonic control on the Nile River. To block that counter-hegemonic resonance, Egypt has established an overt narrative of harm to table its real interest before the diplomatic train.[7] The power balance between Ethiopia and Egypt before the starting of the GERD was to the favour of Egypt as Egypt was a hydro-hegemon power in the Nile Basin. That status quo has started to crack since Ethiopia launched the GERD project.[8]

Ethiopia's 5 Billon Dollar mega project, has defied Egypt's hydro-hegemony and this surprise was a moral avalanche to the country.[9] That moral

[5] https://www.webuildgroup.com/en/projects/dams-hydroelectric-plants/grand-ethiopian-renaissance-dam-project

[6] http://www.meleszenawi.com/ethiopian-pm-meles-zenawi-speech-on-launching-gerd-text-and-videos/

[7] Egypt's narratives on the Nile politics have controlled both the national and international political domain. Nationally, it has characterized the Nile's status as a matter of existential importance and Article 44 of its constitution commits the state to preserving Egypt's "historical rights" to the river.

[8] Mohammed Yimer (2015), 'The Nile Hydro Politics; A Historic Power Shift', *International Journal of Political Science and Development*, Vol. 3(2), pp. 101-107

[9] Gashaw Ayferam Endaylalu (2019), 'Counter Hydro Hegemony Mechanisms and Their Roles in the Eastern Nile Basin', *International Affairs and Global Strategy*. As thoroughly discussed in this paper, GERD, along with other prior strategies, was a right project to righting the past injustice and to counter Egypt's hydro-hegemony.

backlash could have been maintained had Ethiopia not opened its diplomatic gateway for Egypt and Sudan. By inviting Egypt and Sudan to the GERD matter, Ethiopia has attacked its own leverage.

By having its footage in the GERD project, Egypt was able to revive its moral hegemony that was cracked by Ethiopia's announcement of the GERD project. Upon inviting the two downstream states into the GERD discussion, the claim for negotiations became a trap. Ethiopia's initiatives towards cordial relations could have been confined to duly *informing* the downstream riparians (through trilateral forums of professionals) that the GERD ultimately enhances Ethiopia's efforts and commitment to the basin's environmental preservation that ensures the sustainability of the water course and equitable utilization among all riparians without causing significant harm.

Egypt, once retaking its moral hegemony which was once snatched by Ethiopia's surprise announcement of the GERD, has set another strategy that targets at preserving its hegemony in the Nile Basin. As revealed in the GERD negotiations, Egypt's strategy is to entrap Ethiopia in an agreement that would prohibit the latter from launching future projects over the Blue Nile River.

Ethiopia's imprudent decision to invite Egypt and Sudan to assure common trust between the three countries was an enabler for Egypt's move against Ethiopia's emergence as a counter-hegemonic power. The path-breaking deal for Egypt was signed in March 2015. This declaration (which is merely a framework and not a treaty) has made Egypt and Sudan to speak confidently in their coercive move in the attainment of their plans. They have used this instrument as a shield to cover their coercive strategy. Portraying Ethiopia as a defiant to the Declaration of Principles (DoP) before the international community has helped them to play their coercive game behind the scenes. They have even gone beyond the spirits and contents of the Declaration of Principles.

Indeed, Egypt chose the right time to aggressively use its coercion strategy and it, through its president, made a point in the 2019 UNGA summit.[10] That was a turning point from silent manoeuvres to open strategy of escalation, internationalization, and securitization of the GERD through the use of pressure and coercion.[11]

[10] https://semonegna.com/egypts-president-at-unga-speaks-about-nile-river-ethiopias-renaissance-dam/

[11] The U.S. Treasury Department invited the parties for talks in late October after Egypt's President Abdel Fattah al-Sisi and Ethiopia's Prime Minister Abiy Ahmed met on the sidelines of Russia's Africa summit in Sochi. (https://www.crisisgroup.org/africa/horn-africa/ethiopia/nile-dam-talks-unlocking-dangerous-stalemate)

Ethiopia's injudicious approach in the handling of the GERD paved the entry point for Egypt to promote its agenda of pretending as a 'victim' of prospective harm. The entry point for Egypt's manoeuvres and manipulation started in 2012 when Ethiopia agreed to the establishment of the international panel of experts (IPoE) to review the design and study documents of the GERD project.[12] Egypt used the forum to reverse the hard-won counterhegemonic project with a view to subjecting the project to its sphere of influence.

Since then, Egypt is vying to extend its hegemonic control over the Nile waters and it is working aggressively towards the possibility of its desired outcome from the GERD negotiations. The GERD negotiations, if completed as per Egypt's desire, would legitimize and make its hegemonic control of the Nile River unchallenged.

Once the IPoE paved the way for Egypt and Sudan to have a say on Ethiopia's unilateral project, subsequent manipulations easily continued. The IPoE released its studies on December 2013 and it recommended further joint studies on the impacts of the GERD. Ethiopia was not hesitant when it agreed to establish the Technical National Committee (TNC) charged with undertaking of further studies in 2014. However, the TNC did not pursue its studies due to disagreements on the process.

Another diplomatic mistake whose impact lingers to this day was committed in 2015 when the leaders of three governments signed the Declaration of Principles (DoP).[13] The DoP clearly brought a windfall opportunity to Egypt and Sudan to use it as a playing card for the internationalization and escalation of the GERD dispute, even if the careful interpretation of the principles do not justify the various claims of the lower riparian states. Egypt and Sudan invoke the DoP as a legal ground for the GERD dispute in order to internationalize the issue. Without this instrument Egypt and Sudan could not have been able to capture such international attention over the GERD issue.[14] The Blue Nile floods and the harm caused to Sudan (during the rainy season of 2021, even after the second impoundment

[12] GERD is proclaimed as a flagship project. If that is the case, GERD should not have been subject of international negotiation as negotiating a flag is an absurd diplomacy.

[13] *Declaration of Principles*, Khartoum, 2015

[14] Egypt invokes this instrument whenever it appeals for the sealing of an agreement on the filling and operation of the GERD. Egypt incorrectly submitted this instrument to support its allegation that Ethiopia's unilateral filling, without a deal, would violate the latter's duty to conclude an agreement as enshrined under Article 5 of the DoP. By doing so it has attracted the attention of the international community.

of the first phase filling of the GERD) shows that the dam would not cause *significant harm* to downstream riparian states. *We can imagine how grave the floods and harm could have been to Sudan in the absence of the GERD*.

The diplomatic red-line was crossed in November 2019 when Ethiopia accepted the intervention of the United States and the World Bank. This turn, in the history of GERD negotiations could be marked as the opening of diplomatic Pandora box.[15]

Egypt unilaterally invited the USA and the World Bank (WB) to intervene in the GERD negotiations, and it was apparent that the intervening parties exerted pressure on Ethiopia. Given Ethiopia's heavy dependence on those two partners for aid and loans, Egypt indeed chose the right partners for its escalation and internationalization strategies. Ethiopia's refusal to sign the Washington Document and its consistent demand for an African Union-led process was followed by reprisal from the United States.

It was during this critical juncture that a provocative abrupt statement was made by the then US President, Donald J Trump[16] who (in October 2020) said that Egypt will 'blow up' the dam as if there can be victors in bombing dams. It should have been clear to President Trump that such acts would merely lead to reciprocity and downstream destruction through floods and water flow diversions.

Negotiations are being carried out under the African Union's *de facto* mediation role but the pressure from Egypt and Sudan is still mounting.[17] At the time of the writing of this comment, the GERD negotiations are stalled since the disagreement of the negotiating parties on the modalities of the negotiation in their latest meeting in DRC, Kinshasa.[18] Egypt and Sudan were

[15] https://home.treasury.gov/news/secretary-statements-remarks/statement-by-the-secretary-of-the-treasury-on-the-grand-ethiopian-renaissance-dam. *See* also http://www.xinhuanet.com/english/2020-03/05/c_138844013.htm

[16] Since 28 February 2020, Negotiations before the sole observation of the USA and WB came to an end. The tension escalated since then. Egypt and Sudan enhanced their coercive diplomacy since Ethiopia's rejection to the draft document jointly drafted by the USA and WB experts.

[17] A clear message of threat to use force has been forwarded from the two countries. Sudan had claimed neutrality at some intervals while on the contrary it has transgressed and occupied some 40-50 kms of Ethiopian territory.

[18] Egypt and Sudan have proposed the increased role of the observers and they proposed mediation before a quartet [The African Union, European Union, United States and the United Nations]. Ethiopia rejects the increased role of the observers and it sticks to the AU-led process under the auspices of the African Union.

threating Ethiopia with coercion to induce a deal on the filling and operation of the GERD.

3. Coercion as a Driving Force in the GERD Negotiations: Adducing Evidence

Coercion could be defined as the act, process, or power of compelling through the use of express or implied threats of violence or reprisal or other intimidating behaviour that puts a state in a fear of the consequences. It is used to compel that state, a coerced one, to act against its sovereign will.[19] It may assume various forms that have in common the will of a state to force another state into taking a particular action.[20]

The use of coercive power, by the coercing state, to compel the coerced state to accept a deal or to engage in a commitment without its will is a purposeful and intentional act of the coercing state. For coercion to exist an outcome from that coercion is not necessarily required because the coercing state need not be successful in achieving its expectations and goals. What is very important is the exertion of a compelling force by the coercing state with full knowledge and intent.

All forms of coercion, as the strategy of compelling a state to accept a deal unwillingly, are manifested in the GERD Negotiations. There was military coercion (in the form of threats) through the repeated warnings of Egypt to use *all necessary means* to protect Egypt's interest over the Nile Water.[21] Beyond the threats to use force, Egypt is engaged in doubling its military capabilities from year to year. The recent joint military pact signed between

[19] Cambridge Dictionary defines coercion as the use of force to persuade someone to do something that they are unwilling to do. Black's Law defines coercion as compulsion, constraint, compelling by force or arms.

[20] Natalino Ronzitti , 'Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective' in Natalino Ronzitti (eds), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff, 2016), p. 2

[21] The warning of using all necessary means to protect 'Egypt's Nile Waters Rights' is a century old mantra of Egypt's leaders. The warning has survived for centuries. But compared to the usual rhetoric of water war, the recent rhetoric has a sort of imminence given Ethiopia's current efforts to utilize its fair share from the Nile waters. https://www.haaretz.com/middle-east-news/egypt/egypt-vows-to-use-all-means-to-defend-nile-interests-after-ethiopia-skips-talks-1.8600505

Egypt and Sudan is the latest showcase of a military coercion against Ethiopia.[22]

One may wonder whether the recent threats of war expressed either through '*all necessary means'* or the joint military preparations can put Ethiopia under a military coercion. Such military threats are clearly short sighted because destabilized Ethiopia through direct threats or proxy civil wars would merely enhance poverty, over-dependence of smallholder farmers on the water basin catchment, encroachments to sloppy water basin catchment areas, enhanced erosion and aggravated siltation thereby eventually causing the 'end' of the Blue Nile water course.

In the short run, the existing threats of war and joint military preparations of Egypt and Sudan, coupled with the change in the internal and external political and geo-political dynamics, may seem to have a coercive effect on Ethiopia's position in the GERD negotiations. The issue here is not whether Ethiopia would kneel down to the pressure of such threats or not. The presence of military coercion in this case should be evaluated independent of its effect or outcome.

The evaluation relates to the intentional use of such negotiation strategies by Egypt and Sudan. Undoubtedly, they are using such threats purposefully and intentionally to coerce Ethiopia so as to achieve their goals in the GERD negotiations. There is no other country than Ethiopia where their military showcases, preparations and threats is being addressed. In fact, Egypt and Sudan have never make it in secret; and they are rather making it publicly. For example, the designation of the joint military training as "*Protectors of the Nile*" was clearly provocative and it targeted at intimidating Ethiopia as it unequivocally revealed the purposes of the joint preparations.[23]

With regard to economic and political coercion, these tools are simultaneously used by Egypt and its co-opting global allies. The economic coercion is dependent on the political/ geo-political coercion. The United States is an accomplice in the exertion of geo-political and economic coercion. As an observer that was singlehandedly elected by Egypt in November 2019,

[22] The joint military pact and training between the two countries is not something that can be ignored. Given the shift in Sudanese position and its aggression on Ethiopia's border, there is tension in the region.

[23] Joint trainings between Egypt and Sudan reveal security threat in the sub-region. "The Egyptian Armed Forces arrived in Sudan on Thursday to conduct a joint military training called 'Protectors of the Nile', amid the ongoing Grand Ethiopian Renaissance Dam (GERD) crisis." (*See*, https://www.egyptindependent.com/egyptian-sudanese-armed-forces-conduct-joint-military-exercise-in-sudan/)

the United States has indeed put both political and economic coercion on Ethiopia throughout the 2020 rounds of GERD negotiations.

Egypt, as a planner of the strategy, was sure that those global powers could exert their political and economic pressure on Ethiopia towards any deal brokered by them. Negotiations, under their observation, were proceeding as planned by Egypt. The United States had coerced Ethiopia's negotiating team with possible consequences if they refuse to agree and the then-president had even threatened to give a phone call to Ethiopia's Prime Minister in the middle of the negotiations[24] unduly assuming that the leadership could have different views over the issue.

The pressure exerted on Ethiopia in the process of the negotiations have unequivocally manifested the political and diplomatic coercion that was aimed at compelling Ethiopia to agree with the terms and conditions dictated by the US and the World Bank. These facts were ultimately reaffirmed by the 28 February 2020 statement of US Treasury of State which acrimoniously threatened Ethiopia not to proceed with the filling of the GERD before striking a deal with Egypt and Sudan. The statement called upon Ethiopia to sign the Washington Draft Agreement sooner than later. Generations of international water law students will draw lots of lessons from the draft that was meant to confer veto powers to Egypt in all future water use projects of Ethiopia including the quantified release from Ethiopia's dam during dry seasons resulting from shortages of seasonal rainfalls.

Given the factual inequality of Ethiopia and the USA, powerful statement from US President apparently creates pressure on Ethiopia. The existence of coercion cannot be relinquished merely because the coerced party did not submit to it. Pursuant to its warning, the US has cut some 130 Million US Dollars in development aid to Ethiopia. This was a final stage of economic coercion. It was in addition to such aid cut measure that incitement for a threat of military attack came from President Trump's threats.[25]

Egypt's propaganda and diplomacy has indeed deceived the international community and powerful global actors that were induced to perceive that conclusion of an agreement is mandatory. Accordingly, various powerful global actors including the US and EU had kept on calling upon Ethiopia to agree with Egypt and Sudan to resolve the GERD dispute. Intentionally or negligently, these partners did not pay due attention to the bad faith and

[24] Author's discussion with an anonymous insider to the negotiating team.

[25] Although all forms of coercion exerted from the US and the World Bank did not compel Ethiopia to sign a deal (the Washington Draft or newly negotiated one), the pressures have kept Ethiopia to stay in the GERD negotiations.

coercive strategy of Egypt that is reluctant against any win-win solution over the GERD dispute based on equitable utilization.

Unlike the jurisprudence on unilateral development projects, GERD is placed on the top list agenda of powerful global actors as a matter of international concern. Realizing such a seizure, Egypt and Sudan had continued to threaten Ethiopia with military coercion to force the latter to sign a GERD deal before the filling of the second phase of the first stage impoundment of the Blue Nile water.[26] However, Ethiopia has insisted on asserting its rights for equitable utilization of its resources and the GERD negotiations are still underway in the context of political, economic, and military coercion.[27] Whether such coercion is permissible under international law will be discussed in the next section.

4. The Legal Contours of Coercion

Negotiation is one of the key instruments in inter-state relationships. Leverage and power-balance are the best tools to secure interest in the inter-state negotiations. Geo-strategic location, ideational and material or military power can serve States to have a leverage and to take advantage over counterparts. All such strategies are acceptable to the extent that they do not subdue States under forceful coercion. Hence, coercive diplomacy employs military, economic and political forces or compulsion to arm-twist States to succumb their vital national interests.

The threat or use of force is prohibited under the UN Charter.[28] What does force or coercion mean? Does it constitute all forms of coercive power?[29] What type of force or coercion is prohibited under the UN Charter? Answering these questions is indispensable for the themes in this comment.

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[26] Egypt has been using coercion to compel its counterparts to sign a deal over the Nile Waters. For example, the 1959 'Full Utilization of the Nile Waters' Agreement between Egypt and Sudan was signed after Egypt supported an insurrection in Sudan and removed the Sudanese leader who was reluctant to sign the deal.

[27] A reader who might deny the existence of coercion in the GERD negotiations, can still consider the GERD negotiations illegitimate because through coercive diplomacy, Egypt and Sudan, along with the United States, have interfered in the domestic matter of Ethiopia. By doing so, they have violated Article 2(7) of the UN Charter and UNGA resolution 2625 (whose contents are believed to have attained the customary international law normative status).

[28] The prohibition of the Use of Force or *Jus Ad bellum* dates back to the 1929 the Kellogg-Briand Pact (AKA Paris Pact). The UN Charter merely reaffirms the pre-existing norm of international law.

[29] Coercion and force can be used interchangeably.

There are two approaches of understanding the prohibition of the threat or use force. The *restrictive approach* considers Article 2(4) of the UN Charter as a prohibition of the threat or use of armed (military) force. According to this view, States are only prohibited to use military force except in cases of self-defense and collective self-defense. All other forms of coercion or force less than armed force are not prohibited.

According to this view, States who purposefully use other forms of coercive power in their international relationships cannot be held responsible for the use of force unless the coercion falls under resort to the threat or use of military force against other states. This understanding has wide recognition in the International Court of Justice (ICJ) jurisprudence and the Vienna Convention on the Law of Treaties (VCLT). Article 52 of VCLT clearly forbids states not to resort to threat or use force in their treaty making. A treaty concluded as a result of threat or use force is void. [30]

The *expansive interpretation* tends to uphold all forms of coercive powers as prohibited under international law. This interpretation uses a purposive and holistic understanding of the UN Charter. It construes that all forms of coercion, economic, political and military, are prohibited both in the UN Charter and customary international law. According to this perspective, unless Article 2(4) of the UN Charter incorporates all forms of coercion, it cannot be compatible with the overarching purposes of the UN and this will be in contradiction with other principles of the charter.

Member states of the United Nations have reaffirmed equal rights of nations –large and small– and have agreed to unite their strength to maintain international peace and security. These aims and resolutions stated in the preamble indicate the rationale for the establishment of the UN. It is on the basis of these motives that the operative parts of the UN Charter are engraved.

Article 1 states the purposes of the UN that are aligned to the preceding aims embodied in the preamble. A close reading of Article 1(1) of the Charter shows that coercion, in any form, negates the maintenance of international peace and security; and coercion, in all forms, can be a threat to the peace; it can also be breach of the peace. Hence, the use of psychological, diplomatic, economic and military coercion violates the equal rights of nations large and small enshrined under the UN Charter.

The use of coercion in the process of settlement of international disputes contravenes the second purpose of the UN, the development of friendly relations among nations based on respect for the principle of equal Rights.

[30] *Vienna Convention on the Law of Treaties*, 1969

Apparently, the use of economic and diplomatic pressure by a disputing party against the other party in the course of negotiations obstructs friendly relations. It also violates the principle of equal rights and universal peace.

The use of all forms of coercion, does not conform to the third principle of the UN Charter. Coercion in the settlement of international disputes will be a stumbling block to achieve international co-operation. It cannot solve international problems. Nor will it promote and encourage respect for human rights and fundamental freedoms. It could rather fuel the tension between the coercing and coerced states. Moreover, the use of coercion will disrupt harmonious relationship of nations and it will affect their common determination to attain their common ends thereby infringing the fourth purpose of the UN Charter.

As stated under the introductory sentence of Article 2, the UN and its members are obliged to pursue the purposes of the UN. In light of purposes, coercion is clearly against the principles of the UN. Coercion clearly violates the first principle of the UN, the principle of the sovereign equality of all UN Members. By employing coercion against the full and free consent of the coerced state, the coercing state is acting in violation of the cardinal principle of the UN, i.e., the sovereign equality of UN members. If, for example, a state accepts a deal by the coerced state without its free consent, the sovereign equality between the coerced and coercing state is violated.

Moreover, coercion contravenes the duty of good faith among UN member states members in the fulfilment of their obligations under the UN Charter. Coercion further violates the third principle of the UN Charter which requires member states to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. The use of coercion, irrespective of its forms, can endanger international justice, peace and security.

An argument may be raised that all forms of coercion will not have equal impact in endangering justice, international peace and security. Although this line of argument may seem plausible, the repeated use of diplomatic and economic coercion in dispute settlement and negotiations would endanger international peace and security, and justice. Moreover, the relationship between the coerced and coercing state will not be peaceful and just. Even worse, the use of diplomatic and economic coercion in the process of dispute settlement may lead to a military coercion in the forms of threat or use of force.

Hence, allowing other forms of coercion is pushing the coercing states half-way to the threat or use of force. The specific use of military coercion

contravenes the fourth principle of the UN that prohibits the threat or use of force in international relations.

Under Article 33, (Chapter VI, pacific settlement of international disputes), the parties to any dispute shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means of their own choice. All means listed under Article 33 of the Charter require the participation of disputing parties in their full and free consent.

Hence, the fact that the negotiating states have relentlessly used all forms of coercion in the GERD Negotiations to bow Ethiopia down violates the purposes and principles of the UN Charter. GERD, as an essential domestic matter of Ethiopia, should not have been subjected for an international diplomatic discourse and series of pressures. Thus, economic, political and military coercion in the GERD negotiations is a blatant violation of the purposes and principles of the UN Charter that are enshrined in articles 1 and 2; and it violates Ethiopia's sovereignty and political independence that is guaranteed and assured by the UN Charter and customary international law.[31]

Both lines of interpretations, i.e. the *restrictive* and *expansive* approaches in the definition of coercion, correspond with the *static* and *Evolutive* approaches in treaty interpretation. The *static approach* in treaty interpretation is in support of the restrictive understanding of the prohibition on the threat or use force whereas the *Evolutive treaty interpretation* supports the expansive understanding of Article 2(4) of the UN Charter. *Evolutive treaty interpretation* calls for the taking into account of international realties and dynamics during the application of a treaty that was concluded several years ago.

Irrespective of its drafting history, the VCLT recognizes only the use of military coercion as a ground of invalidation. Its legislative history uncovers that there was a need and call for the inclusion of political and economic coercion as grounds of treaty invalidation.[32] In order to accommodate the interests of states who had requested the inclusion of all forms of coercion as grounds of treaty invalidation, an alternative declaration was made a

[31] Notwithstanding this line of argument, there is a growing move on 'State's Right to be Free From Economic Coercion'. *See* Antonios Tzanakopoulos (2015), 'The Right to be Free from Economic Coercion', *Cambridge Journal of International and Comparative Law*, Vol. 4, pp. 616-633.

[32] Charles E. Partridge, JR (1971), 'Political and Economic Coercion: Within the Ambit of Article 52 of the Vienna Convention on the Law of Treaties?' *International Lawyer*, Vol. 5, No. 4, 755-769

supplement to Article 52 of the VCLT. The *declaration on the prohibition of military, political or economic coercion in the conclusion of treaties* reads:-

> This declaration 'solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.' [33]

Political coercion may correspond to the principle of non-intervention in the internal and external affairs of States. ICJ has affirmed that conduct involving a manifestation of a policy of force constitutes a violation of both Article 2(4) of the UN Charter and the Principle of non-intervention.[34]

Using an *Evolutive* treaty interpretation and *expansive* understanding of the use of coercion, Article 52 of the VCLT should be interpreted in a way that can prohibit the use of political and economic coercion in treaty negotiations and conclusions. Such an expansive and broader interpretation is

[33] The Declaration was introduced to "supplement" Article 52 of the VCLT. It states the principle that not only military but also economic and political pressure, or the threat thereof, may not be used to coerce a State to conclude a treaty in violation of the sovereign equality of States and freedom of consent. Full picture can be noted on "M.E. Villiger, The commentary 1969 Vienna Convention on the Law of Treaties] The constitutive instrument of the OAS contains a provision outlawing economic coercion (Art 20); the UN General Assembly Declaration on Friendly Relations (2625-xxv), the UNGA Resolution 42/173 on Economic Measures as a Means of Political and Economic Coercion against Developing Countries of 1987 and the Helsinki Final Act of 1975. *See*, Natalino Ronzitti , Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective in Natalino Ronzitti (eds), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff, 2016), pp. 1-3

[34] Id., p. 4. (The cases are Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, ICJ Reports 1949, p. 35.; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, ICJ Reports 1986, p. 106.; Case Concerning Armed Activities Case in the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005ICJ Reports 2005, p. 227, para. 163). Resolutions 2131 (xx), 2625 (xxv) and 36/103 which are dedicated to the principle of non-intervention. UNGA Res. 3171 (xxviii) on Permanent Sovereignty over National Resources, 17 December 1973, U.N. Doc. A/RES/3171, which emphasize the duty to refrain from military, political, economic or any other form of coercion aimed against the territorial integrity of any State and the exercise of its national jurisdiction. In addition Article 32 of Resolution 3281 (xxix) on the Charter of Economic Rights and Duties of States and paragraphs 7–8 (Ibid). Article 4 (9) of the Constitutive Act of the African Union establishes the "non-interference by any member State in the internal affairs of another State".

steadily gaining acceptance, and it should indeed be the prevailing[35] mode of interpretation.

Hence, the holistic reading of the purposes and principles of the UN leads to the conclusion that the UN Charter prohibits all forms of coercion in the process of pacific settlement of international disputes. This conclusion, in turn, can dictate the revision of Article 52 of the VCLT to include economic and political coercion as grounds of invalidation. Meanwhile, customary international law can be used as a source to make all forms of coercion unlawful.

5. The Duty to Conclude Treaty: With or Without Coercion

International law does not impose the duty of negotiation nor conclusion of an agreement or treaty. It generally sets an obligation to settle international disputes through peaceful means.[36] The choice relating to the particular scheme for peaceful settlement of disputes is at the discretion of disputing states.[37] Likewise, concluding an agreement or a treaty is based on the free will of a State, and this manifests state sovereignty.[38]

The jurisprudence of international adjudication bodies does not render unilateral projects of transboundary watercourses subject to bilateral or multilateral negotiations. ICJ's jurisprudence on the duty to negotiate makes unilateral projects, such as the GERD, outside the remit of States' duty to negotiate. The *North Sea Continental Shelf*, *Fisheries Jurisdiction* and *Access to the Pacific Ocean* cases before the ICJ can shed light on the duty to negotiate and conclusion of agreement.

In the *Continental Shelf* case, the ICJ held that the States have the duty to negotiate when the dispute is on the subject matter of delimitation of a boundary.[39] The dispute was specifically on the delimitation of boundary on a continental shelf. In the *Fisheries Jurisdiction* case, ICJ set the precedent on the duty to negotiate when the dispute incorporates a determination of the rights of each party in the dispute.[40] In ICJ's (2018) Judgment on *the Merits in Obligation to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile),

[35] O Corten, 'Article 52 – Convention of 1969' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties –A Commentary* (OUP 2011) 1201, 1205-1211.
[36] Handbook on the Peaceful Settlement of Disputes between States (Office of Legal Affairs Codification Division, UN, 1992)
[37] Id, p.7
[38] VCLT, Art 6
[39] https://www.icj-cij.org/en/case/52, Para 85
[40] https://www.icj-cij.org/en/case/55

Bolivia requested the Court to adjudge and declare that "Chile has the obligation to negotiate with Bolivia in order to reach agreement granting Bolivia a fully sovereign access to the Pacific Ocean", and that "Chile breached such an alleged obligation and should be directed to perform it."[41] The court held that:

> In international law, the existence of an obligation to negotiate has to be ascertained in the same way as that of any other legal obligation. Negotiation is part of the usual practice of States in their bilateral and multilateral relations. However, the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate. In particular, for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence.[42]

The court further held that there was not such obligation contained in Chile's statements or unilateral acts.[43] It did not find acquiescence by Chile or estoppel against Chile.[44] The Court finally declared that "there was no such thing in general international law as an obligation arising from a State's legitimate expectations."[45] Nor does the specific obligation to negotiate sovereign access exist under the UN Charter or the Charter of the Organization of the American States.[46]

The three cases show that the duties to negotiate and conclusion of treaty do not apply to every international subject matter. These precedents, coupled with precedents on international water disputes, underscore the non-negotiability of unilateral projects over transboundary watercourses; and such projects do not entail the duty to conclude an agreement.[47] Furthermore, it is

[41]The Merits in Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), ICJ, para. 11.
[42] Id., para 91
[43] Id., paras, 140-148
[44] Id., paras. 149-162
[45] Id., para. 162
[46] Id., paras. 163-174
[47] Precedents of different international tribunals on the settlement of disputes emanating from projects built on transboundary watercourses do not subject a unilateral dam to international negotiation. Some of the well-known cases in this regard are: 1.The 1957 Lake Lanoux Arbitration (France v. Spain); 2. The 1997 Case concerning the

to be noted that a deal on a single unilateral project of a dam cannot decide the present and future rights of co-riparian states on a transboundary watercourse. The business of determining the rights of co-riparian states in a transboundary watercourse calls for a different approach such as basin-wide water sharing comprehensive treaty among all riparians within the Nile Basin Cooperative Framework Agreement (CFA).

The next question will thus be the aptness of GERD's subjection for trilateral negotiations. In an unhistorical move, GERD is the first project that has ever been subjected to trilateral negotiation. The norms and practices of international watercourses governance do not have such practices and the only expectation and in fact recommendation of the regime of international watercourses governance is to set a basin-wide legal and institutional arrangement that could be tasked with the governance of a given watercourse based on the principles of *equitable utilization* and *causing no significant harm* among co-riparians.

In the absence of basin wide institutional and legal venues, every riparian country has the legitimate right to build and operate unilateral projects on the watercourse. Other co-riparians can have the right to bring a legal action only after the dam owner completes and operates its project and if significant harm arises from the operation of the project. The dam owner has the duty not to cause *significant harm* against the water uses of other riparians. However, the pressure on GERD (highlighted above), is totally different from this conventional regime of international watercourses governance.[48]

Gabcikovo-Nagymoros Project (Hungary v. Slovakia); 3. The 2006 Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Request for the Indication of Provisional Measures. Three of these disputes were dependent on the prior agreements between the disputing parties on the utilization of their shared waters. In all cases, the ICJ and the Arbitration tribunal were requested to interpret and apply the treaties signed between the disputing parties before and during the launching of projects. In *Gabcikovo-Nagymoros*, a dispute arose from a joint project while the Lake Lanoux and Pulp Mills Cases were unilateral projects. Compared with these cases, the subjection of GERD to a trilateral negotiation is unique and absurd. The absurdity comes from two facts, first, GERD is not a joint project of the three negotiating States. Second, there is no prior trilateral or basin-wide agreement that can trigger the GERD negotiations before the launching of the GERD project. It is to be noted that the 2015 Declaration of Principles, does not entail a mandatory duty of negotiation on Ethiopia.

[48] *Supra* note 47.

6. Concluding Remarks

GERD has become a subject matter of discussion and negotiation between the dam owner and other riparians. The subjection of GERD for such premature trilateral negotiations was the result of the manipulative pressures of Egypt and Ethiopia's initial diplomatic imprudence.[49] GERD was not ripe for such negotiations during both periods mentioned earlier, i.e., 2012 or 2021. In light of the issues discussed in the preceding sections, Ethiopia does not have a legal obligation to negotiate and conclude an agreement on the filling and operation of the GERD with Egypt and Sudan. This conclusion remains valid even with or without proving coercion in the GERD negotiations.

Four points need due attention. *First*, the GERD negotiations have –since November 2019– encountered all forms of coercion that are, arguably, illegal under international law. *Second*, Ethiopia has the right to withdraw from the negotiation that is entwined with series of coercion by invoking the UN Charter and law of treaty. *Third*, Ethiopia is not under a legal obligation, to conclude any deal over the filling and operation of GERD. Therefore, any agreement that could be concluded by coercion would be of no legal effect.

The *fourth* issue relates to the *way forward*. The most appropriate means of safeguarding the balance between the principle of *equitable utilization* and the principle of causing *no significant harm* is a basin-wide water governance treaty. This requires Egypt's readiness to detach itself from its 'historic rights' narratives –based on colonial 'treaties'– by duly recognizing the apparent fundamental change of circumstances (*rebus sic stantibus*) in view of the magnitude of environmental degradation in the basin accompanied by the steadily growing population whose livelihood is clearly dependent on the watercourse. ■

[49] Ethiopian government's justifications for subjecting the GERD for an international negotiation was clearly unpersuasive. The justifications of 'confidence building' and 'regional cooperation' were unconvincing because they could have ended up in compromising sovereignty.

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COMMENT

Adopted Child's Right of Inheritance from the Family of Origin

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Wondewosen Ewunie ♣

Abstract

The relationship between adopted child and his/her family of adoption and family of origin is regulated under the Revised Family Code Proclamation No. 213/2000. Accordingly, the adopted child shall retain his/her bond with the family of origin in addition to his/her close relationship with the family of adoption by considering him/her, for all purposes, as the child of the adopter. One of the issues that arises in connection with a child's relationship with his/her family of origin and family of adoption is the right to inheritance. In particular, the issue arises whether the adopted child can inherit his/her family of origin (through intestate succession) while s/he is deemed to be the child of the adopter and bestowed with all rights and duties including inheritance. The assurance of inheritance right to the adopted child from the estate of his/her family of origin depends upon how much the bond with his/her family of origin is maintained. This article focuses on the legal regime with regard to the adopted child's relationship with his/her family of origin with particular emphasis on the adopted child's right to inherit his/her family of origin, in Ethiopia.

Key terms

Inheritance right · Adopted child · Adoptive parents · Natural parents

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ወንደወሰን እውኔ (2014 ዓ.ም)፣ **'የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት በኢትዮጵያ ሕግ'፣ ሚዛን የሕግ መጽሔት፣ ቅጽ** 15 **ቁጥር** 2፣ **ገጽ** 543-556

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የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት በኢትዮጵያ ሕግ

ወንደወሰን እውኔ*

አህፅሮተ ይዘት (Abstract)

በጉዲፈቻ ልጅ እና በጉዲፈቻ ቤተሰቦቹ እና በቀደምት ቤተሰቦቹ መካከል እንዲኖር የተፈለገው ግንኙነት በተሻሻለው የቤተሰብ ሕግ አዋጅ ቁጥር 213/1992 ተደንቧል። በዚሁ መሠረት የጉዲፈቻ ልጅ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊዎቹ ልጅ ተቆጥሮ ከእነርሱ ጋር የጠበቀ ግንኙነት እንዲኖረው ቢደረግም ከተፈጥሮ ቤተሰቦቹ ጋር ያለው ግንኙነትም ተጠብቆ እንዲቆይ ተደርጓል። የጉዲፈቻ ልጅ ከጉዲፈቻ ቤተሰቦቹ እና ከቀደምት ቤተሰቦቹ ጋር ከሚኖረው ግንኙነት ጋር በተያያዘ ከሚነሱት ጉዳዮች መካከል የውርስ መብት አንዱ ነው። በተለይም የጉዲፈቻ ልጅ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊዎቹ ልጅ ተቆጥሮ መብቶች እና ግደታዎች ሁሉ የተሰጡት ሆኖ ሳለ የተፈጥሮ ቤተሰቦቹን ሊወርስ ይችላል ወይ የሚለው ነጥብ ክርክር ሊደረግበት ይችላል። የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብት የተጠበቀ መሆን አለመሆኑ ልጅየው ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነት በተጠበቀበት መጠን ልክ ይወሰናል። ይህ ጽሑፍ በኢትዮጵያ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረውን ግንኙነት በሚገዛው የሕግ ድንጋጌ ላይ አትኩሮቱን ያደረገ ሲሆን፣ በተለይም የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት ያለው መሆን አለመሆኑን ይመለከታል።

ቁልፍ ቃላት፡-

የውርስ መብት፣ የጉዲፈቻ ልጅ፣ የጉዲፈቻ ቤተሰብ፣ የተፈጥሮ ቤተሰብ

ይዘት

አህፅሮተ ይዘት

1. መግቢያ
2. የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ እና ከተፈጥሮ ቤተሰቦቹ ጋር ስለሚኖረው ትስስር
   2.1 የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ ጋር ስለሚኖረው ግንኙነት
   2.2 የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር ስለሚኖረው ግንኙነት
3. የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ የመውረስ መብት
4. መደምደሚያ

የተጠቀሱ ጽሑፎች

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1. መግቢያ

በጉዲፈቻ ስምምነት የሚፈጠር ዝምድና በጉዲፈቻ ልጅ፣ በጉዲፈቻ አድራጊው እና በጉዲፈቻ ልጅ የተፈጥሮ ወላጆች መብትና ግደታዎች ላይ ተጽእኖ ይኖረዋል።[1] የጉዲፈቻ ስምምነቱ በእነዚህ አካላት መብቶችና ግደታዎች ላይ የሚኖረው የተጽእኖ ዓይነት እና መጠንም በሕግ የሚወሰን ነው። በጉዲፈቻ ስምምነት የሚፈጠር ዝምድና ተጽእኖ ከሚያሳድርባቸው መብቶች መካከል አንዱ ያለኑዛዜ የሞተን ሰው የውርስ ሀብት የመውረስ መብት እንደሆነ መገንዘብ ይቻላል። በተለይም በጉዲፈቻ ስምምነት ዝምድና ሲፈጠር የጉዲፈቻ ልጅ የጉዲፈቻ አድራጊውን እና/ወይም የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብት ላይ ተፅእኖ እንደሚኖረው ይገመታል። ከዚህ አኳያ በጉዲፈቻ ስምምነት ላይ ሕጉ የሚያደርገው ቁጥጥር ሲገመገም ከሚነሱ ጉዳዮች መካከል አንዱ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት ያለው ስለመሆን አለመሆኑ የሚነሳው ክርክር ነው።[2] በዚህም የጉዲፈቻ ልጅ እንደጉዲፈቻ አድራጊው ልጅ ተቆጥሮ የጉዲፈቻ አድራጊውን የውርስ ሀብት እንዲወርስ መብት ከተሰጠው በኋላ በድጋሚ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት ሊወርስ ይገባል ወይስ አይገባም የሚለው የክርክሩ ዋነኛ ማጠንጠኛ እንደሆነ ለመገንዘብ ይቻላል።

በኢትዮጵያ የፌደራል የተሻሻለው ቤተሰብ ሕግ (ከዚህ በኋላ የተሻሻለው ቤተሰብ ሕግ እየተባለ የሚጠቀስ) የጉዲፈቻ ልጅ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊው ልጅ ስለሚቆጠር[3] የጉዲፈቻ አዲራጊውን የውርስ ሀብት የመውረስ መብት ያለው ስለመሆኑ አከራካሪ አይሆንም። በአንፃሩ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው የዝምድና ግንኙነት ተጠብቆ እንደሚቆይ ቢደነገግም[4] በጉዲፈቻ ልጅ እና በተፈጥሮ ቤተሰቦቹ መካከል ተጠብቆ የሚቆየው ግንኙነት ዓይነትና ይዘት በግልፅ ባለመደንገጉ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ የውርስ ሀብት የመውረስ መብት ክርክር ሲነሳበት ይስተዋላል። ጸሐፊውም በሥራው አጋጣሚ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ የውርስ ሀብት ተካፋይ ሊሆን ይገባል ወይስ አይገባም የሚለው ጭብጥ በሙያ አጋሮቹ መካከል በልዩነት ክርክር ሲደረግበት አስተውሏል።

ለዚህ ክርክር መነሻ የሆነው ጉዳይ በጉዲፈቻ ወደ ውጭ ሀገር ሄዳ ያደገች ግለሰብ ኢትዮጵያ ውስጥ ይኖሩ የነበሩ የተፈጥሮ ወላጆቿ በሕይወት ሳሉ ያፈሩት ቤት በውርስ ለእኔ ይገባኛል በማለት ቤቱን ይዘው ሲጠቀሙበትና ሲያስተዳድሩት በነበሩ ግለሰቦች ላይ በፍ/ቤት የክስ አቤቱታ በማቅረቧ ነው። ክሱ የቀረበባቸው ንብረቱን ሲያስተዳድሩ የነበሩት ሰዎች የሕግ አገልግሎት ድጋፍ ለማግኘት ጉዳዩን ጸሐፊው በሚሠራበት ተቋም የፍትሐ ብሔር ጉዳዮችን ለሚከታተል ባለሙያ አቅርበው የጉዲፈቻ ልጅቷ የሚች የተፈጥሮ ወላጆቿን የውርስ ሀብት ልትወርስ ይገባል ወይስ አይገባም የሚለው ጉዳይ በሕግ ባለሙያዎች መካከል በልዩነት ክርክር ተደርጎበታል። የጉዲፈቻ ልጅቷ የሚች የተፈጥሮ ወላጆቿን የውርስ ሀብት የመውረስ መብት ላይ ይህ ክርክር መነሳቱ በጉዲፈቻ ልጅ እና በተፈጥሮ ወላጆች መካከል ተጠብቆ የሚቆየው የዝምድና ግንኙነት ዓይነት እና ይዘት

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[1] Paul A Kiefer (1966), 'Intestate Succession, Sociology and the Adopted Child' 11(2) *Vill L Rev* 392

[2] Donald E Bjertness (1957), 'Domestic Relations - Inheritance by Adopted Children - Right of Adopted Child to Inherit from Its Natural Parent' 33(2) *N.D. L. Rev.* 241፣ 243

[3] የተሻሻለው የቤተሰብ ሕግ፣ አዋጅ ቁጥር 213፣ 1992፣ ነጋሪት ጋዜጣ፣ 6ኛ ዓመት፣ ቁ.1፣ አንቀጽ 181

[4] ዝኒ ከማሁ፣ አንቀጽ 183(1)

እስከምን ድረስ እንደሆነ በተለይም የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብትን ስለማካተት አለማካተቱ የሕግ ትርጉም የሚያስፈልገው ስለመሆኑ አመላካች ነው።

የዚህ ጽሑፍ ዓላማም በጉዲፈቻ ልጅ እና በተፈጥሮ ቤተሰቦቹ/ቿ መካከል ያለው በሕግ ጥበቃ የተደረገለት ትስስር እስከምን ድረስ እንደሆነ መመርመር ነው። በተለይም የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብት እና በተቃራኒ የሚነሱ ክርክሮችን በሚመለከት አግባብነት ካላቸው የተሻሻለው የቤተሰብ ሕግ ድንጋጌዎች እና ተያያዥነት ካለው የውርስ ሕግ ድንጋጌዎች አንፃር በመመርመር በሕጉ አተረጓጎም ረገድ የተሻለ ግልጽነትን መፍጠር አስፈላጊ ነው። በዚሁ መሠረት የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር ያለው የዝምድና ግንኙነት ተጠብቆ መቆየቱ የተፈጥሮ ቤተሰቦቹን በመውረስ መብቱ ላይ የሚኖረው አንደምታ እንደሚከተለው ይብራራል።

2. የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ እና ከተፈጥሮ ቤተሰቦቹ ጋር ስለሚኖረው ትስስር

በጉዲፈቻ ስምምነት የሚፈጠር ዝምድናን የጉዲፈቻ ልጅየውን ጥቅም የበለጠ የሚያስጠብቅ እንዲሆን ለማድረግ ሀገራት የሕግ ቁጥጥር ያደርጋሉ።[5] በአንዳንድ ሀገራት ሕግጋት የጉዲፈቻ ልጅየውን ጥቅም ለማሳደግ በሚደረግ ጥረት ልጅየው ከጉዲፈቻ አዲራጊዎቹ ጋር የጠበቀ ግንኙነት እንዲኖረው እና ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነት (የመውረስ መብቱን ጭምር የሚያሳጣ እስኪሆን ድረስ) ሙሉ ለሙሉ እንዲቋረጥ የሚያደርጉ ሕግጋቶች ይወጣሉ።[6] በሌላ አነጋገር የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ ጋር ፍፁማዊ የልጅነት ትስስር እንዲኖረውና ከቀድሞ የተፈጥሮ ቤተሰቡ ጋር የነበረው ግንኙነት ጨርሶ እንዲቋረጥ ይደረጋል ማለት ነው። ይህም የጉዲፈቻ ስምምነቱ እንደፀና የጉዲፈቻ ልጅየው ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘ የሚኖሩት ሁሉም መብቶች እና ግደታዎች ቀሪ እንዲሆኑ ያደርጋቸዋል። ይህ ዓይነት አሠራር የጉዲፈቻ ልጅ ፍፁም እንደጉዲፈቻ አዲራጊዎቹ ልጅ ተቆጥሮ ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘ የሚኖሩት መብቶች እና ግዴታዎች ሙሉ ለሙሉ ወደ ጉዲፈቻ አዲራጊዎቹ እንዲዛወር ያደርጋል።

በአንፃሩ እንደ ስፔን ያሉ ሌሎች ሀገራት የጉዲፈቻ ልጅየውን ጥቅም የበለጠ ያስጠብቃል ብለው የሚያስቡትን መነሻ በማድረግ፣ የጉዲፈቻ ልጅየው ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ማናቸውም ግንኙነት እንደተጠበቀ ሆኖ፣ ከጉዲፈቻ አዲራጊዎቹ ጋር ቅርብና ቋሚ የሆነ ቤተሰባዊ ትስስር ለመፍጠር ዕድል የሚሰጡ ሕግጋትን ይጠቀማሉ።[7] ይህ ዓይነቱ አካሄድ የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ ጋር ቅርብና ቋሚ የሆነ ቤተሰባዊ ትስስር እንዲኖረው ከማድረግም ባለፈ ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘም የሚኖሩት መብቶች እና ግዴታዎች እንደተጠበቁ የሚቆዩበትን ዕድል ይፈጥራል። ይህም ከፊል የልጅነት ትስስርን የሚፈጥር የሕግ ሂደት ወይም አሠራር እንደሆነ መገንዘብ ይቻላል።

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[5] Paul A Kiefer, *Supra* note 1 pp. 393-394

[6] John R Jr Murphy (1957), 'Adopted Child's Right of Inheritance from the Natural Parents' 6 *Clev-Marshall L Rev* 148

[7] Arthur R Thompson (1917), 'Right of the Adopted Child in Intestate Succession' 3(2) *ABA J* 135

በኢትዮጵያም በጉዲፈቻ ስምምነት የሚፈጠር ዝምድና የጉዲፈቻ ልጅየውን መልካም አስተዳደግና ጥቅምን የሚያረጋግጥ እንዲሆን የሕግ ቁጥጥር ተደርጎበታል።[8] የሕግ ቁጥጥሩም ሕፃናትን የሚመለከቱ እርምጃዎች በሚወሰዱበት ጊዜ በመንግሥታዊ ወይም በግል የበጎ አድራጎት ተቋሞች፣ በፍ/ቤቶች፣ በአስተዳደር ባለሥልጣኖች ወይም በሕግ አውጪ አካላት የሕፃናት ደህንነት በቀዳምትነት መታሰብ እንዳለበት ከሚገልፀው አስገዳጅ ሕገ-መንግሥታዊ ድንጋጌ ይጀምራል።[9]

ሕፃናትን በሚመለከት ከሚወሰዱ እርምጃዎች መካከል አንዱ ሕፃናቱ በጉዲፈቻ የሚያድጉበትን የሕግ ሥርዓት መዘርጋት እና ቁጥጥር ማድረግ ነው። በዚህ የጉዲፈቻ ሥርዓት መዘርጋት እና ቁጥጥር ሂደት ውስጥ የሕግ ቁጥጥር ከሚደረግባቸው ሁኔታዎች መካከል ደግሞ የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ እና ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነት አንዱ ነው። በሀገራችን የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ እና ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነትን ጨምሮ የፌደራል የጉዲፈቻ ሥርዓት የሚገዛው በተሻሻለው የቤተሰብ ሕግ ሲሆን ሥርዓቱ እና ቁጥጥሩም ለሕፃናቱ ደህንነት ቅድሚያ በመስጠት መልካም አስተዳደጋቸውንና ጥቅማቸውን የሚያረጋግጥ መሆን ይጠበቅበታል። ከዚህ አኳያ የተሻሻለው የቤተሰብ ሕግ የጉዲፈቻ ልጅ እንደጉዲፈቻ አዲራጊዎቹ ልጅ ከተቆጠረ በኋላ ከተፈጥሮ ቤተሰቦቹም ጋር የነበረው የዝምድና ትስስር እንዲቀጥል ስላደረገ የኢትዮጵያ የቤተሰብ ሕግ ከፊል የልጅነት ትስስርን የሚፈጥር አካሄድን የሚከተል እንደሆነ መረዳት ይቻላል።

በዚህ መሠረት የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ እና ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ትስስር በተሻሻለው የቤተሰብ ሕግ የተቃኘበትን አግባብ ከጉዲፈቻ ልጅየው የውርስ መብት አንፃር በማገናዘብ እንደሚከተለው ለመዳሰስ ተሞክሯል።

2.1 የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ ጋር ስለሚኖረው ግንኙነት

የጉዲፈቻ ልጅ ከጉዲፈቻ አድራጊዎቹ ጋር የሚኖረውን ግንኙነት በግልጽና በማያሻማ ሁኔታ በሕግ በመደንገግ ቁጥጥር ማድረግ የጉዲፈቻ ልጁን ጥቅም ከማስከበር አንፃር የላቀ ሚና ይኖረዋል። ከዚህ አኳያ (ከላይ እንደተመለከተው) በአንዳንድ ሀገራት የጉዲፈቻ ልጅየውን ጥቅም የበለጠ ያስጠብቅለታል ተብሎ የታሰበውን ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረውን ትስስር ሙሉ ለሙሉ የሚያቋርጥ እና ከጉዲፈቻ አድራጊዎቹ ጋር ጠንካራና ሙሉ ትስስር እንዲኖረው የሚያደርግ ሕግና ሥርዓት በመዘርጋት ፍፁም የልጅነት ትስሰር የጉዲፈቻ ሥርዓትን ይከተላሉ። በአንፃሩ ሌሎች ሀገራት የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ትስስር እንደተጠበቀ ሆኖ ከጉዲፈቻ አድራጊዎቹ ጋር ጠንካራ ትስስር እንዲኖረው የሚያደርግ ሕግና ሥርዓት በመዘርጋት ከፊል የልጅነት ትስስር የጉዲፈቻ ሥርዓትን ይከተላሉ።

በኢትዮጵያ፣ ከሕገ መንግሥቱ አንቀጽ 36(2) ድንጋጌ ለመገንዘብ እንደሚቻለው፣ የሌሎች ባለድርሻ አካላት ሕገ መንግሥታዊ ግደታ እንደተጠበቀ ሆኖ፣ ሕግ አውጭው የመንግሥት አካል ሕፃናትን የሚመለከቱ እርምጃዎች ለሕፃናቱ ደህንነት ቅድሚያ የሰጡ መሆናቸውን የማረጋገጥ ሕገ መንግሥታዊ ግደታ አለበት። ሕግ አውጭው ሕፃናትን የሚመለከቱ እርምጃዎች ለሕፃናቱ ደህንነት ቅድሚያ የሰጡ መሆናቸውን በማረጋገጥ ረገድ ሊያከናውን ከሚችላቸው ተግባራት መካከል አንዱ የጉዲፈቻ የሕግ ሥርዓትን

[8] የተሻሻለው የቤተሰብ ሕግ፣ (ግርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 194/2

[9] የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት፣ አዋጅ ቁጥር 1/1987፣ ነጋሪት ጋዜጣ፣ 1ኛ ዓመት፣ ቁ. 1፣ አንቀጽ 36(2)

መዘርጋትና ቁጥጥር ማድረግ ነው፡፡ በዚሁ አግባብ ሕግ አውጭው ጉዲፈቻን የሚመለከቱ ድንጋጌዎች በተሻሻለው የቤተሰብ ሕግ ውስጥ እንዲካተቱ በማድረግ፣ ቀድሞውንም በሀገራችን የነበረ እና በተለያዩ የማኅበረሰብ ክፍሎች በተለያየ ስያሜ ይታወቅ የነበረው[10] (በጉዲፈቻ ስምምነት የሚፈጠር) የልጅ እና የአባት/የእናት ግንኙነት የሕግ ሥርዓት እንዲዘረጋለት እና ቁጥጥር እንዲደረግበት አድርጓል፡፡[11]

በዚሁ መሠረት የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ቤተሰባዊ ትስስር እንደተጠበቀ ሆኖ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊው ልጅ ተደርጎ እንዲቆጠር የሚያስገድድ ድንጋጌ በተሻሻለው የፌደራል የቤተሰብ ሕግ እንዲካተት ተደርጓል፡፡ ይህም በጉዲፈቻ ልጅ እና በጉዲፈቻ አዲራጊዎቹ መካከል ቋሚ የሆነ ቤተሰባዊ ግንኙነት እንዲፈጠር በማድረግ የጉዲፈቻ ልጅየውን ጥቅም የበለጠ የሚያስጠብቅ እንደሚሆን ይታሰባል፡፡

የጉዲፈቻ ልጅ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊው ልጅ እንደሆነ በመቁጠር ቋሚ የሆነ ቤተሰባዊ ግንኙነት እንዲኖር መደረጉ በጠቅላላው በተፈጥሮ አባት ወይም እናት እና ልጅ መካከል የሚኖሩ መብቶች በጉዲፈቻ ወላጆች እና በጉዲፈቻ ልጅ መካከልም ሳይሸራረፉ እንዲኖሩ የሚያደርግ እና ግደታዎችንም የሚጥል እንደሆነ ለመረዳት ይቻላል፡፡ ይህ ሁኔታ በጉዲፈቻ ልጅ እና በጉዲፈቻ አድራጊው መካከል ከሚፈጥራቸው መብቶችና ግደታዎች ባለፈም በጉዲፈቻ ልጅየው እና የጉዲፈቻ ስምምነቱን በወቅቱ ባልተቃወሙ ከጉዲፈቻ አድራጊው ወደ ላይ የሚቆጠሩ ወላጆች ወይም ወደ ጎን የሚቆጠሩ ዘመዶች መካከል መብቶችና ግደታዎች እንዲፈጠሩ ያደርጋል፡፡[12]

የጉዲፈቻ ልጅየው እንደጉዲፈቻ አድራጊው ልጅ ሆኖ መቆጠሩ የሚያስገኝለት መብቶችና የሚጥልበት ግደታዎች አሉ፡፡ የጉዲፈቻ ልጅየው እንደጉዲፈቻ አድራጊው ልጅ በመቆጠሩ ከሚያስገኝለት መብት አንዱ የጉዲፈቻ ልጅየው የመጀመሪያ ደረጃ ወራሽ ከሆኑ የተፈጥሮ ልጆች ጋር እኩል በመሆን ከጉዲፈቻ አድራጊው ውርስ ሀብት ቀጥተኛ ተጠቃሚ መሆኑ ነው፡፡ ይኸውም በፍትሐ ብሔር ሕግ አንቀጽ 836 ሥር እንደተመለከተው የጉዲፈቻ ልጆች እንደሌሎች የተፈጥሮ ልጆች ተቆጥረው የውርስ ሀብት ተካፋይ እንደሚሆኑ በግልጽ ተደንግጓል፡፡[13] በዚህም በተፈጥሮ ልጆች እና በጉዲፈቻ ልጆች መካከል (በወራሽነትም ሆነ የእያንዳንዳቸውን ድርሻ ልክ በመወሰን ረገድ) ልዩነት ሳይደረግባቸው የጉዲፈቻ አድራጊውን የውርስ ሀብት ሊወርሱ እንደሚችሉ ለመገንዘብ ይቻላል፡፡[14]

የጉዲፈቻ ልጅ እንደሌሎች የተፈጥሮ ልጆች ተቆጥሮ የውርስ ሀብት ተካፋይ የመሆን መብት ተፈፃሚ የማይሆነው የጉዲፈቻ ስምምነቱን በግልጽ በተቃወሙት ወደ ላይ የሚቆጠሩ ወላጆች ወይም ወደ ጎን የሚቆጠሩ ዘመዶች ላይ ብቻ እንደሆነ ከተሻሻለው የፌደራል የቤተሰብ ሕግ አንቀጽ 182 ንዑስ አንቀጽ 1 ድንጋጌ ለመረዳት ይቻላል፡፡ ይህም ሆኖ የጉዲፈቻ ልጅ ከሌሎች የተፈጥሮ ልጆች ጋር እኩል የውርስ ሀብት ተካፋይነት መብት በእነዚህ የጉዲፈቻ አድራጊው ዘመዶች ላይ ተፈጻሚ የማይሆነው

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[10] መሐሪ ረዳኢ (ዶ/ር)፣ *የፌደራሉ የቤተሰብ ሕግ ይዘትና አተገባበሩ*፣ (2012)፣ ገጽ 254

[11] የተሻሻለው የቤተሰብ ሕግ፣ (ግርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 180-196

[12] ዝኒ ከማሁ፣ አንቀጽ 182 (1 እና 2)

[13] የኢትዮጵያ ፍትሐ ብሔር ሕግ፣ አዋጅ ቁጥር 165፣ 1952፣ ነጋሪት ጋዜጣ፣ 19ኛ ዓመት፣ ቁ.2 አንቀጽ 836/2

[14] ዝኒ ከማሁ፣ አንቀጽ 836 (1 እና 2)

የጉዲፈቻ ስምምነቱ በፍ/ቤት መፅደቁ በታወቀ በአንድ ዓመት ጊዜ ውስጥ ተቃውሚቸውን በፍ/ቤት መዝግብ ያስመዘገቡ እንደሆነ ብቻ ነው።[15] የጉዲፈቻ አድራጊው ወደ ላይ የሚቆጠሩ ወላጆች ወይም ወደ ጎን የሚቆጠሩ ዘመዶች ተቃውሞ የጉዲፈቻ ስምምነቱ በፍ/ቤት መፅደቁ በታወቀ በአንድ ዓመት ጊዜ ውስጥ በፍ/ቤት መዝገብ ካልተመዘገበ በስተቀር የፀና አይሆንም። በጉዲፈቻ ስምምነቱ ላይ የፀና ተቃውሞ ከሌለ ደግሞ የጉዲፈቻ አድራጊው ወደ ላይ ከሚቆጠሩ ወላጆቹ ወይም ወደ ጎን ከሚቆጠሩ ዘመዶቹ ቀድሞ/ማ የሞተ ወይም የሞተች እንደሆነ የጉዲፈቻ ልጅየው ጉዲፈቻ አድራጊውን በመተካት ከጉዲፈቻ አድራጊው ወደ ላይ የሚቆጠሩ ወላጆች ወይም ወደ ጎን የሚቆጠሩ ዘመዶች የውርስ ሀብት የመካፈል መብት ይኖረዋል።

በዚህ ሁኔታ የጉዲፈቻ ልጅየው እንደጉዲፈቻ አድራጊው ልጅ ተቆጥሮ በመጀመሪያ ደረጃ ወራሽነት ከጉዲፈቻ አድራጊው እንዲሁም በምትክ ወራሽነት ከጉዲፈቻ አድራጊው ወደ ላይ የሚቆጠሩ ወላጆች ወይም ወደ ጎን የሚቆጠሩ ዘመዶች የውርስ ሀብት ተጠቃሚ እንዲሆን ከተደረገ በኋላ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት በተጨማሪ መውረስ ይችላል ወይስ አይችልም የሚለው ለዚህ ጽሑፍ መነሻ የሆነው አከራካሪው ጉዳይ የጉዲፈቻ ልጅየው ከተፈጥሮ ቤተሰቦቹ ጋር በሚኖረው በሕግ የተደነገገ የግንኙነት ዓይነትና መጠን ይወሰናል። ይህን ጉዳይ በቀጣዩ ርዕስ ሥር እንደሚከተለው በዝርዝር ለመዳሰስ ተሞክሯል።

2.2 የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር ስለሚኖረው ግንኙነት

በጉዲፈቻ ስምምነት ላይ የሚደረግ ቁጥጥር ዓላማው የጉዲፈቻ ልጆችን ጥቅምና ደህንነት ማሳደግ እና ከለላ መስጠት ነው። ቀደም ሲል እንደተመለከተው የጉዲፈቻ ስምምነትን የሚቆጣጠረው ሕግ በተቻለ መጠን የጉዲፈቻ ልጅየውን ጥቅም የበለጠ የሚያስጠብቅ እንዲሆን ለማድረግ ሀገራት ጥረት ሲያደርጉ ይስተዋላል። በዚህም አንዳንድ ሀገራት የጉዲፈቻ ልጅ ከጉዲፈቻ አዲራጊዎቹ ጋር የጠበቀ ግንኙነት እንዲኖረው እና ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነት ሙሉ በሙሉ እንዲቋረጥ የሚያደርግ ሕግ ሲያወጡ ሌሎች የጉዲፈቻ ልጅየው ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ማናቸውም ግንኙነት እንደተጠበቀ ሆኖ ከጉዲፈቻ አዲራጊዎቹ ጋር ቅርብና ቋሚ የሆነ ቤተሰባዊ ትስስር እንዲኖረው የሚያደርግ ሕግ በማውጣት የጉዲፈቻ ልጅየው ጥቅም የበለጠ እንዲጠበቅ ለማድረግ ጥረት ሲያደርጉ ይስተዋላል።[16]

የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነት ሙሉ በሙሉ እንዲቋረጥ የሚያደርግ ሕግ በጉዲፈቻ ልጅ እና በተፈጥሮ ወላጆች መካከል የሚኖረውን የውርስ ሀብት የመውረስ መብት እስከ ማሳጣት የሚደረስ እንደሆነ ለመገንዘብ ይቻላል። በአንፃሩ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነት እንዳለ ሆኖ ከጉዲፈቻ አዲራጊዎቹ ጋር ቅርብና ቋሚ የሆነ ቤተሰባዊ ትስስር እንዲኖረው የሚያደርግ ሕግ የተፈጥሮ ቤተሰቦቹን እና የጉዲፈቻ አዲራጊዎቹን የውርስ ሀብት የመውረስ መብቱን በመጠበቅ ጭምር ጥቅሙን የበለጠ የሚያስጠብቅለት እንደሚሆን ይታመናል።

በሀገራችንም ሕፃናትን በሚመለከት በሕግ አውጭው የሚወሰዱ እርምጃዎች ለሕፃናቱ ደህንነት ቅድሚያ የሚሰጡ መሆን እንዳለባቸው ሕገ-መንግሥታዊ ግዴታ ተደንግጓል።[17] ሕግ አውጭውም ይህን ሕገ-መንግሥታዊ ግደታውን ለመወጣት

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[15] የተሻሻለው የቤተሰብ ሕግ፣ (ግርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 182(2)

[16] John R Jr Murphy, *supra* note 6, p. 150

[17] የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት፣ (ግርጌ ማስታወሻ ቁ. 9)

የጉዲፈቻ ልጅን በተመለከተ በጉዲፈቻ ስምምነት የሚፈጠር ዝምድና የጉዲፈቻ ልጅየውን መልካም አስተዳደግና ጥቅምን የሚያረጋግጥ መሆን እንዳለበት በተሻሻለው የፌደራል የቤተሰብ ሕግ አንቀጽ 194/2 ሥር ደንግጓል።[18] በዚህ ረገድ ሕግ አውጭው በተሻሻለው የፌደራል የቤተሰብ ሕግ የጉዲፈቻ ልጅየውን መልካም አስተዳደግና ጥቅምን ለማረጋገጥ የጉዲፈቻን ልጅ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊው ልጅ በመቁጠር ጥብቅ ትስስር እንዲፈጠር ከማድረግም ባለፈ ከቀደምት ቤተሰቦቹ ጋር ያለው የዝምድና ግንኙነት እንደተጠበቀ እንዲቆይ አድርጓል።

በሌላ አነጋገር "ምንም እንኳን የጉዲፈቻ ልጅ እንደጉዲፈቻ አድራጊው ልጅ [ቢቆጠርም] ከተፈጥሮ ቤተሰቦቹ ጋር የነበረውን ዝምድናና ትስስር ይዞ እንዲቀጥል ሕጋችን....." ስለሚፈቅድለት በዚህ ረገድ የቤተሰብ ሕጉ ከፊል የልጅነት ትስስር የሚከተል ሆኖ እናገኘዋለን።[19] ስለሆነም በጉዲፈቻ ስምምነት ዝምድና በተፈጠረ ጊዜ የጉዲፈቻ ልጅ በመርህ ደረጃ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊው ልጅ መቆጠሩ እንደተጠበቀ ሆኖ ከቀደምት ቤተሰቦቹ ጋር ያለው የዝምድና ግንኙነት ይቀጥላል።[20]

ይሁን እንጂ የጉዲፈቻ ልጅ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊው ልጅ ተቆጥሮ ሳለ ከቀደምት ቤተሰቦቹ ጋር ያለው የዝምድና ግንኙነት የሚቀጥለው እስከምን ድረስ ነው የሚለው ነጥብ በተሻሻለው የቤተሰብ ሕግ በግልፅ ድንጋጌ እልባት አግኝቷል ለማለት አያስደፍርም። ስለሆነም የጉዲፈቻ ልጅ ከቀደምት ቤተሰቦቹ ጋር ያለው የዝምድና ግንኙነት እንደተጠበቀ መቆየቱ በጉዲፈቻ ልጅየው እና በተፈጥሮ ቤተሰቦቹ መካከል ምን ምን መብቶችን እና ግደታዎችን ወይም እገዳዎችን ወይም ክልከላዎችን ጠብቆ ያቆያል የሚለው ጉዳይ በግልጽ የሕግ ሽፋን ተሰጥቶታል ለማለት አይቻልም። ይህ ማለት ግን የጉዲፈቻ ልጅ ከቀደምት ቤተሰቦቹ ጋር ያለው የዝምድና ግንኙነት ተጠብቆ መቆየቱ ሊያጎናፅፍ የሚችለውን መብቶችና የሚያስከትለውን ግደታዎች ወይም ክልከላዎች ከተለያዩ የተሻሻለው የቤተሰብ ሕግ ድንጋጌዎች በትርጉም ለማግኘትና ለማወቅ ፈፅሞ አይቻልም ማለት አይደለም።

ሆኖም የዚህ ጽሑፍ ዓላማ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር ላለው የዝምድና ግንኙነት የሕግ ጥበቃ በመደረጉ በመካከላቸው ተጠብቀው የሚቆዩትን መብቶች እና ግደታዎችን ወይም ክልከላዎችን መተንተን ሳይሆን ለጽሑፉ መነሻ ምክንያት የሆነውን በኢትዮጵያ ሕግ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት ያለው ስለመሆን አለመሆኑ መመርመር በመሆኑ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር ያለው ግንኙነት ተጠብቆ መቆየቱ እነርሱን የመውረስ መብቱ ላይ የሚኖረው ሚና ብቻ ተለይቶ እንደሚከተለው ይብራራል።

3. የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ውርስ የማግኘት መብት

ቀደም ሲል እንደተመለከተው በጥቅሉ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር ያለው ግንኙነት ተጠብቆ እንደሚቆይ በተሻሻለው የቤተሰብ ሕግ ቢደነግግም የዚህ ግንኙነት ተጠብቆ መቆየት የጉዲፈቻ ልጅየውን የተፈጥሮ ቤተሰቦቹን የመውረስ መብት የሚያረጋግጥ ስለመሆኑ ክርክር ሊነሳበት እንደሚችል ለዚህ ፅሑፍ መነሻ የሆነው ጉዳይ

[18] የተሻሻለው የቤተሰብ ሕግ፣ (ግርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 194(2)

[19] መሐሪ ረዳኢ (ዶ/ር)፣ (ግርጌ ማስታወሻ ቁ.10)፣ ገጽ 260

[20] የተሻሻለው የቤተሰብ ሕግ፣ (ግርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 183(1)

አመላካች ነው። የመከራከሪያ ሐሳቦቹም በዋናነት የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ እና ከጉዲፈቻ ቤተሰቦቹ እንዲሁም የተፈጥሮ ወላጆች እና የጉዲፈቻ ወላጆች ከጉዲፈቻ ልጅየው ጋር በተያያዘ ከሚኖሯቸው መብትና ግደታዎች የሕግ ፈቃጅነት ወይም ከልካይነት ጋር ተያይዞ የሚነሱ የፍትሐዊነት ጥያቄዎችን መሠረት ያደረጉ ናቸው።

በተሻሻለው የቤተሰብ ሕግ መሠረት በሚደረግ የጉዲፈቻ ስምምነት ዝምድና ከተፈጠረ በኋላ የጉዲፈቻ ልጅየው በማናቸውም ረገድ እንደ ጉዲፈቻ አድራጊው ልጅ የሚቆጠር በመሆኑ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘ የሚኖሩት መብቶች እና ግደታዎች ወደ ጉዲፈቻ አድራጊዎቹ ይዞራሉ። ይህም ሌሎች የመብትና ግደታ ሁኔታዎች መለወጥ እንደተጠበቁ ሆነው የጉዲፈቻ ዝምድና በመፈጠሩ ብቻ የተፈጥሮ ወላጆች ከጉዲፈቻ ልጅየው ጋር በተገናኘ የነበሯቸው ሁሉም ሕጋዊ መብቶች ከእነርሱ ተነስተው ወደ ልጅየው ጉዲፈቻ አድራጊዎች እንዲተላለፉ ያደርጋል። በዚህ ሁኔታ የተሻሻለው የቤተሰብ ሕግ የጉዲፈቻ ልጅየው የተፈጥሮ ወላጆች ከልጃቸው ጋር በተገናኘ የሚኖራቸውን መብቶች በመንፈግ ለጉዲፈቻ አድራጊዎቹ የሰጠ በመሆኑ የጉዲፈቻ ልጅ ንብረት አፍርቶ ቢሞት የእርሱ ወራሽ ሊሆኑ የሚችሉት የጉዲፈቻ ወላጆቹ እንጂ የሥጋ ወላጆቹ አይሆኑም ማለት ነው። ይህን ተከትሎ የጉዲፈቻ ልጅየውን የመውረስ መብት ለጉዲፈቻ ወላጆቹ ቅድሚያ በመስጠት የተፈጥሮ ቤተሰቦቹ ከእርሱ የውርስ ሀብት እንዳይወርሱ በተደረገበት ሁኔታ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን እንዲወርስ መፍቀድ ፍትሐዊ አይሆንም የሚል መከራከሪያ ይቀርባል።[21]

ይሁን እንጂ ይህ ዓይነት ክርክር የጉዲፈቻ ልጅ ከቀደምት ቤተሰቦቹ ጋር ያለው ዝምድና እንደተጠበቀ እንዲቆይ የሕግ ከለላ የተሰጠው በመሆኑ በልጅየው ቀደምት ቤተሰቦች እና በጉዲፈቻ ቤተሰቦቹ መካከል መምረጥ አስፈላጊ ሆኖ ለጉዲፈቻ ቤተሰቦቹ ቅዲሚያ የሚያሰጥ ሁኔታ እስካልተገኘ ድረስ የጉዲፈቻ ልጅ የቀደምት ቤተሰቦች የጉዲፈቻ ልጅየውን የውርስ ሀብት ሊወርሱ የሚችሉበት ዕድል እንዳለ ያላገናዘበ ነው። በዚህ ሁኔታ የጉዲፈቻ ልጅ የጉዲፈቻ አድራጊዎች እርሱን ቀድመው በመሞታቸው ምክንያት የልጅየውን የውርስ ሀብት ለመውረስ ከቀደምት ቤተሰቦቹ እና ከጉዲፈቻ ቤተሰቦቹ መካከል አንዱን መምረጥ አስፈላጊ የማይሆንበት ሁኔታ ስለሚኖር የጉዲፈቻ ልጅየው የውርስ ሀብት ወራሾች የሚሆኑት የቀደምት ቤተሰቦቹ ብቻ እንደሚሆኑ ለመገንዘብ ይቻላል።

ስለሆነም የጉዲፈቻ ልጅ የቀደምት ቤተሰቦች ሙሉ ለሙሉ ከልጅየው የውርስ ሀብት እንዳይወርሱ የሚያደርግ ሁኔታ በሌለበት የጉዲፈቻ ልጅ እንደጉዲፈቻ አድራጊዎቹ ልጅ በመቆጠሩ የቀደምት ቤተሰቦቹ ከጉዲፈቻ ልጅየው ጋር በተገናኘ የነበሯቸው ሕጋዊ መብቶች ከእነርሱ ተነስተው ወደ ጉዲፈቻ ቤተሰቦቹ ስለተላለፉ የቀደምት ቤተሰቦች ከጉዲፈቻ ልጅየው የውርስ ሀብት እንዳይወርሱ ተደርገዋል የሚል ጥቅል ድምዳሜ ላይ መድረስ ዝርዝር የሕጉን ልዩ ሁኔታዎች ያላገናዘበ ይሆናል። በዚህ የሕጉን ልዩ ሁኔታዎች ባላገናዘበ ድምዳሜ መነሻነት የጉዲፈቻ ልጅ የቀደምት ቤተሰቦች የእርሱን የውርስ ሀብት ካልወረሱ እርሱ የእነርሱን ሀብት እንዲወርስ ሊፈቀድለት አይገባም በሚል

[21] ይህ ነጥብ ፀሐፊው የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብት ያለው ስለመሆን አለመሆኑ ከሙያ አጋሮቹ ጋር ባደረገው ውይይት የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት እንዲወርስ ሊፈቀድለት አይገባም ለሚለው መከራከሪያ በምክንያትነት ይነሳ የነበረ ነው።

የሚነሳው መከራከሪያ ደግሞ የተሻሻለውን የቤተሰብ ሕግ ድንጋጌዎች አጠቃላይ አረዳድ መሠረት ያላደረገ እንደሆነ ለመረዳት ይቻላል፡፡

ሌላው መከራከሪያ በተሻሻለው የቤተሰብ ሕግ የጉዲፈቻ ልጅ ለማንኛውም ሕጋዊ ክስተትና ውጤት እንደጉዲፈቻ አድራጊው የተፈጥሮ ልጅ በመቆጠሩ[22] ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘ ጉዳይ እንዲወጣው የሚጠበቅበት ግዴታ ስለሚቀርለት ግዴታው ካለባቸው ሌሎች ወራሾች ጋር እኩል ከተፈጥሮ ቤተሰቦቹ የውርስ ሀብት ተጠቃሚ እንዲሆን ማድረግ ፍትሐዊነት ይጎድለዋል የሚል ነው፡፡[23] በሌላ አነጋገር ክርክሩ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር በተገናኘ እንደሁኔታው የሚኖሩበት ቀለብ የመቁረጥ ግዴታን ጨምሮ ሌሎች ኃላፊነቶች ስለሚቀሩለት ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘ የሚወጣቸው ግዴታዎች ሳይኖሩበት የእነርሱን የውርስ ሀብት እንዲወርስ ሊፈቀድለት አይገባም የሚል ነው፡፡ ለዚህ መከራከሪያ ነጥብ በዋናነት የሚነሳው ምክንያት ደግሞ ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘ ሊወጣቸው የሚገቡ ግዴታዎች ቀሪ የተደረጉለት የጉዲፈቻ ልጅ ግዴታዎቹ ከማይቀሩላቸው ሌሎች የተፈጥሮ ወላጆች ወራሾች ጋር እኩል የውርስ ሀብት ተካፋይ እንዲሆን መፍቀድ ፍትሐዊነት ይጎድለዋል የሚል ነው፡፡

ከዚሁ ጋር በተያያዘ የጉዲፈቻ ልጅ የጉዲፈቻ አድራጊውን የውርስ ሀብት እንዲወርስ ከተደረገ በኋላ በድጋሚ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት ከሌሎች ወራሾች ጋር እኩል የውርስ ሀብት ተካፋይ እንዲሆን ማድረግ በተዘዋዋሪም ቢሆን በወራሾች መካከል መድሎን የሚፈጥር በመሆኑ የጉዲፈቻ ልጅየው ከተፈጥሮ ቤተሰቦቹ የውርስ ሀብት ተካፋይ እንዲሆን ሊፈቀድለት አይገባም የሚል መከራከሪያም ይቀርባል፡፡[24] ሌላው ከፍትሐዊነት ጋር ተያይዞ የሚነሳው መከራከሪያ የጉዲፈቻ ልጅ ሁለት ጊዜ ማለትም እንደልጅ ተቆጥሮ የጉዲፈቻ አድራጊዎቹን የውርስ ሀብት እንዲወርስ ከተደረገ በኋላ በድጋሚ የተፈጥሮ ቤተሰቦቹን እንዲወርስ መፍቀድ የጉዲፈቻ ልጅ ያልተገባ ጥቅም እንዲያገኝ ማድረግ ስለሚሆን ይህ እንዲሆን ሊፈቀድለት አይገባም የሚል ነው፡፡[25]

ነገር ግን የጉዲፈቻ ልጅ የተፈጥሮ ወላጆች ቀለብ ለማግኘት ከሌሎች በሕግ ቀለብ የመስጠት ግዴታ ካለባቸው ዘመዶቻቸው አንዱን መጠየቅ በማይችሉበት ጊዜ ከጉዲፈቻ ልጅየው ቀለብ የመጠየቅ መብት ያላቸው[26] በመሆኑ የጉዲፈቻ ልጅ ለተፈጥሮ ቤተሰቦቹ ቀለብ የመቁረጥ ግዴታ ሙሉ ለሙሉ ቀርቷል ሊባል አይችልም፡፡ በርግጥ የጉዲፈቻ ልጅ እንደጉዲፈቻ ቤተሰቦቹ ልጅ ተቆጥሮ ከእነርሱ ከሚገኙ ሁሉም መብቶች ተጠቃሚ ሲሆን ሙሉ የወላጅና ተወላጅ ግዴታዎችንም የመወጣት ሕጋዊ ኃላፊነት ያለበት በመሆኑ ከግዴታዎቹ መካከል አንዱ የሆነውን ቀለብ የመቁረጥ ግዴታ በሚወጣበት ጊዜ

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[22] የተሻሻለው የቤተሰብ ሕግ፣ (ማርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 181

[23] ይኸኛውም ሐሳብ ፀሐፊው በጉዳዩ ላይ ከሙያ አጋሮቹ ጋር ባደረገው ውይይት የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት እንዲወርስ ሊፈቀድለት አይገባም ለሚለው መከራከሪያ በምክንያትነት የተነሳ ነው፡፡

[24] Joel B Sherman, 'Rights and Duties of the Natural Parents of an Adopted Child' (1964-1965) 20 *Intramural L Rev NYU* 142፤ ይህ የመከራከሪያ ነጥብ ፀሐፊው የጉዲፈቻ ልጅ የተፈጥሮ በተሰቦቹን የውርስ ሀብት የመውረስ መብት ያለው ስለመሆን አለመሆኑ ከሙያ አጋሮቹ ጋር ባደረገው ውይይትም ተነስቶ ነበር፡፡

[25] Charles A Taylor (1967), 'Inheritance Rights of the Adopted Child in Kentucky' 55(4) *Ky LJ* 874, 878

[26] የተሻሻለው የቤተሰብ ሕግ፣ (ማርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 212(2)

በጉዲፈቻ ቤተሰቦቹ እና በተፈጥሮ ቤተሰቦቹ መካከል መምረጥ አስፈላጊ ሆኖ ሲገኝ ለጉዲፈቻ ቤተሰቦቹ ቅድሚያ የመስጠት ግደታ[27] እንዳለበት መገንዘብ ያስፈልጋል። ይህም የጉዲፈቻ ልጅየው ለቀደምት ቤተሰቦቹ ያለበት ቀለብ የመቁረጥ ግዴታ በቅድመ ሁኔታ የተገደበ እንደሆነ ያስገነዝበናል።

ይህ በእንዲህ እንዳለ የጉዲፈቻ ልጅ ለተፈጥሮ ቤተሰቦቹ ቀለብ የመቁረጥ ግደታ ያለበት እና ይህንኑ ግደታውን ሊወጣ የሚችልበት አጋጣሚ ሊኖር እንደሚችል ግን ከቤተሰብ ሕጉ አንቀጽ 212 ድንጋጌ ለመረዳት ይቻላል። ስለሆነም በቅድመ ሁኔታዎች የተገደበ ቢሆንም እንኳን የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር በተያያዘ ሊወጣው የሚገባው ቀለብ የመቁረጥ ግደታ ሊኖር እንደሚችል እየታወቀ ከተፈጥሮ ቤተሰቦቹ የውርስ ሀብት ተካፋይ እንዳይሆን መከልከል ተገቢ አይሆንም።

የጉዲፈቻ ልጅ የቀደምት ቤተሰቦቹን እና የጉዲፈቻ ቤተሰቦቹን (የሁለቱንም) የውርስ ሀብት እንዲወርስ መፍቀድ በወራሾች መካከል ልዩነትን መፍጠር እና የጉዲፈቻ ልጅ ያልተገባ ጥቅም ጥቅም እንዲያገኝ የሚያደርግ ስለሆነ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን እንዲወርስ ሊፈቀድለት አይገባም የሚለው መከራከሪያም ቢሆን የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን እንዲወርስ ቢደረግ ሌሎች ወራሾች ከድርሻቸው በላይ የሚወስዱትን የጉዲፈቻ ልጅየውን ድርሻ ከማስቀረት ባለፈ የሌሎች ወራሾችን የውርስ ሀብት ድርሻ የሚነካባቸው አይደለም፤ ይህም መሠረታዊ መብታቸውን የሚያሳጣቸው ባለመሆኑ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን እንዳይወርስ ለመከልከል የሚያበቃ በቂ ምክንያት ሊሆን አይችልም።

ሌላው የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት እንዲወርስ ሊፈቀድለት አይገባም ለሚለው መከራከሪያ በምክንያትነት የሚነሳው ነጥብ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን እንዲወርስ ማድረግ የጉዲፈቻ አድራጊዎቹን የጉዲፈቻ ልጃቸውን የማጣት ስጋት ውስጥ ስለሚከታቸው ሁኔታው ልጁ ከጉዲፈቻ አዲራጊዎቹ ጋር ለሚኖረው ግንኙነት እንቅፋት ሊሆን ይችላል የሚል ነው።[28] ይሁን እንጂ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን እንዲወርስ ማድረግ ልጁ ከጉዲፈቻ አዲራጊዎቹ ጋር ለሚኖረው ግንኙነት እንቅፋት ይሆናል በሚል ስጋት ብቻ እንደሚደርስ እርግጠኛ ባልሆነ ግምት የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብቱን ማሳጣት ተገቢ አይሆንም።

ይልቁንም በዘመናዊ የጉዲፈቻ ስምምነት አረዳድ የጉዲፈቻ ዓላማ የሆነውን የጉዲፈቻ ልጅየውን ጥቅምና ደህንነት የበለጠ ማስጠበቅ የሚችለውን የሕግ አተረጓጎም በመከተል ለጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብቱን ማረጋገጥ የሕጉን መንፈስ የተከተለ አረዳድ ይሆናል። ስለሆነም የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት በተመለከተ ግልፅ ድንጋጌ ባለመኖሩ ፍ/ቤቶች ስለጉዳዩ አግባብነት ያላቸውን የቤተሰብ ሕጉን ድንጋጌዎች ሲተረጉሙ የጉዲፈቻን ዓላማ ሊከተሉ ይገባል። ይህም የጉዲፈቻን ዓላማ መሠረት ያደረገ አተረጓጎም፣ የጉዲፈቻ ልጅየውን ጥቅምና ደህንነት የበለጠ ማስጠበቅ የሚችለውን አማራጭ በመከተል፣ ለጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብቱን በሚያጎናፅፍ መልኩ መሆን ይኖርበታል።

በአጠቃላይ በተሻሻለው የቤተሰብ ሕግ የጉዲፈቻ ልጅ በማናቸውም ረገድ ቢሆን እንደጉዲፈቻ አድራጊው ልጅ ከተቆጠረ በኋላ ከተፈጥሮ ቤተሰቦቹም ጋር ያለው የዝምድና

[27] ዝኒ ከማሁ፣ አንቀጽ 183(3)
[28] Paul A Kiefer, *supra* note 1, p. 395

ግንኙነት እንዲቀጥል መደረጉ[29] ሕጉ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹ እና የጉዲፈቻ አዲራጊዎቹ (የሁለቱም) ልጅ እንዲሆን እንዳደረገው ለመገንዘብ ይቻላል። በዚሁ አግባብ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹ እና የጉዲፈቻ አዲራጊዎቹ (የሁለቱም) ልጅ እንዲሆን መደረጉ ከሚያስከትላቸው ሕጋዊ ውጤቶችና ክስተቶች መካከል የጉዲፈቻ ልጅየው የውርስ መብት አንዱ[30] ሲሆን ይህም የሁለቱንም (የተፈጥሮ ቤተሰቦቹን እና የጉዲፈቻ አዲራጊዎቹን) የውርስ ሀብት የመውረስ መብት የሚያጎናጽፈው ነው። ይህ ሆኖ ሳለ በወራሾች እና ተወራሾች እንዲሁም በወራሾች በራሳቸው መካከል ከሚኖር መብትና ግደታ አኳያ በተቃኘ የመብትና ሀብት ልዩነት መነሻነት በሚነሳ የፍትሐዊነት ጥያቄ ብቻ የጉዲፈቻ ልጅ የጉዲፈቻ አዲራጊውን እና ቤተ-ዘመዶቹን የውርስ ሀብት ብቻ እንጂ የተፈጥሮ ቤተሰቦቹን እና ቤተ-ዘመዶቻቸውን የውርስ ሀብት እንዳይወርስ መከልከል አሳማኝ አይደለም።

የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብት ያለው ስለመሆን አለመሆኑ ግልፅ የሆነ የሕግ ድንጋጌ አለመኖሩም ቢሆን ሕግ አውጭው የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት እንዳይኖረው የማድረግ ሐሳብ እንዳለው ግምት የሚያስወስድ ሁኔታ በሌለበት ይህንን መብቱን የሚነፍግ የሕግ ትርጉም መከተል የተሻሻለውን የቤተሰብ ሕግ ድንጋጌዎች ያላገናዘ አረዳድ ይሆናል። የተሻሻለው የቤተሰብ ሕግ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት እንዳይወርስ በግልጽ አልደነገገም። ይልቁንም ሕጉ የጉዲፈቻ ልጅ ከጉዲፈቻ አድራጊዎቹ ጋር ጥብቅ ቤተሰባዊ ትስስር እንዲኖረው ካደረገ በኋላ ከተፈጥሮ ቤተ-ዘመዶቹም ጋር የነበረው ቤተሰባዊ ትስስርም እንደተጠበቀ እንዲቆይ በማድረጉና የልጁን መብትና ጥቅም ይበልጥ ሊያሰጠብቅ የሚችለውን አካሄድ በመከተሉ፣ ሕግ አውጭው የተጣለትን ለሕፃናት ደህንነት ቅድሚያ የመስጠት ሕገ-መንግሥታዊ ግዴታ ተወጥቷል ሊባል ይችላል።

የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ግንኙነት በጠቅላላ እንደተጠበቀ የሚቆይ ሆኖ ሳለ እና የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት ሊወርስ አይችልም የሚል ግልጽ የሕግ ክልከላ በሌለበት ሁኔታ፣ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት የሚያሳጣ የሕግ አተረጓጎም ስልት መከተል ከቤተሰብ ሕጉ አረዳድ የወጣ ይሆናል። ስለሆነም፣ በሕግ በግልጽ እስካልተደነገገ ድረስ በጉዲፈቻ ልጅ እና በተፈጥሮ ቤተሰቦቹ መካከል ያለው ዝምድና ተጠብቆ እንዲቆይ መደረጉ በራሱ የጉዲፈቻ ልጅየው ከተፈጥሮ ቤተሰቦቹ የውርስ ሀብት ተካፋይ የሚያደርገው ሆኖ ሳለ በጉዲፈቻ ስምምነቱ ምክንያት ብቻ ይህ የውርስ መብት ሊነጠቅ የሚችልበት አግባብ አይኖርም።

በተጨማሪም የጉዲፈቻ ልጅ የጉዲፈቻ አዲራጊዎቹ ሀብት ሳያፈሩ ሊሞቱ ወይም ሊረዱት የማይችሉ ሊሆኑ የሚችሉበት አጋጣሚ ሊኖር ስለሚችል የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት እንዳይኖረው የሚያደርግ ግልጽ የሕግ ክልከላ በሌለበት እንደዚህ ያለውን ንፁህ እና ረዳት የሌለውን የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብት የሚያሳጣ አካሄድ መከተል ፍትሐዊ አይሆንም።[31] በሌላ አነጋገር በጉዲፈቻ ልጅ እና በተፈጥሮ ቤተሰቦቹ መካከል የሚኖር ትስስር እንዲቀጥል የሚያደርገው የተሻሻለው የቤተሰብ ሕግ ድንጋጌ ንፁሃን እና ረዳት የሌላቸውን የጉዲፈቻ

[29] የተሻሻለው የቤተሰብ ሕግ፣ (ግርጌ ማስታወሻ ቁ. 3)፣ አንቀጽ 181 እና 183(1)
[30] John R Jr Murphy, *supra* note 6, p. 150
[31] Paul A Kiefer, *supra* note 1, p. 398

ልጆች የተፈጥሮ ወላጆቻቸውን የመውረስ መብት በሚያሳጣ መልኩ በጠባቡ ሊተረጎም አይገባም።

ስለሆነም በተሻሻለው የቤተሰብ ሕግ የጉዲፈቻ ስምምነትን ለመግዛት በተቀመጡ ድንጋጌዎች የትኛውም ቦታ ላይ ግልጽ ክልከላ ባልተቀመጠበት ሁኔታ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብቱን ሊነጠቅ የሚችልበት አግባብ የለም። ማለትም፣ የጉዲፈቻ ልጅ የተፈጥሮ ቤተሰቦቹን የመውረስ መብቱ በሕግ አውጭው በግልጽ እስካልተደነገገ ድረስ ፍ/ቤቶች የዝምድና ሐረግን መሠረት በማድረግ የውርስ ሀብቱ ተካፋይ እንዲሆን መፍቀድ ይኖርባቸዋል።[32] በዚህ አግባብ የጉዲፈቻ ልጅ የተፈጥሮ ወላጆች ያለኑዛዜ በሞቱ ጊዜ የጉዲፈቻ ልጅየው የመጀመሪያ ደረጃ ወራሽ በመሆን የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት ለመውረስ ወይም የውርስ ሀብቱ ተካፋይ ሊሆን እንደሚችል መገንዘብ ያስፈልጋል።

4. መደምደሚያ

የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ወይም ቀደምት ቤተሰቦቹ ጋር የሚኖረው ግንኙነት የሚወሰነው የጉዲፈቻ ስምምነትን እና ሥርዓትን በሚገዛው የጉዲፈቻ ሕግ እንደሆነ በዚህ ጽሑፍ ለማየት ተሞክሯል። በአንድ አገር የጉዲፈቻ ስምምነትን እና ሥርዓትን ለመግዛት በሚወጣ ሕግ መሠረት፣ የጉዲፈቻ ልጅ ፍፁም እንደጉዲፈቻ አዲሪጊዎቹ ልጅ እንዲቆጠር እና ከቀደምት ቤተሰቦቹ ጋር የሚኖረው ግንኙነት ሙሉ ለሙሉ እንዲቋረጥ ሊደረግ ይችላል። በአንፃሩ የጉዲፈቻ ልጅ እንደጉዲፈቻ ቤተሰቦቹ ልጅ ተቆጥሮ ጥብቅ ትስስር እንዲኖረው የማድረጉ ጥረት እንደተጠበቀ ሆኖ ከቀደምት ቤተሰቦቹ ጋር የሚኖረው ግንኙነትም ተጠብቆ እንዲቆይ የሚያደርግ የጉዲፈቻ ሕግና ሥርዓት ሊዘረጋ የሚችልበት ሁኔታም ሊኖር እንደሚችል ከተለያዩ ሀገራት የጉዲፈቻ ሕግ ለመገንዘብ ይቻላል።

ስለጉዲፈቻ ስምምነት እና ሥርዓት የሚደነግገው የኢትዮጵያ የተሻሻለው የቤተሰብ ሕግ፣ የጉዲፈቻ ልጅ ከጉዲፈቻ ቤተሰቦቹ ጋር ጥብቅ ትስስር እንዲኖረው ከማስቻሉም በላይ ከቀደምት ቤተሰቦቹ ጋር የሚኖረው ግንኙነትም ተጠብቆ እንዲቆይ የሚያደርግ መሆኑን ለመረዳት እንችላለን። የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ ጋር የሚኖረው ዝምድና ተጠብቆ እንዲቆይ የሕግ ጥበቃ የተደረገለት መሆኑ ከሚያስገኛለት መብቶች መካከል ደግሞ የውርስ መብት አንዱ ነው። በዚህም የጉዲፈቻ ልጅ ከጉዲፈቻ አድራጊዎቹ ጋር በሚኖረው ግንኙነት እንደልጅ የሚያገኛቸው ማናቸውም ዓይነት መብቶች እንደተጠበቁ ሆነው የተፈጥሮ ቤተሰቦቹን የውርስ ሀብት የመውረስ መብት ይኖረዋል ማለት ነው። ስለሆነም፣ የጉዲፈቻ ልጅ ከተፈጥሮ ቤተሰቦቹ የውርስ ሀብት ተካፋይ እንደይሆን የሚያደርግ ግልጽ የሆነ የሕግ ክልከላ የሌለ መሆኑንና ይህ የውርስ መብቱ የሚነፈግበት የሕግ አግባብ እንደሌለ መገንዘብ ያስፈልጋል።

[32] John R Jr Murphy, *supra* note 6, p. 152

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