CONSTITUTIONALISM, CONSTITUTIONAL ADJUDICATION AND HUMAN RIGHTS IN ETHIOPIA

Editors

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Center For Human Rights

Constitutionalism, Constitutional Adjudication and Human Rights in Ethiopia

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Preface

This peer-reviewed book, *Constitutionalism, Constitutional Adjudication and Human Rights in Ethiopia*, is one of two publications the Center for Human Rights (Addis Ababa University) is releasing under the long-standing tripartite partnership with the Institute of International Law and International Relations (University of Graz) and the Ethiopian Civil Service University. The partnership, which lasted for more than three years, was an extension of an earlier comparable partnership that had stayed for equal number of years, resulting, overall, in more than a dozen of academic exchanges, equal number of visiting professors for the Center's graduate programs, a number of policy dialogue forums, and a couple of PhDs attended at the University of Graz. This long-standing relationship has been among the best academic partnerships the Center has had.

Although these publications were not part of the initial design, as there were other research and publications in the partnership, the Austrian Academic Service (OeAD), which sponsored the whole partnership on behalf of Austrian Agency for International Development Cooperation (ADA), gave permission to the Center, in the no-cost extended period, to use remaining funds for the publications. Hence, here are the outcomes: this book and the other publication on *Gender, Development and Women's Rights: Ethiopia's perspective*. For graciously permitting the funds for the publications as well as for sponsoring the whole fruitful tripartite collaboration, the Center would like to express its gratitude to OeAD-ADA.

For being part of this exemplary partnership, we would like to thank colleagues from the University of Graz, Institute of International Law and International Relations, particularly Professor Wolfgang Benedek and Bernadette Knauder. From their commitment to the objectives of the partnership including the improvement of the high-level teaching and research of human rights, their collegiality, and so on, the Center has never wished a better partnership. We would also like to thank our colleagues from the Center for Human Rights who engaged throughout the collaboration, particularly Dr. Tadesse Kassa, for overseeing the efficient implementation of the partnership, and Ms. Kalkidan Adugna, for handling financial and

logistical matters. We wish also to extend our gratitude to colleagues from the Ethiopian Civil Service University, for being part of the collaboration.

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Introduction

Despite the FDRE Constitution's decades of existence and its institutions of interpretation, constitutional interpretation and practice in Ethiopia has been in its infancy. Lack of legitimacy, lack of independence, lack of remedies, and so on might have contributed to the state of affairs in constitutional development. But this is not to suggest everybody agrees with this dismal record of constitutional interpretation. While the institutions mandated to uphold constitutionalism might have spectacularly failed in some high-profile cases having to do with politics and the powerful, there have been a number of exemplary constitutional cases in which citizens by and large were granted constitutional remedies. This is not to do a balancing act; rather to point out the importance of careful studies to show with evidence how and why constitutional interpretive organs in Ethiopia have failed and/or succeeded in defending constitutionalism. The contributions in this edited volume, with the exception of one dealing with regional constitutional interpretation, would give us insights on the good and bad of constitutional interpretation and practice in Ethiopia. They will give us insights on the importance of comparativism for constitutional interpretation, the place of conforming interpretation, the state of enforcement of constitutional review decisions, regional constitutional interpretation with an example from Tigray, practices of ethnic identity determination at the HoF and more, the interpretive practice of access to justice, and the practice of constitutional adjudication of socio-economic rights,

The first Chapter, wrote by Tsega Andualem, begins with possible benefits of using foreign constitutional law in the interpretation of constitutionally entrenched human rights. Tsega starts by pointing out the increasing global practice of using foreign constitutional law or precedents in constitutional interpretation, which appears absent in the practice of the Ethiopian constitutional interpretation bodies. Although neither the Constitution nor the Proclamations on powers of the Council of Constitutional Inquiry (CCI) and the House of the Federation (HoF) explicitly authorize the use of foreign laws in constitutional interpretation, the author argues, no legal provision prohibits it either. The core argument is the use of foreign precedents could significantly contribute to the development of constitutional rights jurisprudence in Ethiopia since it would enable the interpretation bodies to better understand and interpret the constitutionally entrenched human

rights. The author regrets that the Ethiopian Federal Constitution does not explicitly authorize the use of foreign precedents, which contrasts negatively with the South African Constitution, which explicitly authorizes courts to consider foreign law in the interpretation of constitutionally entrenched human rights. The author does not only recommend the use of foreign constitutional law in Ethiopian constitutional rights jurisprudence, he also suggests a number of measures to bring this about. His suggested measures range from legal provisions explicitly authorizing the practice to a call on civil society organizations, constitutional law scholars, and law schools to play their part in bringing pertinent foreign jurisprudence to the attention of the constitutional interpretation bodies. Yet, in the end, the author offers a caveat to his recommendation, namely paying attention to contextual differences. Although jurisprudence from jurisdictions with a good human rights record should be the prime source of reference, the constitutional interpreters should only follow foreign jurisprudence if it is persuasive in the Ethiopian context. The concluding part of the chapter stresses that giving due regard for comparative constitutional and foreign precedents when interpreting human rights will contribute to a better enforcement of human rights in Ethiopia.

In chapter 2, Mussie Mezgebo explores the applicability of the principles of conforming interpretation in the interpretation of constitutionally guaranteed fundamental rights and freedoms in Ethiopia. Mussie starts his analysis by pointing to the constitutional recognition of the principle of conforming interpretation. He asserts that this principle is bidding on the courts as well as the HoF and CCI. He argues that the principle serves as a vanguard protection against arbitrary application of human rights by requiring conformity to international human rights standards. By examining the practice of the HoF and CCI, Mussie concludes that these institutions have barely applied the principle. He, however, has found that the Federal Supreme Court Cassation Division has made efforts to give effect to the principle, despite inconsistencies. Mussie opines that renewed emphasis on and clarification of the principle of conforming interpretation will help a lot in enhancing the protection of human rights in Ethiopia.

In chapter 3 Teguada Alebachew explores the challenges for enforcement of constitutional review decisions and possible way outs. Teguada starts her analyses with the premise that the utility of constitutional review depends on the availability of effective enforcement mechanisms for review decisions.

Through empirical and desk research involving analysis of decisions and interviews with functionaries of the HoF, the organ authorized to review constitutionality, Teguada finds that resistance from courts and other state organs has become serious challenge to the effective enforcement of review decisions. Teguada attributes this problem to the absence of a clear and comprehensive procedure governing the judicial role of the HoF. She recommends, first and foremost, a comprehensive procedural law on the enforcement of review decisions of the HoF. In the meantime, the HoF needs to be creative in its decisions to create influence and exercise control over its decisions. Teguada also recommends that forging clarity into the contents of decisions will help facilitate the effective enforcement of constitutional review decisions of the HoF.

In chapter 4, on constitutional interpretation in Tigray, Gebremeskel Hailu focuses on an issue that has been almost unexplored in Ethiopian constitutional researches. In most federations, regional constitutions have low-visibility; it is not different in Ethiopia. Nonetheless, Ethiopia's regional constitutions contain distinct provisions with regard to regional institutional and administrative structures (including local governments). The author rightly points out that for regional constitutions to contribute to constitutionalism at regional level, a mechanism of constitutional review needs to be available. In this regard, the Tigray Regional Constitution provides for the establishment of a Constitutional Interpretation Commission, to be assisted by a regional Council of Constitutional Inquiry (which is modelled on the federal one). After a theoretical section in which he outlines the importance of constitutional interpretation for the enforcement of human rights, the author discusses the basic features of the Tigray Regional Constitution. He points out that the chapter on human rights included in the Regional Constitution is an almost identical copy of Chapter Three of the Federal Constitution – which creates challenges in identifying the scope of the respective constitutional interpretation powers of the HoF and the regional Constitutional Interpretation Commission. In this respect, the author rightly questions the extent to which the regions have used their constitutional space (i.e. the discretion to come up with distinct constitutional provisions). Although the Federal Constitution (including its chapter on human rights) is binding for the regional states, this supremacy of the Federal Constitution does not prevent regional states from complementing federal constitutional provisions. For instance, with regard to human rights, it would

be possible for the regional constitutions to build on the human rights foundations entrenched in the Federal Constitution by offering a better protection to human rights. After specifying the legal framework governing the regional constitutional interpretation bodies, the author evaluates the constitutional interpretation trend in the region. One of the important findings is that the number of constitutional complaints has been increasing since a couple of years. The author also assesses the decisions of the Commission, which are mainly related to land matters. He furthermore discusses a number of challenges affecting the performance of the Commission such as its lack of impartiality and independence, its part-time nature, the indeterminate jurisdictional boundary between the HoF and the Constitutional Interpretation Commission with regard to human rights provisions, and unclear mechanisms for enforcing constitutional interpretation decisions. It may be obvious that many of the challenges identified also affect the performance of the federal HoF.

Chapter 5 written by Beza Dessalegn and Christophe Van der Beken discusses the issue of ethnic identity determination. Article 39 of the Federal Constitution grants extensive group rights, including the right to territorial autonomy, to Ethiopia's nations, nationalities, and peoples (or ethnic groups). For fulfilling these rights, ethnic territorial units have been established in the form of nine regional states and of dozens of ethnic-based sub-regional administrations (or local governments). However, the entitlement of a group to the aforementioned rights (constitutionally subsumed under "the right to self-determination") – and thus to an ethnic-based territorial unit – depends on the group being officially recognized as a "nation, nationality or people". The Federal Constitution does not contain a list of "nations, nationalities and peoples" and thus leaves room for communities to be recognized as such. Considering the benefits (in terms of the right to self-determination) a "nation, nationality or people" status confers, several communities have submitted distinct identity determination petitions. Yet, the authors point out that the current political environment, which emphasizes unity and administrative integration, is not conducive to distinct identity claims. Neither does the Constitution provide a clear legal framework governing identity determination petitions. The authors explain that procedural and substantive rules with regard to identity claims were clarified and determined by the HoF in the *Silte case*. After outlining and assessing the applicable rules, the authors discuss identity determination

petitions in three regional states: the SNNP Region, Oromia, and Amhara. While a large number of petitions have been submitted to the Council of Nationalities in the SSNP Region, none of those have received a positive answer. The same is true for the petitions in the Oromia Region. The authors explain this situation by referring to the political nature of the responsible institutions. Both the Council of Nationalities in the SNNP Region and the Constitutional Interpretation Commission in the Oromia Region are exclusively composed of politicians representing the ruling party. Considering the focus of the latter on unity and administrative integration, it is unlikely that the identity petitions will get a positive answer. Even though the same political environment characterises the Amhara Region, the Kemant were able to get recognition as a distinct ethnic group. On the basis of this discussion, the authors identify a dichotomy between the Constitution, which does allow and provides the criteria for new identity recognition, and political practice, which impedes constitutional implementation. This entails a risk for constitutionalism, which is compounded by a political practice that has recognized distinct ethnic groups, not on the basis of objectively verifiable and consistent criteria, but as an expedient strategy to prevent or mitigate ethnic tensions and conflicts, as is illustrated by the Kemant case. In this regard, the authors warn that such informal political approach may incentivize groups to deviate from the procedural path and hence be a catalyst for ethnic tensions and conflict. The authors therefore recommend the responsible institutions to adopt an approach that is based on the verification of clear and consistent criteria for ethnic identity recognition.

In chapter 6, Belachew Girma and Kelali Kiros explore the right of access to justice in the constitutional jurisprudence of Ethiopia. They examine whether the jurisprudence of the HoF and CCI has brought clarity regarding the substantive scope of the rights of access to justice as recognized under Article 37 of FDRE Constitution, which otherwise is not clear. Belachew and Kelali conclude, based on analysis of decisions of the HoF and CCI, that the HoF and CCI have limited themselves to a literal reading of Article 37 of the Constitution. They argue that a workable definition of the right of access to justice is important to ensure predictability and recommend the HoF/CCI to be assertive and creative in their interpretation of the right.

In the final Chapter (Chapter 7), Belachew Girma and Teguada Alebachew dwell on the issue of enforcing socio-economic rights in Ethiopia through

constitutional adjudication. Starting with the premise that constitutional adjudication plays important role in facilitating justiciability of socio-economic rights, Belachew and Teguada investigate the role of the HoF and CCI in realizing socioeconomic rights, focusing on the right to housing. Belachew and Teguada find that the number of cases pertaining to the right to housing submitted to the HoF and CCI are limited. The authors are of the view that even with these limited cases, the HoF and the CCI have not taken assertive and creative approach in framing and disposing of the cases in a way that expounds enforcement of socioeconomic rights.

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Using Comparative Constitutional Law for Enriching Constitutional Rights Jurisprudence in Ethiopia

Tsega Andualem Gelaye[*]

Abstract

The act of considering foreign constitutional law or judicial precedent in interpreting one's own constitution may sound absurd. However, it is a practice that has gained widespread acceptance in a considerable number of constitutional systems. The main justification given for using the constitutional jurisprudence of other jurisdictions in the interpretation of constitutional rights is to gain inspiration and learn. This is partly based on the "universality" of fundamental rights. Accordingly, the constitutional rights problems one system faces and the solutions it provides are likely to be similar and relevant. Thus, it makes sense to consider the constitutional rights jurisprudence of other systems in developing one's own. Despite this general trend, foreign or comparative law seems to have no role in the interpretation of constitutional rights in Ethiopia. This chapter argues that despite the silence of the FDRE Constitution on the matter, there is nothing that prevents the Council of Constitutional of Inquiry (CCI) or House of Federation (HoF) from using comparative jurisprudence in discharging their respective role in constitutional interpretation. As such, their failure to use comparative constitutional law or jurisprudence so far has deprived them of an important opportunity to develop robust fundamental rights jurisprudence. Accordingly, the chapter suggests some measures to ensure greater and meaningful use of comparative constitutional law in constitutional rights interpretation in Ethiopia. It also highlights the role various actors could play in the process.

Introduction

The practice of using foreign constitutional law/precedents in constitutional interpretation is becoming prevalent in many jurisdictions.[1] This is different

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1 C. Saunders, "Judicial Engagement with Comparative Law", in T. Ginsburg and R. Dixon (eds), Comparative Constitutional Law, (2011), pp. 571-598.; G. Halmai, "The Use of

from referring to international treaties and judicial precedents of international/regional courts. In some of these systems there is a clear constitutional authorization of the practice. A good example for this is South Africa, where the Constitution gives the discretion to courts to "consider foreign law" when they find it necessary to do so.[2] In other systems, the practice is developed by courts themselves in the course of exercising their duty of constitutional interpretation. Here, the Supreme Court of Uganda could be mentioned. In one of its judgements, the Court developed various principles of constitutional interpretation that would guide it in its task.[3] Among them is the consideration of comparable foreign precedent by the court in addressing a constitutional dispute.

Here, one may question what has driven the prevalence of the practice in recent years and what justifies the use of foreign precedent in the first place? Different scholars have addressed this issue in various forms. The most common justifications they offer in defense of the practice are the following. First, considering foreign/comparative law in the course of constitutional interpretation offers some lessons and insights for the court dealing with a certain constitutional problem.[4] This is not only handy in assisting the court to identify potential solutions to the issue at hand but also in better understanding the problem itself. Second, the use of foreign/comparative law

foreign law in constitutional interpretation", in M. Rosenfeld and A. Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, (2012), pp. 1328-1347; V. R Scotti, "India : a critical use of foreign precedents in constitutional adjudication", in T. Groppi and M.C Ponthoreau (eds), The Use of Foreign Precedents by Constitutional Judges, (2014), pp. 69-96; N. Dorsen, "The Relevance of Foreign Legal Materials in U.S. Constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer," I·CON vol. 3(4) (2005), pp. 519–541; U. Bentel, "Mining For Gold: The Constitutional Court of South Africa's Experience With Comparative Constitutional Law", GA. J. INT'L & COMP. L., vol. 37 (2009), pp.219-265; A. Novak , "The 'Judicial Dialogue' in Transnational Human Rights Litigation: Muruatetu & Anor *v* Republic and the Abolition of the Mandatory Death Penalty in Kenya", Human Rights Law Review, vol.18 (2018), pp. 771–790; Jack Tsen-Ta Lee, "Foreign Precedents in Constitutional Adjudication by the Supreme Court of Singapore 1963-2013", Wash. Int'l L.J., vol. 24 (2015), p. 253.

2 The Constitution of the Republic of South Africa (1996) Art. 39(1) c.

3 Uganda Law Society *v.* Attorney General of the Republic of Uganda (Constitutional Petition No. 18 of 2005) [2006] UGCC 10 (30 January 2006).

4 N. Dorsen, "The Relevance of Foreign Legal Materials in U.S. Constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer", I·CON, vol. 3(4) (2005), pp. 519–541.

is justified because of the essential sameness of constitutional problems different societies face.[5] This view is predominantly advanced by scholars in the universalist camp. And it is usually invoked in relation to issues concerning fundamental rights as they are perceived to have a universal nature or character.[6] Their universality is primarily associated with/traced from their basic function in all societies, which is claimed to be preserving human dignity. As such, examining the way other systems have resolved or interpreted a problem concerning a certain constitutional right may be handy in resolving the same issue in one's own system. Third, considering comparative law also serves the purpose of self-understanding.[7] Each constitutional system has certain core or fundamental underlying ideals and assumptions that it seeks to preserve. Here, comparative law serves as "interpretive foil" or a mirror, to better see and understand the underlying values of one's own constitutional system through the lens of others.[8]

However, the practice of using foreign constitutional law in constitutional interpretation is not without its critics. Some scholars and judges attack it for being undemocratic.[9] Their charge is that courts of a state are mandated only to interpret their own constitution, which is the manifestation of the sovereign will of the people. If they consider other constitutions or rely on rulings of foreign courts to resolve a certain constitutional matter, they will end up neglecting their own constitution and undermine the sovereignty of the nation. The other major criticism is based on the relationship between the constitution of a state and the prevailing social, political and economic conditions in the state concerned.

Accordingly, scholars in the particularistic camp contend that since there is a deeply embedded tie between a constitution and the people of a particular

5 G. Halmai , "The Use of foreign law in constitutional interpretation", in M. Rosenfeld and A. Sajó (eds), The Oxford Handbook of Comparative Constitutional Law, (2012), pp. 1328-1347.

6 S. Fredman, Comparative Human Rights Law, (2015), p. 6.

7 S. Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation", Indiana Law Journal, vol. 73 ¾ (1999), pp. 820-892; S. Choudhry, "Migration as a new Metaphor in Comparative Constitutional Law", in S. Choudhry (eds), The Migration of Constitutional Ideas, (2006), pp. 1-35.

8 *Ibid.*

9 S. Choudhry, "Migration as a new Metaphor in Comparative Constitutional Law", in S. Choudhry (eds), The Migration of Constitutional Ideas, (2006), p. 6.

country, there is no apparent reason to look at or consider the law and constitutional jurisprudence of other countries.[10] In other words, the consideration of comparative law in constitutional interpretation is a pointless exercise as each constitution is peculiar to a certain country and deeply linked with its social and cultural context. The use of comparative law in constitutional interpretation is also condemned for being arbitrary and unprincipled. The core argument of the critics is that since there is no determinate principle that judges could rely on for selecting a certain precedent from a particular jurisdiction, the whole exercise is dependent on their whim and there is a possibility of "cherry picking".[11] As such, judges may only select those decisions that comply with their own views while neglecting others that took contrary positions.

Yet, most of the criticisms discussed above are problematic to accept on their face. In the first place, comparative/foreign law has no binding status or effect in any of the jurisdictions that use it regularly in constitutional interpretation.[12] Its role is solely confined to persuading and offering insights to judges in resolving a constitutional problem. As such, it is illogical to consider it as a practice that is undemocratic and a threat to the sovereignty of the people. Second, the claim that a constitution of one nation shares nothing with other jurisdictions is also difficult to swallow. Here, it suffices to mention the fact that no constitution in the world is completely organic or autochthonous.[13] Almost all constitutions across the globe are influenced by at least one constitution in one way or another during their making or interpretation. In addition, despite some variations between constitutions due to difference in socio-cultural conditions, they essentially serve the same function at a basic level and share certain elements as such. Here, the fundamental rights provisions of various constitutions could be mentioned as an example.

10 P. Legrand, "The Same and Different", in P. Legrand and R. Munday (eds), Comparative Legal Studies: Traditions and Transitions, (2003), pp. 240-311.

11 A. Friedman, "Beyond Cherry-Picking: Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence," Suffolk U. L. Rev., vol. 44 (2011), pp. 873-889.

12 S. Bertea and C Sarra, "Foreign Precedents in Judicial Argument: A Theoretical Account", Eur. J. Legal Stud. vol.7 (2014), pp. 128-162.

13 A. Gamper, "Foreign Precedents in Austrian Constitutional Litigation", Vienna J. on Int'l Const. L., vol.9 (2015), pp. 27-39.

Moreover, comparative law could be used in a "dialogical" or "deliberative" manner.[14] This approach does not primarily aim at discovering one best universal solution to a particular constitutional question. Instead, it accepts that the solution different systems offer to a certain constitutional problem may vary depending on context. According to Choudhry, the dialogical approach rather aims at a better understanding of the normative foundations and underlying values of one's own system through the lens of others.[15] Thus, a dialogical perspective enables self-reflection and self-understanding. In doing so, constitutional interpreters will identify what makes their system unique and what attributes it shares with others. This in turn provides them with a justification for adopting the solutions adopted by others in case of similarity or for rejecting them based on sufficient explanation in case of differences.[16] Thus, the dialogical perspective addresses the concern that the universalist approach gives insufficient attention to contextual factors and possible differences between constitutional systems. Based on the dialogue undertaken, constitutional interpreters in one system will have the option to either endorse or refuse interpretations of other systems with regard to a certain constitutional question by giving adequate and persuasive reasons.[17]

Furthermore, though there is some degree of arbitrariness in selecting foreign/comparative law, it is not a problem that is completely irresolvable. Rather, it is something that could be rectified if constitutional interpreters clearly identify the criteria they use for picking a certain comparative law and provide adequate justification for their choice.[18] Furthermore, this possibility of abuse should not be a reason to completely dismiss the use of comparative law in constitutional interpretation. What we need to do is to be cautious when we deal with foreign law to minimize the risks of abuse. This is also the advice of the judges of the Constitutional Court of South Africa, as the benefits of comparative law as a source of insight outweigh the risks associated with its use.[19]

14 Fredman, cited above at note 6, p. 6.

15 Choudhry, cited above at note 7, pp. 835-838.

16 *Ibid.*

17 Fredman, cited above at note 6, pp. 17-18.

18 *Ibid.*

19 *K v. Minister of Safety & Sec.* 2005 (9) BCLR 835 (CC) at para. 35 (S. Afr.). Justice O'Regan: "It is clear that in looking to the jurisprudence of other countries, all the

Unfortunately, Ethiopia is one of the jurisdictions that do not utilize foreign or comparative law in constitutional interpretation (particularly constitutional rights). The existing scholarly literature has also neglected the issue despite its immense importance. This chapter seeks to fill this gap by investigating the possible benefits of using comparative constitutional law in the interpretation of fundamental rights in Ethiopia. With these objectives in mind, the next section examines the status (role) of comparative law in the FDRE Constitution and other subsidiary laws concerning interpretation of constitutional rights. The current practice of not using comparative law in the interpretation of fundamental rights is also briefly discussed. This will be followed by a section that provides some justifications for Ethiopia to use foreign precedents in the interpretation of constitutional rights. Finally, the chapter suggests some of the measures that should be taken in Ethiopia to ensure greater and meaningful use of comparative law in the interpretation of fundamental rights. The role of various stakeholders in ensuring this will also be outlined. The chapter finishes with a short conclusion that summarizes the main ideas of the chapter.

I. The Role of Comparative Constitutional Law in the Interpretation of Constitutional Rights in Ethiopia

The Federal Democratic Republic of Ethiopia (FDRE) Constitution is silent on the issue of considering comparative constitutional law in the interpretation of constitutional rights. This could be contrasted with its position on international treaties, which states, "The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International Instruments adopted by Ethiopia."[20] As such, the Constitution imposes a clear duty on constitutional interpreters to duly consider international law while

dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done."

20 Constitution of the Federal Democratic Republic of Ethiopia (hereinafter FDRE Const.) (1996) Art. 13(2).

construing the meaning of the fundamental rights provisions of the Constitution and ensure their compatibility. This is probably the only guidance the Constitution gives with respect to its interpretation. Other provisions dealing with the issue of constitutional interpretation are devoted to identifying the bodies responsible for constitutional interpretation i.e. CCI and the HoF.[21] It would have been ideal had the Constitution provided a clear guideline on how the Constitution should be interpreted. The Constitution of South Africa is a good model in this regard as it states not only the general principle of constitutional interpretation but also provides interpreters with a detailed guide on how constitutional rights are to be interpreted.[22]

Here, it is important to note that Ethiopia is not an exception with respect to not incorporating a provision into the Constitution that expressly mandates interpreters to consider comparative law. This seems to be the case for many other jurisdictions as well, with the exception of South Africa, which expressly recognizes the role of comparative law in interpretation of fundamental rights incorporated into the Constitution. [23] In those systems that do not incorporate a provision dealing with comparative law, courts took the prime initiative of using it in resolving constitutional matters. The use of foreign precedents in constitutional interpretation by Israeli courts could be mentioned as an illustration.[24]

That being the case, the status/role of foreign/comparative law is not obvious in subsidiary Ethiopian laws that deal with constitutional interpretation either. In both proclamations that define the powers of the HoF and CCI, use of comparative law/precedent is not explicitly mentioned. However, a creative interpretation of some of the provisions incorporated into these proclamations may serve as a ground for using comparative or foreign law in constitutional interpretation. For instance, the provision dealing with "Principles for executing constitutional interpretation" states, "the House

21 *Id.*, art. 62 & 82.

22 The Constitution of the Republic of South Africa (hereinafter Const. CRSA) (1996) Art. 39(1) c "in interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

23 Halmai, cited above at note 5, pp. 1328-1347.

24 I. Porat, "The Use of Foreign Law in Israeli Constitutional Adjudication", in G. Sapir, D. Barak-Erez, and A. Barak (eds.), Israeli Constitutional Law in the Making, (2013), pp. 151-171.

shall identify and implement principles of Constitutional interpretation which it believes help to examine and decide Constitutional cases submitted to it."[25] This Article gives the House a clear mandate to identify and apply relevant principles of constitutional interpretation. As such, the HoF could make the consideration of relevant comparative law into one of these principles, as it is a vital tool that assists in the proper resolution of constitutional matters.

The question here would be whether this line of reasoning would apply for interpretation of constitutional rights as the Constitution clearly demands their conformity with international human rights treaties ratified by Ethiopia. A similar provision is incorporated into the proclamation that elaborates the powers and functions of the HoF.[26] In the view of the author, these provisions do not prohibit the use of comparative law in constitutional interpretation for the following reasons. First, the provision is not formulated in an exclusive manner. Though it obliges constitutional interpreters to ensure the conformity of their interpretation with international treaties, it does not prohibit them from considering other materials such as comparative law as an interpretative aid. Second, the purpose of the provision seems to be ensuring the compatibility of Ethiopian laws including the Constitution with the international obligations assumed by Ethiopia when adopting and ratifying international human rights treaties. The intent also seems to be ensuring a human rights friendly interpretation by applying international standards. This purpose will not be defeated by the consideration of comparative law as an addition. It may even further assist in better interpretation of fundamental rights incorporated into the Constitution. Third, international treaties and comparative foreign law have a different role in constitutional interpretation. While reference to international treaties is mandatory, the consideration of foreign constitutional law is optional. In addition, while international treaties have binding effect, the impact of foreign law is confined to persuasion. Considering this, there is nothing that makes the use of comparative law in constitutional interpretation in Ethiopia unconstitutional. Yet, to the best of the author's knowledge, neither the CCI nor the HoF have used foreign constitutional precedents explicitly in any of

25 Proclamation No 251/2001, A Proclamation to Consolidate the House of Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities, 7th Year No. 41, ADDIS ABABA – 6th July. 2001, Art. 7(1).

26 *Id.*, Art. 7(2).

their decisions to date.[27] Here, it could be argued that the two institutions may be using comparative law implicitly without putting it expressly in their decisions. However, the author did not find any evidence that supports this argument. Further, if they have such practice it would be problematic from accountability perspective. This is because, unless they explicitly mention the sources they relied on in resolving a case, it would be difficult to hold them accountable. It would also undermine their credibility.

In the assessment of the author, the non-use of comparative constitutional law by the CCI/HoF has contributed its part for the weak or rudimentary jurisprudence of constitutional rights in Ethiopia, both in terms of quantity and quality. Concerning quantity, very few cases dealing with limited types of fundamental rights have been decided by the CCI/HoF to date. Here, it is important to note that most cases submitted fail during the screening phase before the CCI. Yet, no sufficient explanation is given as to why the cases submitted did not require constitutional interpretation. The limited number of cases decided by the HoF is troubling considering the existence of the Constitution for more than two decades and the rampant violation of several fundamental rights. In terms of substance as well, the decisions only cover few types of constitutional rights and the reasoning often falls short of providing sufficient analysis regarding the content of the right and the justifiability of a limitation. This could be contrasted with the fundamental rights interpretation approach of the Constitutional Court of South Africa, which is reputed for its rich jurisprudence in explicating the content of the rights as well as for its deep step-by-step analysis of the restrictions in question.

27 FDRE CCI, Recommendations of Council of Constitutional Inquiry, CCI Journal vol.1 September 2018 (Amharic), About 38 cases are included in this volume. House of Federation, Journal of Constitutional Decisions vol.1 2008 (Amharic), https://www.lawethiopia.com/index.php/case-law/constitutional-decisions, Interview with Belachew Girma, former constitutional law expert at the Council of Constitutional Inquiry, (23 March 2020). One possible exception may be the case *Wosen Alemu & Daniel Oticho v. Amhara National Regional State Justice Professionals Training and Legal Research Institute & Amhara National Regional State Judicial Administration Council*, House of Federation File Number 019/08, 15 October 2016. In its decision, the HoF held that the customary practice in the justice sector that excluded blind persons from becoming judges is unconstitutional. Though the HoF did not cite any foreign jurisprudence, it considered the experience of other countries on the matter which assisted it in arriving at the final decision. However, it did not provide further details regarding what these experiences were and how they differ from the customary practice in Ethiopia.

Here, it suffices to mention two constitutional principles developed in other systems to demonstrate the positive impact of considering comparative law in interpreting fundamental rights. The first principle is human dignity, which has its origin in international human rights treaties and the German Basic Law. [28] Human dignity became one of the core concepts in constitutional law in the years following the end of the Second World War. Its centrality is derived from the utility of human dignity as a foundation for constitutional rights and as a source of guidance for courts in determining their substance as well as their limitation. [29] Initially, the concept was an abstract idea that proclaimed the "intrinsic worth" of human beings without specifying what was meant by it in concrete terms. Over time, due to the continuous effort exerted by courts and scholars the core aspects of human dignity as a constitutional concept started to crystallize. Now human dignity at its core seeks to safeguard the respect for human life and integrity, equal worth, and autonomy of all human beings as creatures of special value or status. The principle is regularly used by the Constitutional Court of South Africa to explicate the content of the constitutional rights and serves as a guide to assess the propriety of limitations. [30]

If constitutional interpreters in Ethiopia consider the human dignity based constitutional jurisprudence of South Africa, it would offer them important insights to better understand and interpret fundamental rights incorporated into the FDRE Constitution. The reason for this is that human dignity is regarded both as a foundation of fundamental rights and as their ultimate purpose both in international human rights treaties and in national

28 E. J. Berle, Dignity and Liberty Constitutional Visions in Germany and the United States, (2002), p. 50; H. Dreier, "Human dignity in German Law", in M. Duwell (eds), The Cambridge Handbook on Human Dignity: Interdisciplinary Perspectives, (2015), pp. 375-384; E.J. Berle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law", Utah Law Review, vol. 4 (1997), pp. 963-1056; K. Dicke, "The Founding functions of human dignity in the universal declaration of Human Rights", in D. Kretzemer and E. Klein (eds), The Concept of Human Dignity in Human Rights Discourse , (2002), pp. 111-120.

29 A. Barak, Human Dignity: The Constitutional Value and the Constitutional Right, (2015), pp. 103-113.

30 L. Ackerman, Human Dignity the Lodestar for Equality in South Africa, (2012), pp. 86-111; A. Barak, Human Dignity: the Constitutional Value and the Constitutional Right, (2015), pp. 243-279; A. Chaskalson, "Dignity as a Constitutional Value: A South African Perspective", Am. U. Int'l L. Rev., vol. 26 (2011), pp. 1377-1407; H. Botha, "Human Dignity in Comparative Perspective" STELL L. R., vol. 2 (2009), pp. 171-220.

constitutions. As such, adequate interpretation and protection of human rights is impossible without understanding human dignity and using it as a guide.[31] Given the abstract nature of most fundamental rights, a reference to human dignity helps to determine their substance and scope. It could also serve as an important basis to derive new fundamental rights that are not specifically mentioned in the Constitution. In addition, viewing fundamental rights through the prism of human dignity makes them resistant to tradeoff and ensures their better protection.[32]

The other important principle of constitutional interpretation is proportionality, which seems to be alien to the Ethiopian constitutional rights jurisprudence. Its prime function in many constitutional systems is differentiating arbitrary from reasonable limitation of rights. [33] Proportionality provides a transparent and step-by-step guidance for determining whether a certain limitation on constitutional rights is acceptable or not. In general, proportionality is divided into two stages. The first stage is called violation stage in which it is determined whether a legislation or measure adopted by the government falls within the protected scope of constitutional rights.[34] If the measure does not touch the protected scope of the right, no problem of constitutionality of the limitation would arise. This requires us to define the scope of the right protected by the Constitution and to see whether such protected activity is banned or restricted by the law enacted by the government. If our finding shows that the measure of the government is within the ambit of the right then we would move to the second stage of proportionality, which is called justification stage. In this stage, our primary goal is to determine whether the infringement or restriction of the right by the legislation is justified or not.[35] In doing so, we need to go through four separate steps before we reach the final conclusion. These include determining the properness of the government objective, the existence of rational connection, necessity, and balancing.[36] The application

31 A. Barak, Human Dignity: The Constitutional Value and the Constitutional Right, (2015), pp. 103-113.

32 J. Tasioulas, "Human dignity and the Foundation of Human Rights", in C. McCrudden (eds), Understanding Human Dignity, (2014), pp. 291-312.

33 A. Barak, Proportionality: Constitutional Rights and their Limitations, (2012), p. 131.

34 *Id.*, pp. 19-20.

35 *Id.*, p. 245.

36 *Ibid.*

of these steps in the limitation analysis of constitutional rights helps to prevent arbitrary restriction of rights. Today the principle of proportionality has spread to many constitutional systems and is playing a central role in limitation analysis.[37]

Constitutional interpreters in Ethiopia would benefit a lot if they consider comparative law and jurisprudence of other systems on proportionality as it would help to enrich their analysis and ensure the appropriateness of limitations on fundamental rights. This is because arbitrary limitation of rights is a serious problem in Ethiopia.[38] It is also important to note that most of the limitation clauses in the FDRE Constitution provide that a right could be limited by law without saying anything further. A good example for this could be the right to liberty which could be curtailed for grounds prescribed by law.[39] All that is required to limit the right seems to be having a legal basis. This is dangerous since it might give the government the leeway to restrict liberty by enacting a law and providing a ground which it thinks fit unless there is an additional guarantee to test the appropriateness of its measure. Further, though some limitation clauses of the Constitution went a bit further by stating explicitly the grounds that could justify the limitation of rights, the guarantees they provide are insufficient. For instance, the protection of reputation, the youth and human dignity are mentioned as tenable grounds for restricting freedom of expression.[40] This might be considered as a positive thing since it narrows down the list of grounds regarded proper by the Constitution for restricting the right. Yet the guarantee they provide for the right is still inadequate. The reason for this is that there is no mechanism for assessing the social importance of the purpose justifying limitation on the one hand compared to the damage done to the right as a result of the restriction on the other hand. In addition, conflicts between different sets of rights are inevitable and the FDRE Constitution does not clearly indicate how these should be resolved. Considering these gaps in the Constitution, it would be beneficial if constitutional interpreters in Ethiopia use the proportionality

37 Tsegaye Regassa, "Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia", Mizan Law Rev., vol. 3(2) (2009), p. 287.

38 Adem Kassie, "Rule by law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical", CGHR Working Paper 1, (2012), pp. 6-10.

39 FDRE Const, cited above at note 20, Art. 17.

40 *Id*, Art. 29.

principle developed in other constitutional systems in their limitation analysis and in resolution of conflicts between rights.

II. Justifications for Enhancing the Use of Comparative Constitutional Law in Interpretation of Fundamental Rights in Ethiopia

The FDRE Constitution is praised by many scholars for devoting a substantial part of its content to fundamental rights and freedoms.[41] Yet, most of these rights and fundamental freedoms have not been applied in practice for so long. Their role so far has been not much more than decorating the Constitution. In addition, the number of constitutional decisions in general and those concerning fundamental rights in particular are very few and negligible. The most common explanations in the literature for the weak constitutional rights jurisprudence in Ethiopia are the authoritarian character of the government in power, the partiality of the institutions interpreting the Constitution, and the strong influence of the executive.[42] However, there are also other factors that contributed their part for weak constitutional rights jurisprudence in Ethiopia. One of them is the failure on the part of the constitutional interpreters to make adequate use of comparative law. Here, drawing a parallel with the South African experience following the end of apartheid is helpful. At its core, apartheid was an ideology that denied the equal dignity of black South Africans and treated them as inferior.[43] They were also deprived of all fundamental rights including political participation. In reaction to this, the new South African Constitution was founded on the aspiration of ensuring equal dignity for all. It also recognized a comprehensive bill of rights by including a wide range of rights such as civil and political as well as socio-economic rights.[44]

41 Adem Kassie, "Human Rights under the Ethiopian Constitution: A Descriptive Overview", Mizan Law Review, vol. 5(1) (2011), pp. 41-71

42 Adem, cited above at note 38, pp. 11-17.

43 S. Woolman, "The architecture of dignity", in D. Cornell (ed), The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials, Vol. I (2013), pp. 73-123.

44 K. E. Klare, "Legal Culture and Transformative Constitutionalism", S. Afr. J. on Hum. Rts., vol. 4 (1998), pp. 146-188.

The South African Constitution also gives courts the responsibility to ensure the adequate enforcement of these fundamental rights. In order to assist them with this task, it provides clear guidelines they should follow in interpreting fundamental rights, which include an authorization for courts to consider foreign law.[45] The makers of the South African Constitution included this provision on purpose. Their reason was that during the Apartheid era, South Africa was isolated from the rest of the world because of the racist policies of its government.[46] Its courts were also subservient to the regime in power and were not able to serve as guardians of rights. As such, there was no indigenous South African constitutional rights jurisprudence that the courts in post-apartheid South Africa could rely on.[47] In order to address these problems, the unique provision of the South African Constitution that allows courts to draw inspiration from other foreign constitutional systems with advanced fundamental rights jurisprudence was incorporated.

South African courts are leading in the use of foreign/comparative law in constitutional interpretation. This is why South Africa is considered as the "laboratory" for the use of foreign/comparative law.[48] In many of the landmark decisions of the Constitutional Court of South Africa foreign precedents played a crucial role in shaping the reasoning of the court. A good example of this is the *Makwanyane* decision of the CCSA (Constitutional Court of South Africa) that outlawed the death penalty. In this decision alone a reference to more than 220 foreign court judgments was made.[49] Still today, South African courts constantly consider comparative law in their decisions. According to some scholars, the extent of citation of foreign precedents is decreasing as the courts have developed local constitutional jurisprudence

45 CRSA, cited above at note 2, Art. 39 (1) c.

46 U. Bentele, "Mining For Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law", GA. J. INT'L & COMP. L., vol. 37 (2009), pp. 219-265; A. Lollini, "Legal Argumentation Based on Foreign Law: an Example from the Case Law of the South Africa Constitutional Rights", Utrecht Law Review ,vol. 3(1) (2007), pp. 60-74.

47 *Ibid.*, "[c]omparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw"

48 J. Foster, "The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa," U.S.F. L. Rev., vol. 45 (2010), p. 79.

49 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

over the years. Yet, the contribution of foreign or comparative law to the development of a rich constitutional interpretation has been substantial.[50]

Coming back to the Ethiopian case, the place given for the protection of human/constitutional rights in the period preceding the adoption of the FDRE Constitution was very limited. For many centuries, Ethiopia was ruled by a monarchical form of government. In this system, key powers of the government were concentrated in the hand of the Emperor.[51] The Emperor had law making, executive as well as adjudicatory powers. Since the rulers invoked a divine right to rule, their powers were also absolute and unchecked. Though some constitutional rights were recognized in the 1955 Revised Constitution of Ethiopia, the rulers were not that much concerned to respect them. [52] In addition, there were no independent bodies to ensure their observance. These factors inhibited the emergence and development of a human rights culture in Ethiopia.

The monarchical era ended in 1974 and a military junta that went by the name *Derg* assumed power and established a Marxist oriented government.[53] Ideologically Marxists/communists have a very hostile attitude towards human rights. This is evident from Marx's statement that dismissed the rights of man "as a bourgeois fantasy that masked the systemic inequality of the capitalist system".[54] Marx further noted that "none of the supposed rights of man go beyond the egoistic man, man as he is, as a member of civil society . . . withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice". [55] This view was widely accepted in most socialist states at the time. Human rights were also seen as "rights of the bourgeoisie to enslave and to oppress the labouring people".[56] In addition, civil and political rights were rejected in most socialist states. The

50 Foster, cited above at note 48, pp. 79-139.

51 Bereket Habte Selassie**,** "Constitutional Development in Ethiopia", Journal of African Law**,** vol. 10(2) (1966), p. 89.

52 Tsegaye Regassa, cited above at note 37, pp. 297-298.

53 Andargachew Tiruneh, The Ethiopian Revolution 1974-1987, (1993).

54 M. P. Bradley, "Human Rights and Communism", in J. Fürst (ed), The Cambridge History of Communism, Volume III, Endgames? Late Communism in Global Perspective, 1968 to the Present, (2017), pp. 151-152.

55 *Ibid.*

56 *Ibid.*

primary concern for those states was the protection of social and economic rights.[57] Mass killing and gross violations of human rights were also common in many socialist states[58] and Ethiopia was no exception. During the reign of the *Derg*, Ethiopia witnessed massive violations of human and constitutional rights. Thousands were massacred, arbitrarily imprisoned and tortured to death for opposing the government in power.[59] Similar to the monarchical regime, the communist rule in Ethiopia was not conducive for the emergence of a culture of human rights.

The military regime was defeated and removed from power in 1991, which removal paved the way for the adoption of the FDRE Constitution. As mentioned in the introductory section of the chapter, the FDRE Constitution has dedicated one third of its provisions to fundamental rights. Ethiopia also ratified most of the international human rights instruments at around the same time. This was done partly in reaction to the massive violation of human rights during the military regime. Nonetheless, the drafters did not include provisions that guide interpreters in properly discharging their task including permission for interpreters to use foreign/comparative law. This seems to be a gap because at the time of adoption of the FDRE Constitution there was no indigenous fundamental rights jurisprudence due to the hostile attitudes of the previous regimes towards human rights. In addition, Ethiopian courts also did not have much experience in dealing with and interpreting constitutional rights. Considering all this, it would have been more sensible if the Constitution clearly allows the use of comparative law. This would have given the constitutional interpreters the opportunity to learn from the experience of others and develop their own strong fundamental rights jurisprudence. Partly because of the absence of a provision allowing use of foreign law, the bodies entrusted with the task of constitutional interpretation have never expressly used or relied on comparative law.

The other possible factor that explains the non-usage of comparative law or foreign precedents in constitutional interpretation in Ethiopia could be the type of legal system the country follows. According to Saunders, the legal system of a state partly determines the extent to which comparative law is

57 *Ibid.*

58 *Ibid.*

59 Andargachew Tiruneh, The Ethiopian Revolution 1974-1987, (1993) p. 223.

used.[60] As such, the use of foreign jurisprudence is higher in the common law systems than in their civil law counterparts. The main reason is that the precedent-based reasoning and the adversarial nature of the procedure gives the judges more opportunity to engage with comparative law.[61] Furthermore, the adversarial nature of the proceedings also enables parties to bring relevant foreign jurisprudence to the attention of the court. In contrast, civil law systems are primarily code based. The role of judges is also very much limited.[62] Since Ethiopia falls primarily in the category of civil law systems, lawyers trained with that mindset may find it difficult to consider comparative law as part of their argument or reasoning. Yet, it is important to bear in mind that comparative law plays a role even in some civil law systems. Good examples in this regard are Hungary and Argentina.[63] Thus, the civil law character of the Ethiopian legal system does not prevent constitutional interpreters in Ethiopia from considering comparative law and jurisprudence for insight.

III. Measures to Boost the Use of Comparative Constitutional Law in Constitutional Interpretation and the Responsible Actors/Stakeholders

As noted in the previous sections of this chapter, despite the immense importance of comparative constitutional law for developing and enriching Ethiopian constitutional rights jurisprudence, it seems to be completely neglected to date. A number of measures could be taken to enhance the role of comparative law in constitutional interpretation. The first bold move could be incorporating into the Constitution a provision that expressly allows constitutional interpreters to use or consider foreign jurisprudence. This could also be done by providing this in any of the proclamations dealing with the powers of the CCI or the HoF without necessarily amending the Constitution. The reason for this is that in some of the jurisdictions that are skeptical to use comparative law the main justification for the skepticism is the constitutional silence on the use of foreign jurisprudence.[64] Bodies

60 C. Saunders, "Judicial Engagement with Comparative Law", in T. Ginsburg and R. Dixon (eds), Comparative Constitutional Law, (2011), pp. 571-598.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 Dorsen, cited above at note 4, pp. 519-541.

entrusted with constitutional interpretation in Ethiopia may also raise a similar defense for not using foreign law. For this reason, it would help a lot if the Constitution or subsidiary laws recognize the importance of comparative law. In addition, the presence of such provision may also encourage applicants or defendants to support their argumentation in a case by invoking comparative law.

Most importantly, what needs to change is the attitude or mindset of the constitutional interpreters more than the Constitution or the subsidiary laws on the matter. The process of amending a constitution is tedious and extremely cumbersome. So, it may take years if we are going to wait for a provision in the Constitution that authorizes the use of comparative law. The problem could be easily resolved if constitutional interpreters adopt an open attitude towards foreign jurisprudence and appreciate the important lessons it offers. In many of the constitutional systems that regularly use comparative law one does not find an explicit basis for it in the constitution. Rather it is their open attitude, desire to learn from others, and creative interpretation that enables the constitutional interpreters to reap the benefit of using comparative law. [65] As such, the CCI and HoF in Ethiopia should follow the lead of these systems and work towards ensuring the appropriate place of comparative law in discharging their task of constitutional interpretation. Experience sharing with other systems may be helpful in this regard.

However, a constitutional basis and an open attitude of interpreters towards the consideration of comparative law is not enough to increase its role. Other actors must also play their part. These include parties to constitutional disputes, civil society organizations, constitutional law scholars, and law schools, among others. In many of the jurisdictions where there is significant use of comparative law, litigants assume the prime responsibility of bringing related foreign precedents to the attention of courts in their application or defense. [66] On a number of occasions courts have expressed their gratitude for the submission made by parties as it broadened their perspectives and assisted in their interpretation. In Ethiopia also parties must take the leading role in citing relevant foreign case law in their submission. One good example for this is a recent case filed before the CCI regarding the individuals evicted from

65 Halmai, cited above at note 5, pp. 1328-1347.

66 T. Groppi and M.C Ponthoreau (eds), The Use of Foreign Precedents by Constitutional Judges, (2014).

Legtafo area.[67] In their application, the lawyers for the applicants relied on relevant law from South Africa including the *Grootboom* case to strengthen their argument and demonstrate violation of their clients' rights. This is a practice that must be commended and followed by other litigants in the future, as it will serve as an input for interpreters to arrive at the most sound or reasonable decision.

In other jurisdictions amicus briefs are also avenues through which comparative law reaches courts.[68] Institutions, law professors and other legal experts can submit amicus briefs to courts by analyzing relevant foreign law. Since judges may not have enough time to undertake a deep/extensive research on comparative jurisprudence, the submission will greatly assist them in their task. The issue here is whether this is possible under the Ethiopian system. To the best of the writer's knowledge, the practice of submitting amicus briefs on constitutional matters is not common in Ethiopia. This may be because the possibility of doing so is not expressly stipulated in the proclamations dealing with constitutional interpretation. However, there seems to be an implicit legal basis that allows submission of amicus briefs. For instance, the proclamation consolidating the powers of the HoF states, "the House may, before it passes a final decision on constitutional interpretations, call up on pertinent institutions, professionals, and contending parties to give their opinions."[69] A similar provision is also incorporated into the CCI proclamation.[70] These provisions could serve as an entry point for comparative or foreign jurisprudence. The challenge here is the issue of accessibility of the process to legal experts and others interested in the case. Unless the litigation process is transparent and open to the public, it may be difficult for legal experts to submit amicus brief in a timely manner. Thus, the constitutional interpretation process in Ethiopia, especially in matters dealing with fundamental rights, must be open.

67 Seble Negussie & 239 others v. Oromia Special Zone Legdadi-Legtafo City Administration & Oromia Special Zone Legdadi-Legtafo Land Development and Management Office, A Constitutional Complaint submitted to the Council of Constitutional Inquiry on 15 May 2019.

68 J. Yoo, "Peeking Abroad: The Supreme Court's Use of Foreign Precedents in Constitutional Cases", Haw. L. Rev., vol. 26 (2004), p. 385.

69 Proclamation No 251/2001, cited above at note 26, Art.10.

70 Council of Constitutional Inquiry Proclamation, Proclamation No. 798/2013 Federal Negarit Gazeta, 19thYear No.65, ADDIS ABABA 30 August 2013, Art. 9.

In other jurisdictions, there are also other mechanisms that are utilized to ensure greater use of comparative law in constitutional interpretation. For instance, in South Africa and many other systems judges have clerks.[71] These clerks greatly assist the judges by doing research on relevant comparative law for a case at hand. The Constitutional Court of South Africa for instance runs foreign clerk programs.[72] These foreign clerks join the court as trainees and come from different countries across the globe. They have also great contribution for bringing or sharing jurisprudence from their own system especially when the language of the judgment is inaccessible to the judges.[73] For economic reasons this may be difficult to emulate in Ethiopia. However, it is important to establish an efficient research department within the CCI/HoF and strengthen the already existing ones. This ensures greater use of insights from comparative law and contributes for the development of rich constitutional rights jurisprudence.

Civil Society Organizations working in the area of protection of constitutional rights could also play their part in increasing the use of comparative law in Ethiopia. One way could be submitting amicus briefs as discussed above or filing a well-reasoned application that includes comparative jurisprudence to constitutional interpreters by representing individuals affected. They could also work in making relevant foreign jurisprudence accessible. This could be done, for instance, by translating important foreign constitutional rights decisions to local languages and by submitting them to the concerned bodies. Besides Civil Society Organizations, Ethiopian law schools could also contribute their part in developing rich constitutional rights jurisprudence by teaching their students methods and use of comparative law. Based on the observation of the author, the teaching practice in Ethiopian law schools largely focuses on one system (the Ethiopian) with little attention to comparative law. Thus, modifying this approach and paying proper attention to comparative law, would enable us to reap its benefits like other jurisdictions. This could be done by making comparative constitutional law part of the curriculum in undergraduate and

71 C. Rautenbach, "Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court", in T. Groppi and M–C. Ponthoreau (eds), The Use of Foreign Precedents by Constitutional Judges, (2013), pp. 185-209.

72 *Ibid.*

73 *Ibid.*

postgraduate studies with varying levels of sophistication. The assumption here is that if students receive a proper training on comparative law, they are more likely to use it in the future as judges or lawyers.

The approach towards constitutional interpretation adopted by the CCI/HoF also determines the extent of use of comparative law. In the existing literature and constitutional practice, there are three main theories regarding how a constitution should be construed and what things must be considered by judges. The first approach is what is usually referred as "originalist", which gives a prominent place to the intent of the drafters of the constitution at the time of its making.[74] According to this theory, the primary factor that should guide a judge in giving meaning to abstract rules embodied in the constitution is the intent of the framers, which could be inferred from documents containing the drafting history and debates. The second approach is called a "textualist" theory of constitutional interpretation. [75] In determining the meaning of abstract constitutional norms, it requires judges to give a particular emphasis to the ordinary meaning of words and phrases of the constitutional text. As such, meaning is constructed by applying the literal meaning of the text without taking into account other considerations. The third approach of constitutional interpretation is referred as "value oriented", "moral reading" or "purposive" constitutional interpretation.[76] It claims to address the limitations of the "originalist" and "textualist" approaches of constitutional interpretation. The originalist theory of interpretation is heavily criticized as backward looking, as it mainly focuses on the intent of the makers without considering new developments.[77] This makes a constitution static and unresponsive to changes. Critics of this theory contend that a constitution is a "living tree" and it must grow over time and adapt itself to changing circumstances. [78] Otherwise, it would become outdated and useless. The major critique against the textualist approach of

74 A. Barak, Human Dignity: The Constitutional Value and the Constitutional Right, (2015), pp. 103-113.

75 *Ibid.*

76 *Ibid.*

77 Ronald Dworkin, "The Moral Reading of the Constitution", The New York Review of Books, 21 March 1996 issue <https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/>, last visited on 8 July 2019; Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution, (1997), pp. 7-19.

78 *Ibid.*

constitutional interpretation is that it excludes the historical, political, social and moral considerations that shape the meaning of a certain constitutional norm.[79] It also presumes that legal texts are value neutral and have no link to morality. According to Dworkin, a constitution itself expresses "moral values" in different forms.[80] As such, perceiving it as a value free and neutral document is not appropriate. Based on this, he proposes what he calls a "moral reading" of the constitution.[81] This approach requires judges to look closely at values that underpin the constitutional text in interpreting it.

Another proponent of the "purposive" interpretation theory is Ahron Barak who is a renowned legal scholar and constitutional judge from Israel. According to him, in conducting constitutional interpretation, the primary guidance for judges should be the purpose that a certain constitutional provision was intended to serve.[82] This is not the same as the intent of the drafters in the originalist theory. Barak divides the purpose that a constitutional text serves as "subjective" and "objective". Under a constitution's objective purpose, he includes factors like history, drafter's intent, text, structure, and language.[83] However, these factors are not sufficient or determinative of the meaning. They must rather be complemented with the subjective purposes of the text, which include the intent of the system, comparative jurisprudence and international law.[84] These considerations are also necessary to prevent or constrain judges from arbitrary exercise of interpretive discretion. In the view of the writer, among the three approaches of constitutional interpretation discussed in the previous sentences, the ideal one for ensuring adequate interpretation of rights is the last one. This is because the purposive approach is the most comprehensive one as it takes into account various factors that contribute to the richness of interpretation including the use of foreign precedent or comparative law. Thus, if constitutional interpreters in Ethiopia adopt this approach it is more likely that they would consider comparative law in their decisions, which in turn enriches their reasoning.

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 A. Barak, Purposive Interpretation in Law, (2005) pp. 67-100.

83 *Ibid.*

84 *Ibid.*

IV. Meaningful Use of Foreign Constitutional Precedents in Constitutional Rights Interpretation

In the previous sections of this chapter, the possible advantages of using comparative law and mechanisms of enhancing its use in the interpretation of fundamental rights in Ethiopia were discussed. Yet, there are a number of issues that constitutional interpreters should consider for it to offer a meaningful assistance in their task. One of them is the need to pay adequate attention to contextual differences in utilizing comparative law. It is a well-accepted fact that legal rules and principles do not operate in a vacuum.[85] As such, the prevailing economic, social, political, historical, and cultural conditions have a significant impact on the constitutional system of a country. Likewise, the constitutional jurisprudence developed by courts is also considerably shaped by these factors. Accordingly, constitutional interpreters in Ethiopia should check the similarity of context before they rely on foreign jurisprudence for resolving a constitutional dispute. This would also add legitimacy to its use.

More importantly, in matters concerning constitutional rights, the CCI/HoF must not pick decisions from any jurisdiction. Rather it would be more helpful to use jurisprudence from those systems that have a reputation for better protection of constitutional rights. This is also the reason why the Constitutional Court of South Africa accords greater weight to jurisprudence coming from jurisdictions regarded as "open and democratic".[86] In these systems, the bar for protection of fundamental rights is higher and courts have developed a rich jurisprudence over the years. Thus, there is a great deal to learn from them. In contrast, in those systems regarded as undemocratic, the status of protection of fundamental rights is poor. Courts also lack independence to develop strong fundamental rights jurisprudence and to hold the government accountable.[87] Referring to these systems and relying

85 A. Lollini, "Legal Argumentation Based on Foreign Law: An Example from the Case Law of the South Africa Constitutional Rights," Utrecht Law Review, vol. 3(1) (2007), pp. 60-74.

86 Ferreira *v* Levin NO and Others; Vryenhoek and Others *v* Powell NO and Others (CT5/95) [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) (19 March 1996).

87 C. M Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis", The American Journal of Comparative Law, vol. 44(4) (1996), p. 605–626.

on their judgments would harm rather than advance the protection of constitutional rights. As such, constitutional interpreters must be cautious in selecting their sources of inspiration.

The other issue is whether constitutional interpreters in Ethiopia always have to follow decisions coming from the systems considered as "open and democratic". The answer to this is a resounding no. In the first place, the CCI/HoF is entrusted to interpret the Ethiopian Constitution. In doing so, they just consider comparative law with the objective of getting some insights from it. Thus, if they do not find foreign jurisprudence on a similar matter persuading, they have every right to reject it. Their only obligation in the view of this author is to conduct a meaningful dialogue. This means that constitutional interpreters must not simply accept or reject the ruling of a court from another jurisdiction. They must rather provide a sufficient reason why they find the decision of a certain court persuasive. In case of rejection as well, they must explain why the contrary decision they have arrived at is justified. If they manage to do this, they will be able to escape the charge of "cherry picking" which most courts using foreign jurisprudence face. Furthermore, in doing so the Ethiopian constitutional interpreters will not be just mere recipients of decisions from other courts. They would also contribute their part in the global judicial dialogue centered on constitutional rights. Other courts may also find their decision persuasive and rely on it.

Conclusion

The FDRE Constitution, which contains a wide range of fundamental rights, has existed for more than two decades. Yet, most of these rights remained on paper. In addition, institutions entrusted with the task of constitutional interpretation did not succeed in developing strong constitutional rights jurisprudence. This becomes evident when one considers the total number of fundamental rights decisions rendered by them, the types of rights involved, and the substance of the decisions. When one inquires why this has happened, s/he may find different explanations. The most common explanations for the weak constitutional rights jurisprudence in Ethiopia in the existing literature are the authoritarian character of the government in power, the partiality of institutions interpreting the Constitution, and the strong influence of the executive. This chapter adds another factor that may have contributed its part for the poor enforcement of fundamental rights in Ethiopia, which is disregard for comparative law and foreign precedents when interpreting

constitutionally enshrined rights. The argument is that at the time of adopting the Constitution, Ethiopia had no culture of respecting fundamental rights and freedoms as the previous regimes were authoritarian in nature, exercising absolute power. As a result of this, during that period courts did not develop strong indigenous constitutional rights jurisprudence.

Considering this, it would be difficult to expect the new organs entrusted with the task of constitutional interpretation in the FDRE Constitution, i.e. the CCI and the HoF, to develop robust fundamental rights jurisprudence from scratch since there is no indigenous jurisprudence to rely on. These institutions also lack familiarity with the correct approach of interpreting fundamental rights. Furthermore, though the Constitution requires constitutional interpreters to ensure the conformity of their interpretation with international treaties ratified by Ethiopia, this is not enough. The reason for this is that most of these treaties provide general standards and the number of decisions rendered by bodies monitoring them are few. The better approach would have been to allow constitutional interpreters in Ethiopia to consider the constitutional rights jurisprudence of other national systems like what is the case in South Africa. This would have given them an adequate insight and inspiration to properly deal with fundamental rights issues and develop their own jurisprudence over time. Unfortunately, the FDRE Constitution does not expressly give any place for consideration of comparative law in conducting constitutional interpretation. The various decisions rendered by the CCI and the HoF also show that foreign constitutional jurisprudence has no role in their decisions. This has deprived Ethiopian constitutional interpreters of important insights coming from comparative law that could have helped in enriching their fundamental rights jurisprudence.

Accordingly, if we are committed to improve the poor state of constitutional rights jurisprudence in Ethiopia, we must take the role of comparative law and precedent in constitutional interpretation seriously. The experience of countries like South Africa with the use of comparative law could serve as a good model. For this to happen, the chapter suggests a number of mechanisms. These include incorporating a provision in the FDRE Constitution that expressly allows constitutional interpreters to consider comparative law through amendment or stating the same in the proclamation consolidating the powers of the HoF and CCI. More importantly, attitudinal change regarding the use of foreign precedents on the

part of constitutional interpreters in Ethiopia is needed. They should be open to persuasive ideas and insights from other systems. If they have an open and welcoming attitude towards comparative law, they will seriously consider relevant foreign precedents brought to their attention by parties. They would also search for insights from foreign jurisprudence on their own initiative and use it in developing their own reasoning. Furthermore, adopting a purposive approach of constitutional interpretation would help them to broaden their interpretive horizon and use relevant comparative law.

However, it is important to note that the effort of constitutional interpreters alone does not guarantee adequate use of comparative law in constitutional interpretation. Other actors such as litigating parties, law professors and legal experts, civil society and law schools also play a crucial role in the process. This primarily requires them to bring relevant foreign constitutional jurisprudence in pleadings and through the submission of amicus briefs. Though the practice of submitting amicus briefs seems unknown in the Ethiopian constitutional litigation, there is nothing that prohibits it. The proclamations dealing with the powers and functions of CCI/HoF also provide implicit legal ground for the practice. Civil societies working on protection of constitutional rights could assist in a number of ways to make relevant foreign decisions accessible to constitutional interpreters. Ethiopian law schools could also play a vital role in the process by endowing their students with the necessary skills of dealing with comparative law materials and making them mindful of their immense importance.

Finally, the chapter argued that use of comparative law has not only benefits but risks as well. Thus, Ethiopian constitutional interpreters must exercise caution to reap benefits and minimize unnecessary risk. This could be done by adopting a context sensitive use of comparative jurisprudence that takes into account similarities in social, economic, cultural and political conditions before picking a certain precedent from a particular jurisdiction. It is also preferable if they primarily consider jurisdictions regarded as "open and democratic" like their South African counterpart. This is because these jurisdictions are regarded as having advanced constitutional rights protection standards and jurisprudence. Considering these systems helps them to gain helpful insights. Yet, constitutional interpreters in Ethiopia should not be required to align their decision with the jurisprudence of open and democratic societies at all times. Instead, what they should do is engage in meaningful dialogue with them. Thus, both in times of relying on a foreign

precedent or in times of rejection, they must give adequate justification for the position they have arrived at. Following such approach is essential to maintain their integrity and it also enhances their legitimacy.

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Principle of Conforming Interpretation in Ethiopia

Mussie Mezgebo[*]

Abstract

Although there is an obligatory, precise and explicit constitutional principle of conforming interpretation in Ethiopia, its application remains very limited. While the House of Federation and the Council of Constitutional Inquiry have a clear obligation to interpret the fundamental rights and freedoms in conformity with international human rights and other instruments, they have barely put this obligation into practice. Paradoxically, the Federal Supreme Court Cassation Division has repeatedly put the principle into practice despite the absence of clear obligation or reference to do so. Yet, the Court's application suffers from irregularity, inconsistency and selectivity. Renewed academic emphasis, systemic approach and clarification might help to get the most out of the principle for the protection of human rights in Ethiopia.

Introduction

In 1995, Ethiopia adopted a new federal constitution that gives considerable place to the protection of fundamental rights and freedoms. Thirty six out of one hundred six articles or more than thirty-three percent of the constitution are, directly or indirectly, devoted to the protection of fundamental rights and freedoms.[1] The natural, inviolable and inalienable nature of human rights is recognized and is one of the five fundamental principles of the Constitution.[2] The amendment procedures for the fundamental rights and freedoms are particularly stringent.[3] Except for the right to self-determination of ethnic groups and socio-economic rights, the contents of the fundamental rights

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1 The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 10, Art. 13-44, Art. 93(4)(c) and Art. 105(1), Proc. No 1, Neg. Gaz. Year 1, no. 1. (FDRE Constitution)

2 *Id.*, Art. 10.

3 *Id.*, Art. 105(1).

and freedoms are primarily based on the international human rights instruments.[4]

In addition, Article 13(2) of the Constitution imposes an obligation to interpret the fundamental rights and freedoms in conformity with the principles of international instruments (of human rights and others), apparently as a vanguard protection against arbitrary interpretation of the fundamental rights and freedoms.[5] This interpretative obligation is imposed upon the House of Federation (HF) and Council of Constitutional Inquiry (CCI) as they are empowered to interpret the Constitution pursuant to Articles 62(1), 83 and 84. Arguably, the interpretative obligation is shared by the federal courts as they have implicit power to interpret fundamental rights and freedoms in conformity with international instruments by considering Articles 13(1) and (2) of the Constitution, Article 3 of the Federal Courts Proclamation,[6] their natural interpretative function, the nature of international obligations, and judicial practice.[7] With slight differences, a similar position has also been taken by constitutions of the regional states of the Ethiopian federation.[8]

As part of the constitutional interpretation, consolidatory laws have been enacted that further specify the obligations of the HoF and CCI in interpreting the fundamental rights and freedoms enshrined in the FDRE Constitution. Article 20(2) of the CCI Proclamation[9] and Article 7(2) of the

4 See: Explanatory Note to the FDRE Constitution, p. 22, and Ethiopian Constitutional Commission, Minutes of the Ethiopian Constitution (1995), vol. 2, p. 22, and Chapter Three of the FDRE Constitution and the Universal Declaration of Human Rights (UDHR).

5 *Id.*, Art. 13(2).

6 Federal Courts Proclamation, 1996, Art. 3(1), Proc. No 25, Neg. Gaz. Year 2, no. 13.

7 See, for example, *Berhanu Nurga v. Federal Anti-Corruption and Ethics Commission* (Case File No. 95921, Federal Supreme Court Cassation Division, 20 April 2015), Federal Supreme Court Cassation Division Decisions, vol. 18, p. 251, and Assefa Fiseha, "Constitutional Adjudication through Second Chamber in Ethiopia", Ethnopolitics, vol. 16(3), (2017), p. 308.

8 See, for example, the Revised Constitution of the Amhara Regional State, 2002, Art. 12(2), Proc. No. 59, Zikre Hig. Year 7, no. 2, and the Constitution of the Tigray Regional State, 1995, Art. 12(2), Proc. No. 1, Neg. Gaz. Year 1, no. 1.

9 Council of Constitutional Inquiry Proclamation, 2001, Art. 22(1), Proc. No. 250, Neg. Gaz. Year 7, no. 40.

Consolidation of the HoF Proclamation[10] reiterate that the Council and the House must interpret fundamental rights and freedoms in conformity with the principles of international instruments. There is no, however, subsidiary law that specifies the arguably implicit obligation of the courts to interpret the fundamental rights and freedoms in conformity with the principles of international instruments.

Despite the incorporation of the principle of conforming interpretation in the initial CCI Proclamation (No. 250/2001) in carrying out the constitutional interpretation obligation, this directive principle has been taken off in the latest proclamation governing the function of CCI (Proclamation No. 798/2013).[11] In fact, the removal of the obligation of conforming obligation from the Proclamation cannot discharge the CCI from conforming its interpretation with international human rights instruments, as it has a constitutional basis. In contrast, the HoF Proclamation No. 251/2001 has not been amended yet. The obligation of conforming interpretation, therefore, in accordance with the subsidiary law, still applies to the HoF.

The removal of the obligation to conforming interpretation from the latest CCI Proclamation coupled with rare performance of the obligation for over two decades by the CCI and HoF as enshrined under the FDRE Constitution and subsidiary laws in their actual interpretative experience seem to have the effect of repealing the principle of conforming interpretation by practice or render it invisible and irrelevant for dispensing constitutional cases.[12] By doing so, both the HoF and CCI do barely identify, clarify, use and develop the principle of conforming interpretation as enshrined under Article 13(2) of the FDRE Constitution. Paradoxically, since 2013 the FDRE Supreme Court Cassation Division has been citing Article 13(2) of the FDRE

10 Consolidation of the House of Federation and Definition of its Powers and Responsibilities Proclamation, 2001, Art. 7(2), Proc. No. 251, Neg. Gaz. Year 7, no. 41.

11 See, Council of Constitutional Inquiry Proclamation, 2013, Proc. No. 798, Neg. Gaz. Year 19, no. 65.

12 Office of the Council of Constitutional Inquiry, Recommendations of the CCI, (2019) vol. 1(1).

Constitution or the obligation to conforming interpretation, although subsequent observation shows diminishing reference to it.[13]

This chapter thus seeks to explore the place and role of the principle of conforming interpretation in the Ethiopian legal system. Particularly, it tries to identify meaning, scope, duty bearers, legal basis, practical usage, trend and the role of conforming interpretation in the promotion of human rights in Ethiopia. In doing so, the chapter has six sections. The first section deals with the meaning of conforming interpretation. It tries to define the principle from legal, judicial and doctrinal perspectives. The second section deals with the scope of application of the principle and tries to answer what domestic laws are subject to conforming interpretation and what norms of international law are standards of measurement. The third section deals with the role or purpose of the principle in relation to the promotion of human rights in Ethiopia. For this, attention has been drawn to the national and foreign judicial interpretative practices and concepts in order to gauge the actual and potential benefits that may derive from the usage of the principle. The fourth section deals with the basis for the duty to interpret domestic laws in conformity with international norms. Similarly, laws, interpretative practices and concepts have been consulted to identify the foundations for the duty. The fifth section deals with cases of conflict between national and international law and the role of the principle in such cases, particularly when the national law provides better protection than the international. In response, two mutual cases of conflicts between national and international law will be raised and analyzed in light of the principle's purpose. Finally, the sixth section deals with identifying the duty bearers in conforming interpretation by referring to the FDRE Constitution, Proclamations and judicial decisions and practices.

I. What is Conforming Interpretation?

The principle of conforming interpretation, which is also known as 'consistent interpretation', 'loyal interpretation', 'harmonious interpretation', or 'conciliatory interpretation', is a technique of interpretation that obligates

13 *G. Agri Pac PLC and Getahun Asfaw v. Ethiopian Revenues and Customs Authority,* (Federal Supreme Court Cassation Division, 11 June 2013), Federal Supreme Court Cassation Division Decisions, vol. 15, p. 261. See also subsequent volumes of the cassation decisions.

courts or other organs with judicial function such as CCI and HoF to interpret domestic laws in conformity with the international instruments.[14] While doing so, courts or other authorized organs apply domestic laws for resolving cases, but the interpretation of laws is to be done in light of international instruments. This means, the international norms will not be applied independently and directly before national courts or other authorities, but they play a role in determining the content of applicable domestic laws. In conforming interpretation, there is, therefore, always application of domestic laws. Consequently, the principle ensures indirect effect of international norms in resolving cases presented before national courts or other authorities. This particular functionality makes the principle a method of discharging international obligations.[15]

Yet, this does not mean that there would be different interpretation outcomes if the courts or other authorities declined to consider the international norms through the principle of conforming interpretation. Normally, in many cases, interpretation outcomes conform to international norms without the latter being considered. Courts or other authorities may also refer to international norms in their interpretative functions in order to justify their decisions or show the unique importance of domestic norms. It thus needs to distinguish cases of conforming interpretation from other uses of international norms. For a decision to be considered an example of conforming interpretation, international norms should be identified and utilized in interpretation of domestic laws and the outcome of the interpretation is either consistent with or, at least, not in violation of international norms.

Evidently, the principle is similar to the domestic interpretative technique that applies to constitutionality of subsidiary laws. When courts or other authorities find a subsidiary law in conflict with the Constitution, they

14 A. Sakowicz, "The Principle of Conforming Interpretation of National Law in the Area of Criminal Law. General Remarks", The Journal of University of Bialystok: Studies in Logic, Grammar and Rhetoric, vol. 31 (2012), p. 83.

15 See, G. Betlem, "The Doctrine of Consistent Interpretation – Managing Legal Uncertainty", Oxford Journal of Legal Studies, vol. 22(3) (2002), pp. 397–8; A. Nollkaemper, National Courts and the International Rule of Law, (2011), pp. 139-161; and A. Wentkowska, "A 'Secret Garden' of Conforming Interpretation– European Union Law in Polish Courts Five Years after Accession", in Yearbook of Polish European Studies, 12/2009.

normally resolve the conflict by interpreting the subsidiary law consistently with the Constitution. For example, the Federal Supreme Court Cassation Division in *Tsedale Demisse v Kifle Demisse* case resolved the conflict between parents' right to guardianship and tutorship over their child and the principle of best interest of the child as enshrined under Article 235(1) of the SNNP Regional State Family Code and among others, Article 36(2) of the FDRE Constitution.[16] Article 235(1) provides that in case of death, disability, unworthiness or removal of one of the parents, the one who remains will exercise guardianship and tutorship.[17] In its decision, the Court held, however, that it is not in the best interest of the child to recognize the biological father's guardianship and tutorship, despite Article 235(1) of the Family Code. The Court disqualified the application of the subsidiary law in order to conform to the FDRE Constitution. Similar technique is also being applied in the relations between the international and domestic legal systems. The difference is thus the context in which the technique of conforming interpretation is being applied. Therefore, the principle of conformity interpretation is a technique of interpretation that prevents inconsistent interpretation of domestic laws against international obligations.[18]

The principle is not, however, similar to the principle of direct effect. The principle of direct effect involves direct application of international norms in resolving domestic cases so long as the norms fulfill certain conditions such as domestication and nature of the treaty being self-executing. Through the principle of direct effect, courts or other authorities could determine rights, obligations and privileges using international norms and if there is a clash between domestic and international norms, domestic laws are set aside to pave ways for direct application of the international norms.[19] Nevertheless, both the principles of conforming interpretation and direct effect aim at the

16 *Tsedale Demisse v. Kifle Demisse*, (Case File No. 23632, Federal Supreme Court Cassation Division, 6 November 2007) Federal Supreme Court Cassation Division Decisions, vol. 5, p. 188.

17 Family Code of the Southern Nation, Nationalities and Peoples Regional State, 2004, Proc. No. 75, Debub Neg. Gaz. Year 3, No. 5.

18 See, G. Betlem, "The Doctrine of Consistent Interpretation – Managing Legal Uncertainty", Oxford Journal of Legal Studies, vol. 22(3) (2002), pp. 397–8.

19 M. Araszkiewicz, "Coherence-Based Account of the Doctrine of Consistent Interpretation", in M. Palmirani et al (eds.), AI Approaches to the Complexity of Legal Systems, (2011), p. 34.

achievement of the same objective, i.e. the application of international norms and thereby, ensuring the observance of international obligations.

II. Scope of Application

The scope of application of the principle of conforming interpretation has two essential questions. First, what norm of international law should be used as a standard for measuring the conformity of domestic laws? Second, what rule of domestic laws should be interpreted in conformity to international instruments? Regarding the first question, Article 13(2) of the FDRE Constitution identifies the UDHR, International Covenants on Human Rights, and International Instruments adopted by Ethiopia as standards of measurement. The 'International Covenants on Human Rights' refer to both present and hitherto adopted, human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women(CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), and Convention on the Rights of Persons with Disabilities (CRPD).[20] The 'international instruments' seem to refer to any international instruments with human rights substance such as ILO, environmental, and humanitarian instruments. Importantly, any international instrument adopted by Ethiopia is a standard of measurement for conforming interpretations even though it is not ratified by Ethiopia. In this regard, the Constitution follows a minimum level of treaty/declaration acceptance. Consequently, whether the international instruments are integral part of the law of the land as per Article 9(4) of the FDRE Constitution does not matter for the purpose of conforming interpretation. Apart from adopted instruments, the article does not, however, mention international customary rules as standards of measurement.

20 United Nations High Commission for Human Rights, Office of the High Commissioner, UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN>, last visited on 10 December 2019.

Regarding the second question, Article 13(2) of the FDRE Constitution provides that the fundamental rights and freedoms specified in chapter three of the Constitution shall be interpreted in conformity with international instruments. Here, the interpretation of the constitutional rights is inextricably linked to subsidiary laws, customary practices and governmental decisions, which are triggering factors for the interpretation of constitutional rights.[21] As a result, in the author's view, constitutional rights, subsidiary laws, customary practices, and governmental decisions should all be interpreted in conformity with international instruments.

III. Purposes of Conforming Interpretation

The principle of conforming interpretation has various purposes. Intrinsically, it gives effect to international obligations that would determine benefits, privileges, rights, duties and responsibilities of the parties to a dispute. This happens by aligning domestic laws with international norms. Under normal circumstances, interpreting domestic laws in conformity with international norms brings more protection to individuals, particularly in countries with less developed human rights systems such as Ethiopia. For example, in *G. Agri Pac PLC and Getahun Asfaw v Ethiopian Revenues and Customs Authority*[22] case, the appellants benefited from the interpretation of tax laws that impose criminal liability for inability to pay tax in conformity with the ICCPR provision that prohibits imprisonment for the inability to pay contractual obligations. In doing so, the international norm can serve as a safeguard against arbitrary or less human rights protective interpretation of domestic laws.

The CCI and HoF, for example, have rendered different decisions on the constitutionality of Regulation No. 155/2008 regarding the right to be heard and access to justice. Article 37 of the Regulation empowers the Director General of the then Ethiopian Revenue and Customs Authority to expel an employee without the need to follow due process, and bars courts from

21 Council of Constitutional Inquiry Proclamation, 2013, Art. 3, Proc. No. 798, Fed. Neg. Gaz. Year 19, no. 65.

22 *G. Agri Pac PLC and Getahun Asfaw v. Ethiopian Revenues and Customs Authority,* (Federal Supreme Court Cassation Division, 11 June 2013), Federal Supreme Court Cassation Division Decisions, vol. 15, p. 261.

reviewing the decision of the Director General.[23] In an earlier case, *Ashenafi Amare et al v Ethiopian Revenues and Customs Authority*, the CCI and HoF argued that the Regulation does not violate the right to access to justice as provided for in Article 37 of the FDRE Constitution. The decision was based on the justification that in a parliamentary system, the legislature has the power to decide which matters should be subjected to judicial review within the ambit of the Constitution.[24] Recently, in *Administrative Tribunal of the Civil Service Ministry v Ethiopian Revenues and Customs Authority* case, the CCI and HoF, however, reversed their earlier stance, claiming that the Regulation violates the right to be heard, access to justice, and equality as enshrined under Articles 37 and 25 of the FDRE Constitution and Article 14(3)(b)(d) of the ICCPR.[25] In my view, had the CCI and HoF used the principle of conforming interpretation from the onset in their interpretative function, there would have been better interpretation outcomes that would conform to international standards.

There are also a number of purposes associated with the principle of conforming interpretation in relation to the principle of direct effect. This can be named as the extrinsic purpose of the principle of conforming interpretation. The principle generally gives silent application of international norms that might not have been possible with the help of the principle of direct effect. In many ways, the principle of conforming interpretation is more effective and practically important considering the drawbacks of the principle of direct effect. Despite states' ratification or adoption of international treaties, the domestic application of treaties through the principle of direct effect is very problematic for several reasons.

First, the nature of the treaty by itself is a determining factor whether the treaty in question can be directly applied in the determination of rights and obligations. Normally, self-executing treaties, treaties that can create direct

23 Council of Ministers Regulation to Provide for the Administration of Employees of the Ethiopian Revenues and Customs Authority, 2008, Art. 37, Reg. No. 155, Fed. Neg. Gaz. Year 14, no. 49.

24 *Ashenafi Amare et al v. Ethiopian Revenues and Customs Authority*, (File No.101/2009, FDRE Council of Constitutional Inquiry, 9 February 2010). (Unpublished)

25 *Administrative Tribunal of the Civil Service Ministry v. Ethiopian Revenues and Customs Authority*, (File No. 72/2019, House of Federation, 9 June 2019).

rights and obligations, will not pose difficulty for direct effect. However, non-self-executing treaties cannot be applied directly as there are necessary additional measures for their implementation.[26] In Ethiopia, there is little legal and practical guidance as to whether treaties are to be considered as self-executing or non-self-executing treaties. Considering Article 9(4) of the FDRE Constitution, it can be said that, as Getachew Assefa concluded, without getting deeply into the issue, ratified treaties are presumed as self-executing unless there are reasons to make them non-self-executing.[27] In the United States, ratified treaties are considered as integral part of the law of the land, but they may be categorized as non-self-executing treaties for several reasons. In their legal and practical experience, a treaty may be assigned a non-self-executing treaty status when the treaty meets the conditions provided in the constitutional doctrine, the justiciability doctrine, the intent doctrine, the Fujii doctrine, the private right of action doctrine, or the recent American Law Institute (ALI Restatement) doctrine.[28] Among the doctrines, for example, in *Fujii v. State Case* (1952), a Japanese-American invoked the domestic enforcement of '*…the human rights and fundamental freedoms for all without distinction as to race*' as enshrined in Article 1(3) of the 1945 United Nations Charter, but the court rejected his claim on the ground that the authors of the treaty needed to have the intention that the treaty be directly applicable in domestic cases.[29] These doctrines generally prevent the direct application of treaties in the domestic legal order. This means, it is not possible to invoke treaties that are named as non-self-executing treaties

26 According to the American Law Institute's Third Restatement of the Foreign Relations Law of the United Nations, "An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.

27 See, Getachew Assefa, "The Place of International Law in the Ethiopian Legal System", in Zeray Yihdego et al (eds.), Ethiopian Yearbook of International Law, (2017), p. 77.

28 For more, see David Sloss, The New ALI Restatement and the Doctrine of Non-Self-Executing Treaties, (2017, unpublished, US Federal Bar Association), p. 57; and A. Enabulele and E. Okojie, "Myths and Realities in 'Self-Executing Treaties'", Mizan Law Review, vol. 10 (1) (2016), pp. 1-37.

29 David Sloss, The New ALI Restatement and the Doctrine of Non-Self-Executing Treaties, (2017, unpublished, US Federal Bar Association), p. 58.

before national courts or other authorities for the aforementioned doctrinal reasons. Yet, with the help of the principle of conforming interpretation, it is possible to give effect to such treaties.

Second, the general consideration of international law as a law that regulates inter-state matters limits its direct application to private cases.[30] Consistent with such understanding, in 2000 the Dutch court, for example, rejected a civil case presented to make The Netherlands liable for its participation in the 1999 Kosovo bombings. The court decided that Article 2(4) of the UN Charter had no direct effect since it was not intended to protect the rights or interest of private parties.[31] Such understanding of international law prevents the application of international law to private cases. Nevertheless, cases that depend on international human rights instruments may not face such problems, as they have unique characteristics from traditional treaties, including the nature of the obligations and beneficiaries of the rights.[32]

The third is lack of clarity concerning the condition of applicability of international law in domestic cases. States roughly fall into monist or dualist category in their approach to determine the condition of applicability of international law.[33] In Ethiopia, there is no clear provision in the Constitution that explains conditions for application of treaties. This situation leads scholars such as Ibrahim Idris, Takele Soboka, and Getachew Assefa, to have their own position on this issue.[34] Getachew Assefa and Takele generally

30 G. Betlem and A. Nollkaemper, "Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation", European Journal of International Law, vol. 14(3) (2003) p. 577.

31 *Id.*, p. 578.

32 For more, see L. Brilmayer, "From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements", Faculty Scholarship Series. Paper 3753, (2006).

33 M. Antonovych, Implementation of International Human Rights Instruments by National Courts, <http://ekmair.ukma.edu.ua/bitstream/handle/123456789/4230/Antonovych_Implementation_of_International_Human.pdf>, last visited on 14 December 2019.

34 For more, see Ibrahim Idris, "The Place of International Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution", Journal of Ethiopian Law, 20(1) (2000); Takele Soboka, "The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia",

argue in favor of having smooth application process for international human rights treaties in Ethiopia. They argue that publication of human rights treaties in the *Federal Negarit Gazetta* is not a necessary condition for the application of the treaties. Whereas, Ibrahim Idris argues that human rights treaties need to be published in the *Federal Negarit Gazetta* as mandatory precondition for their domestic application. In my opinion, these divergent opinions are not generally good for the applicability of the principle of direct effect. Of course, as stated earlier, the Federal Cassation Division has been citing ICCPR since 2013, despite the fact that the treaty in question has not been published in the *Federal Negarit Gazetta*.

Last but not least, the lack of clarity concerning the hierarchical status of treaties in domestic legal system. Like the conditions of applicability of treaties, there are also divergent views about the hierarchical status of treaties in the Ethiopian legal system. Ibrahim Idris and Takele Sobeka, for example, contend that treaties, particularly human rights treaties, are either superior or, at least, equal to the FDRE Constitution. Assefa Fiseha and Minasse Haile, however, argue that treaties are inferior to the FDRE Constitution and equal to the federal proclamations.[35] All things considered, the supremacy clause enshrined under Article 9(1) of the FDRE Constitution, the prima facie requirement of publication of laws in Article 3 of the Federal Negarit Gazetta Proclamation No. 3/1995,[36] the duty of the President to publish international agreements in the *Federal Negarit Gazeta* pursuant to Article 71(2) of the FDRE Constitution, the responsibility of the House of Peoples' Representatives to promulgate a ratification proclamation for an international agreement it ratifies in accordance to Article 11(1) of the International Agreements Making and Ratification Procedure Proclamation No. 1024/2017[37], and the inaccessibility of the human rights treaties to the general public, particularly in terms of availability and language issues, affect

Journal of Ethiopian Law, vol. 23(1) (2009); Getachew Assefa, "The Place of International Law in the Ethiopian Legal System", in Zeray Yihdego et al (eds), Ethiopian Yearbook of International Law, (2017).

35 Cited in Getachew Assefa, cited above at note 27, p. 79.

36 Federal Negarit Gazeta Establishment Proclamation, 1995, Art. 2, Proc. No. 3, Fed. Neg. Gaz. Year 1, no. 3.

37 International Agreements Making and Ratification Procedure Proclamation, 2017, Art. 11(1), Proc. No. 1024, Fed. Neg. Gaz. Year 23, no. 55.

the domestic application of international agreements through the principle of direct effect.

IV. Foundations of the Duty to Conforming Interpretation

The principle of conforming interpretation has legal, judicial and theoretical basis.[38] These foundations either obligate or empower courts or other authorities to interpret national laws in conformity with international norms. There are no identical foundations for conforming interpretations in all states, however. The grounds for the interpretative obligation depend on content of the national constitutions, the states' membership to certain treaties, judicial practices and traditions. Some states may have a number of bases; while others may not even have any express legal basis to do so, although they might have been engaged in performing conforming interpretation.

4.1. National Legislations

In Ethiopia, the express legal basis for the obligation to conforming interpretation is found in Article 13(2) of the FDRE Constitution. This Article sets the legal requirement up on which the 'courts', CCI and HoF can exercise the duty to interpret the fundamental rights and freedoms in a way that conforms to the international norms.[39] Similarly, foreign states' constitutions have also incorporated the principle of conforming interpretation. Article 39(1)(b) of the South African Constitution, for example, stipulates that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law".[40] Article 11(2)(c) of the Malawi Constitution provides that "in interpreting the provisions of this Constitution a court of law shall, where

38 A. Nollkaemper, National Courts and the International Rule of Law, (2011), pp. 147-157.

39 Both the CCI and HoF have express power to interpret the FDRE Constitution according to Articles 62(1), 83 and 84 of the Constitution. Whereas, the courts' power of interpretation is derived impliedly from Article 13(1) of the Constitution, Article 3 of the Federal Courts Proclamation No. 25/96, international obligation, and Federal Supreme Court Cassation. For more, see the topic on duty bearers of conforming interpretation in Ethiopia.

40 The Constitution of the Republic of South Africa, 1996, section 39, Act No. 108, (as amended) <https://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf>, last visited on 10 December 2019.

applicable, have regard to current norms of public international law and comparable foreign case law".[41] Similarly, Article 10(2) of the Spanish Constitution declares that "the principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain".[42] Article 1 paragraph 2 of the Mexican Constitution also provides that "the provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times".[43] Similarly, Article 16(2) of the Portuguese Constitution provides that "the constitutional precepts concerning fundamental rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights".[44]

States without written constitutions have also incorporated the principle of conforming interpretation under their respective legislation. The 1998 United Kingdom Human Rights Act, for example, states that "a court or tribunal determining a question which has arisen in connection with a Convention right must take into account, *inter alia*, any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen".[45]

41 The Constitution of the Republic of Malawi, 1994, Article 11, Act No. 20, (as amended) <https://www.constituteproject.org/constitution/Malawi_1999.pdf>, last visited on 18 December 2019.

42 The Constitution of the Kingdom of Spain, 1987, Article 10(2), (as amended) <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>, last visited on 10 December 2019.

43 The Political Constitution of the United Mexican States, 1917, art 1, (as amended) <http://comparativeconstitutionsproject.org/wp-content/uploads/UNAM-Mexican-Constitution_vf.pdf?6c8912>, last visited on 10 December 2019.

44 The Constitution of the Republic of Portugal, 1976, Article 16(2), (as amended) <https://www.wipo.int/edocs/lexdocs/laws/en/pt/pt045en.pdf>, last visited on 10 December 2019.

45 The United Kingdom, Human Rights Act, 1998, Article 2(1) Act No. c42 <http://www.unesco.org/education/edurights/media/docs/e25aa4bc217eb36d75471f751fb531874ce1fe8d.pdf>, last visited on 10 December 2019.

4.2. International Law

Unlike national laws, interpretative obligation arising from international law is not clearly set. Yet, with the help of courts and treaty bodies' interpretation of international norms, the obligation to conforming interpretation has been inferred from treaty obligations. For instance, Article 10 of the Treaty Establishing the European Community states that:

> "European Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." [46]

At face value, the Article does not say anything about the obligation to conforming interpretation unlike, for example, Article 13(2) of the FDRE Constitution. However, the European Court of Justice, for the first time, positively identified the existence of the national court's obligation to make conforming interpretation through inferential interpretation of the Article in its judgment in the case of *Von Colson and Kamann v Land Nordrhein-Westfalen* that deals with discrimination based on sex in the area of access to employment.[47] In particular, the Court concludes that:

> "However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light

46 The Treaty Establishing the European Community, 1951, Article 10, (as amended) <http://hrlibrary.umn.edu/instree/EUAmsterdam-treaty.pdf>, last visited on 10 December 10 2019.

47 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* (Case File No. 14/83, European Court of Justice, 10 April 10 1984).

<https://eur-<lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61983CJ0014&from=EN>, last visited on 10 December 2019.

> of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.[48]…. It is for the national court to interpret and apply the legislation adopted for the implementation of directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law."[49]

In subsequent times, the Court restated its decision in *Von Colson and Kamann v Land Nordrhein-Westfalen* in various decisions and further refined and consolidated the obligation of national courts to interpret domestic laws in conformity with the European treaties.[50] For example, in *Marleasing v La Commercial International de Alimentación SA* case, the Court reiterated its earlier decision and expanded the scope of the interpretative obligation to be applied to the national laws that were enacted before the introduction of the European Directive. In particular, the Court held that:

> "In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891, paragraph 26…. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty." [51]

48 *Id.*, reasoning paragraph 26, p. 18.

49 *Id.*, final ruling paragraph 3, pp. 19-20.

50 See, *Marleasing v. La Comercial Internacional de Alimentación,* (Case File No. C-106/89, European Court of Justice, 13 November 1990); *Annalisa Carbonari and Others v. Università degli Studi di Bologna and Others*, (Case File No. C-131/97, European Court of Justice, 25 February 1999); *Karen Mau v. Bundesanstalt für Arbeit* (Case File No. C-160/01, European Court of Justice, 15 May 2003) and others available at <https://eur-lex.europa.eu/collection/eu-law/eu-case-law.html>, last visited on 10 December 2019.

51 *Marleasing v. La Comercial Internacional de Alimentación,* (Case File No. C-106/89, European Court of Justice, 13 November 1990) Paragraph 8 <https://eur-lex.europa.eu/resource.html?uri=cellar:384f064c-f467-4dda-a3cb-a44d930a6e25.0002.06/DOC_1&format=PDF>, last visited on 10 December 10 2019.

With respect to the existence of Ethiopia's obligation, under international law, to interpret national laws in conformity with the international obligations, generally it is not possible to pinpoint by referring to any clear obligation under international law to which Ethiopia is a party. In fact, as G. Betlem and A. Nollkaemper indicate, there is no international positive authoritative obligation that imposes the duty to interpret domestic laws in conformity with international norms.[52] Without any reservation, this fact is relevant to Ethiopia. To date, Ethiopia is a party to many treaties, including the core human rights instruments such as the CAT, ICCPR, ICESCR, CEDAW, CERD, CRC and CRPD.[53] None of these treaties, however, do explicitly provide any legal obligation for member states to interpret national laws in conformity with the treaties. It is thus possible to say that Ethiopia is under no explicit international duty to interpret domestic laws in conformity with international norms.

Yet, it is possible to argue that Ethiopia has an international obligation to interpret its domestic laws in conformity with the international treaties by referring to the interpretative works of the UN Treaty Bodies and judicial practices. In its General Comment No. 30, the Human Rights Committee noted that the enjoyment of the rights recognized under the ICCPR could be effectively assured, among other means, through the interpretive effect of the Covenant in the application of national laws by the judiciary.[54]

In addition, in its General Comment No. 9, the Committee on Economic Social and cultural Rights (CESCR) held that it is the duty of the judiciary to ensure that the State's conduct is consistent with its obligations under the ICESCR and the neglect of this responsibility amounts to violation of rule of

52 See, G. Betlem and A. Nollkaemper, cited above at note 30, p. 574.

53 United Nations High Commission for Human Rights, Office of the High Commissioner, UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN>, last visited on 10 December 2019.

54 General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR (Human Rights Committee of the ICCPR, adopted on 29 March 2004, 80th session, (2187th meeting), Para. 15.

law, which includes, among others, respect for international human rights obligations.[55] Besides, the Committee affirms that:

> "It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[56]

These comments, though vague and unspecified, generally highlight the existence of an international duty to interpret domestic laws in conformity with international law as a way of giving effect to international human rights obligations. Such inference is vivid and relevant when the importance of the General Comments is considered. The General Comments provide authoritative interpretation of human rights; they set the criteria for evaluating states' human rights treaties performance,[57] and provide timely and context-based interpretations[58] and of course, member states have agreed to the interpretative role of the respective Treaty Bodies.[59]

Besides, the existence of an international duty to interpret domestic laws in conformity with the international obligations has been supported by judicial

55 General Comment No. 9 on the Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The domestic application of the Covenant (ECOSOC, Committee on the ICESCR, adopted on 1 December 1998, 90th session, (Agenda Item 3), Para. 14

56 *Id.*, Para. 15.

57 See, H. Keller and G. Ulfstein, "Introduction" and "General Comments of the Human Rights Committee and their legitimacy", in H. Keller and G. Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, (2012), pp.1-15 and pp. 116-198.

58 Vienna Convention on Law of Treaties, 1965, Art. 31, Adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties).

59 See, for example, International Covenant on Civil and Political Rights, Art. 40(4), Adopted and Opened for signature, ratification and accession by GA Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

practices. For example, the Federal Supreme Court Cassation Division, in the aforementioned *Tsedale Demisse v Kifle Demisse* case, acknowledges the Court's obligation under Article 3(1) of the CRC to give priority to the best interest of the child while deciding on issues related to children. Consequently, the Court made Article 235(1) of the SNNPR Family Code inapplicable in consideration of Article 3(1) of the CRC.[60] Similarly, in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* case, the Australian High Court confirmed the existence of the duty to interpret domestic laws in light of the duty to primarily consider the best interest of the child as enshrined under Article 3(1) of the CRC.[61] There is, furthermore, extensive jurisprudence by Dutch, UK, Israeli and US courts that confirms the international basis for the duty to interpret domestic laws in conformity with international laws.[62]

4.3. Judicial Decision

Through judicial decisions, the duty to interpret domestic laws in conformity with international norms can be elaborated, reaffirmed and, as the domestic law permits, become a binding precedent for all lower courts. In Ethiopia, as noted earlier, both the CCI and HoF have neither utilized nor reaffirmed the principle of conforming interpretation as provided for in Article 13(2) of the FDRE Constitution. However, the Federal Supreme Court Cassation Division, in the *Degefe Murji v. Busheftu Revenues Authority*[63] case, decided that courts must interpret domestic laws in conformity with international laws. In particular, the Court stressed the need to interpret Article 96 of the Federal Income Tax Proclamation No. 285/2002 and Article 69 of the Oromia Regional State Income Tax Proclamation No. 94/2003, which were the legal basis for the Oromia Regional State Supreme Court to sentence Mr. Degefe for one year rigorous imprisonment for his inability to pay tax, in

60 *Tsedale Demisse v. Kifle Demisse*, cited above at note 16, p. 189.

61 *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, (Australia: High Court, 7 April 1995) <https://www.refworld.org/cases,AUS_HC,3ae6b70c8.html>, last visited on 10 December 2019.

62 G. Betlem and A. Nollkaemper, cited above at note 30, p. 575.

63 *Degefe Murji v. Busheftu Revenues Authority*, (Case File No. 53544, Federal Supreme Court Cassation Division, 18 June 2010), Federal Supreme Court Cassation Division, (unpublished).

conformity with Article 11 of the ICCPR, which states, "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation". In Ethiopia, it is important to note that there is no domestic law that recognizes the right to freedom from imprisonment for inability to perform contractual obligations, as enshrined under the ICCPR.

Subsequently, the Court has also passed decisions in four cases by referring to the interpretative obligation enshrined under Article 13(2) of the FDRE Constitution.[64] In the *G. Agri Pac PLC and Getahun Asfaw v. Ethiopian Revenues and Customs Authority*[65] case, the Court, for example, further consolidated its position to interpret domestic laws in conformity with international norms. In its decision, the Court held:

> "Art 11 of the ICCPR provides that 'no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. It is also to be reminded that the Court had given binding decision in its earlier decision on Degefe Murji v Busheftu Revenues Authority case (case file no. 53544) in which the Court decided that art 94 of the Federal Income Tax Proclamation No. 286/2002 and art 49 of the Federal Value Added Tax Proclamation No. 285/2002 must be interpreted and enforced in conformity with the above mentioned international agreement pursuant to art 13(2) of the FDRE Constitution. As such, there is no legal ground to make the appellants criminally liable for their inability to pay the tax decided by the Authority based on presumptive taxation. The Hawassa High Court and the Regional Supreme Court thus committed fundamental error of law for passing criminal punishment against the appellants for claiming that they committed tax evasion in the absence of the above legal requirements and of the moral and material elements of a crime."[66]

Importantly, pursuant to Article 2(1) of the Federal Courts (Amendment) Proclamation No. 454/2005, interpretation of law by the Federal Supreme Court Cassation Division, rendered with not less than five judges sitting, is binding on all lower federal and regional courts.[67] This means, the Cassation

64 See, Federal Supreme Court Cassation Division Decisions, Volumes 15 and 18.

65 *G. Agri Pac PLC and Getahun Asfaw v. Ethiopian Revenues and Customs Authority*, cited above at note 22, p. 261.

66 *Id.*, Para. 20, translation by the author from Amharic.

67 Proclamation to Re-amend the Federal Courts Proclamation No. 25/96, Art. 2(1), Proc. No. 454, Fed. Neg. Gaz., Year 11, no. 42.

Division's decision is a formal source of law, and thus, the decision is to be considered as a legal basis for the duty to interpret domestic laws in conformity with international treaties. Accordingly, all lower federal and regional courts in Ethiopia have the duty to interpret domestic laws in conformity with international norms as provided in Article 13(2) of the FDRE Constitution.

4.4. Hierarchy

Many foreign jurisdictions use hierarchy as a foundation for the duty to interpret domestic laws in conformity with international law.[68] Hierarchy of laws shows the existing power relation among various contending laws. In case of conflicts between laws, courts normally resort to establish hierarchy among the laws and apply the higher law. In a similar vein, if both national and international laws have potential applicability but have conflicting norms, courts or other authorities may either give effect to international law or national law. In constructing hierarchy between these laws, the position of national constitutions and the nature and consequences of international obligations should be taken into account.

In Ethiopia, there is no clear stipulation in the FDRE Constitution as to the hierarchy between national law and international law. In fact, there is academic disagreement over the position of treaties in Ethiopia. Some claim that international agreements are inferior to the FDRE Constitution and have equal status with Proclamations; whereas, others claim that treaties are superior to the Constitution or, at least, share equality with the Constitution.[69] Takele Soboka, who shares the latter view, however, strongly argues that the construction of hierarchy made in Ethiopia, which makes treaties inferior to the FDRE Constitution and, sometimes, equal with Proclamations, is based on the evaluation of treaties from the standards of national laws, particularly in reference to the supremacy of the Constitution and incorporation of ratified treaties as an integral part of the law of the land. To him, the view that treaties ratified by Ethiopia are subordinate to the Constitution and equal with proclamations does not consider the

68 A. Nollkaemper, cited above at note 38, pp. 153-154.

69 For more, see Takele Soboka, "The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia", Journal of Ethiopian Law, vol. 23(1) (2009).

consequence of ratifying treaties, including the obligation to perform international obligations in good faith, the interpretative obligation under Article 13(2) of the FDRE Constitution, and the non-possibility of invoking domestic laws to evade international obligations pursuant to Article 27 of the Vienna Convention on the Law of Treaties.

Some national constitutions have recognized the higher status of international agreements, empowering national courts to interpret domestic laws in conformity with international treaties. Article 94 of the Netherlands Constitution provides the supremacy of treaty obligations over domestic laws. It states, "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons." Yet, any treaty that conflicts with the Constitution needs to be approved by 2/3 majority vote of the Dutch Parliament before its acceptance into the international obligations.[70] The country's special engagement with international law can also be illustrated by the fact that Article 90 of the Constitution directs the government to promote the development of the international legal order. Accordingly, the Dutch Courts have been engaged in interpreting domestic laws in conformity with international law unless the legislature expressly intends to give effect to domestic law.[71] Another example is the Polish Constitution, whose Article 9 provides that the Republic of Poland shall respect international law binding upon it.[72]

In many states, the duty to conforming interpretation does not emanate from the explicit stipulations of national laws that secure a hierarchically higher position for international law. Rather, the duty derives from the need to conform to international obligations accepted by the state in question. This position assumes a hierarchically higher position of international law over national law, requiring the interpretation of national laws in conformity with international obligations. In recognition of this higher position of treaties,

70 The Constitution of the Kingdom of The Netherlands, 1815, Art 94, (as amended) <https://www.refworld.org/docid/3ae6b5730.html>, last visited on 12 December 2019.

71 G. Betlem and A. Nollkaemper, cited above at note 30, p. 574.

72 Constitution of the Republic of Poland, 2 April 1997, <https://www.refworld.org/docid/3ae6b5574.html>, last visited on 12 December 2019.

courts have been interpreting domestic laws to conform to international obligations under treaties. The Israeli Supreme Court in the *Kurtz and Letushinsky v. Kirschen*[73] case; the Ugandan Supreme Court in the *Attorney General v. Susan Kigula*[74] case; the Canadian Supreme Court in the *Her Majesty The Queen v. Lawrence R. Hape (R. v. Hape)*[75] case; the Botswana Court of Appeal in *Attorney-General of Botswana v. Dow*[76]; and the US Supreme Court in the *Murray v. Charming Betsy*[77] case have interpreted their domestic laws in a manner conforming with international obligations assumed by the respective countries.

Based on the above, it is possible to argue that the CCI, HoF and courts in Ethiopia can base their application of the principle of conforming interpretation on the need to conform national laws and actions to Ethiopia's obligations under international law. This is, however, an addition to and a consolidation of the interpretative obligation stipulated under Article 13(2) of the FDRE Constitution. Under normal circumstances, respect for treaties and avoidance of actions that contravene treaty obligations are assumed to be the natural consequence of accepting international obligations. For this, the duty to conforming interpretation can provide a good mechanism to respect or, at least, to avoid the violation of international agreements accepted by Ethiopia.

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73 *Kurtz and Letushinsky v. Kirschen (*Israeli Supreme Court, Israel, Supreme Court sitting as a Court of Civil Appeal, 1967) <http://courses.kvasaheim.com/ps376/briefs/cgmillerbrief3.pdf>, last visited on 15 December 2019.

74 *Susan Kigula & 416 Ors v. Attorney General* (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (10 June 2005) <https://ulii.org/ug/judgment/constitutional-court-uganda/2005/8>, last visited on 15 December 2019.

75 *R. v. Hape, [2007]* 2 S.C.R. 292, 2007 Supreme Court of Canada 26 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do>, last visited on 15 December 2019.

76 Attorney-General v Dow 1992 BLR 119 (CA) Botswana Court of Appeal (Full Bench), Lobatse <http://www.elaws.gov.bw/desplaylrpage.php?id=2692&dsp=2>, last visited on 15 December 2019.

77 *Murray v. The Charming Betsey*, 6 U.S. 64 (1804) <https://supreme.justia.com/cases/federal/us/6/64/>, last visited on 15 December 2019.

4.5. Other Foundations

The duty to interpret domestic laws in conformity with international obligations can also be founded on reasons of legislative intent and persuasive authority.[78] According to the legislative intent theory, courts or other authorities are expected to follow and be guided by the intention of the legislature while interpreting legislations. Moreover, when a state assumes or adopts international obligations, then two assumptions follow. First, the legislature intends earlier laws to conform to newly assumed international obligations where there are inconsistencies. Second, the legislature will not subsequently enact laws that violate the international obligations. These reasonable expectations can legitimatize courts' or other authorities' engagement in conforming interpretations. In the *Tsepe v The Independent Electoral Commission* case, the Supreme Court of Lesotho, for example, held that "where there is uncertainty as regards the terms of domestic legislation, a treaty becomes relevant, because there is a prima facie presumption that the legislature does not intend to act in breach of international law, including treaty obligations."[79]

On the other hand, the doctrine of persuasive authority provides a non-binding ground for national courts or other authorities to use international norms for interpretative purposes. In principle, courts or other authorities have no legal obligation to follow foreign laws, international law, or foreign judicial decisions.[80] In other words, it is the discretion, when the domestic laws permit, of courts to consult the norm or decision in a particular case. The ground for its application is therefore imbedded in the convincing nature of the substance of norms or decisions. Because of this, it is different from binding precedents or laws, which do not depend on persuasive authority. As such, this particular concept can be applied in the interpretation of domestic laws by referring to persuasive content of international norms. In the *Sabally v Inspector General of Police* case, the Gambian Supreme Court, for example,

78 A. Nollkaemper, cited above at note 38, pp. 154-157.

79 *Tsepe v Independent Electoral Commission and Others* (CIV/APN/135/2005) (CIV/APN/135/2005) [2005] LSHC 96 (27 April 2005) <https://lesotholii.org/ls/judgment/high-court/2005/96>, last visited on 15 December 2019 and A. Nollkaemper, cited above at note 38, p. 155.

80 C. Flanders, "Toward A Theory of Persuasive Authority", Oklahoma Law Review, vol. 62(55) (2009), p. 61.

argued that the principles enshrined under the African Charter on Human and Peoples Rights are 'pertinent and relevant to the instant case', despite lack of mandate to directly apply the Charter because the Charter had not been incorporated.[81]

V. Cases of Conflict between National and International Law

Article 13(2) of the FDRE Constitution provides an obligation to interpret the fundamental rights and freedoms in conformity with international norms. The literal interpretation of the Article gives the sense that it is necessary to interpret the fundamental rights and freedoms in conformity with the international human rights treaties. What if, however, the FDRE Constitution provides a better protection than the international norms? Should courts, CCI or HoF be compelled to interpret domestic laws in conformity with the international obligations? Simply, no! In my view, Article 13(2) is framed based on the assumption that human rights treaties provide better protection than domestic laws, so that national laws must be interpreted in conformity with the treaties to avoid lesser protection. In this manner, as one can understand from the Constitutional Minutes and Explanatory Notes, the purpose of the interpretative obligation is to prevent disqualification of rights and freedoms through misinterpretations.[82]

In line with its vanguard function, it is possible to say that Article 13(2) of the FDRE Constitution does not allow for weakening a domestically protected right on the account that national laws must be interpreted in conformity with international norms. If there were an opposite conclusion, the very purpose of the interpretative obligation would be defeated. The persuasiveness of this conclusion is also supported by international norms. Specifically, Article 5(2) of the ICCPR provides that:

> "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext

81 A. Nollkaemper, cited above at note 38, p. 156.

82 See, Ethiopian Constitutional Commission, Minute of the Ethiopian Constitution (1995), vol. 2, p. 22.

> that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

This means, the international norms do not override the existence of any better recognition of a right in domestic laws or customs. They even prohibit limitations to or derogations from the rights protected in domestic law or custom in the pretext that the international norms do not recognize them or they recognize them to a reduced extent.

In a similar way, in the *Minister of Home Affairs and Director-General of Home Affairs v Fourie et al v Minister of Home Affairs* case, which involved a conflict between the ICCPR and the South African Constitution, since the Constitution provides protection against discrimination on ground of sexual orientation, whereas the ICCPR does not explicitly identify sexual orientation as a protected ground against discrimination, the South African Constitutional Court declared that:

> "The decision of the UN Human Rights Committee is clearly distinguishable. The Committee held that there was no provision in the ICCPR which forbade discrimination on sexual orientation… Even more directly to the point, in contradistinction to the ICCPR, our Constitution explicitly proclaims the anti-discriminatory right which was held to lack support from the text of the ICCPR. Indeed, discrimination on the grounds of sexual orientation is expressly stated by our Constitution to be presumptively unfair. And, holds that… It would be a strange reading of the Constitution that utilized the principles of international human rights law to take away a guaranteed right. This would be the more so when the right concerned was openly, expressly and consciously adopted by the Constitutional Assembly as an integral part of the first of all rights mentioned in the Bill of Rights, namely, the right to equality."[83]

It is possible also to see hypothetical cases that involve conflict/difference between the human rights treaties and the FDRE Constitution. First, regarding the definition of a child, Article 1 of the CRC defines a child as every human being below the age of eighteen years unless under the law applicable

83 *Minister of Home Affairs and Director-General of Home Affairs v. Fourie et al v Minister of Home Affairs,* [2005] ZACC 19; ILDC 282 (ZA 2005) Para. 103 and 104 <http://www.saflii.org.za/za/cases/ZACC/2005/19.html>, last visited on 10 December 2019.

to the child, majority is attained earlier; whereas Article 36 of the FDRE Constitution does not define what a child means. The definition of a child in the FDRE Constitution must be, therefore, interpreted in conformity with Article 1 of the CRC.

Second, regarding minority rights, both the FDRE Constitution and ICCPR recognize the rights of minorities/ethnic groups. Yet, with different standing and extent, Article 27 of the ICCPR recognizes minority rights as individual rights and the rights are not framed in terms of empowering rights:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Whereas, Article 39 the FDRE Constitution recognizes both internal and external aspects of the right to self-determination of minority/ethnic groups to be claimed and exercised by a group (rather than by individual members of the group) and the right is accessible up on the fulfillment of the criteria set out in sub 5 of the same Article. Regarding internal self-determination, Articles 39(2) and (3) of the Constitution provide the right to language, culture, identity, autonomy/self-administration and equitable representation in the administration of the federation.

There are, therefore, differences between Article 39 of the FDRE Constitution and Article 27 of the ICCPR regarding minority/ethnic rights in terms of content, extent and right bearer, which leads to a conflict between the two laws. In this case, the duty to interpret Article 39 of the FDRE Constitution in conformity with Article 27 of the ICCPR will not be applied as enshrined under Article 13(2) of the FDRE Constitution, since Article 39 of the FDRE Constitution recognizes better rights than the right recognized under Article 27 of the ICCPR.

VI. Duty Bearers in Conforming Interpretation

Which organs of the state are under the duty to interpret domestic laws in conformity with international norms? To answer this, one needs to refer to different authoritative sources. To begin with, Article 13(2) of the FDRE Constitution imposes, without specifying the duty bearers, the duty to

interpret the fundamental rights and freedoms in conformity with the international instruments. By referring to the allocation of constitutional interpretative power, it is possible, however, to identify the duty bearers. According to Article 62(1) of the Constitution, the HoF has the power to interpret the Constitution, including the fundamental rights and freedoms. The CCI has also expertise function in conducting constitutional dispute investigations pursuant to Article 84(1) of the Constitution. Hence, both the CCI and HoF are under the duty to interpret the fundamental rights and freedoms in conformity with international instruments.

Whether the courts have the duty to interpret domestic laws in conformity with the international norms is, however, not clear. Pursuant to the Constitution, courts do not have the power to make constitutional interpretation. On top of this, the CCI Proclamation and the Consolidation of the HoF Proclamation have further excluded courts from sharing the interpretative obligation by providing institutional and operational frameworks for discharging the interpretative obligation. The former Proclamation even requires courts to submit cases to the CCI and HoF, if the courts believe that there is a need for constitutional interpretation. There are, however, constitutional arguments for conferring the mandate to courts. Among others, Article 13(1) of the Constitution obligates courts to respect and enforce fundamental rights and freedoms enshrined under Chapter III of the Constitution. Based on this constitutional stipulation, it has been claimed that courts need to have the power to interpret the fundamental rights and freedoms in order to effectively discharge their human rights obligations. Assefa Fiseha, for example, argues that courts should exercise the implicit power they have under Article 13(1) to interpret the fundamental rights and freedoms subject to the final say of CCI and HoF over interpretation.[84] The Federal Supreme Court Cassation Division, in *Berhanu Nurga v. Federal Anti-Corruption and Ethics Commission*[85], also said that, based on the content and spirit of Articles 13(1) & (2) of the FDRE Constitution, it is the responsibility of courts to enable the accused to benefit

84 Assefa Fiseha, "Constitutional Adjudication through Second Chamber in Ethiopia", Ethnopolitics, vol.16(3) (2017), p. 308.

85 *Berhanu Nurga v. Federal Anti-Corruption and Ethics Commission* (Case File No. 95921, Federal Supreme Court Cassation Division, 20 April 2015) Federal Supreme Court Cassation Division, vol. 18, p. 251.

from the constitutionally guaranteed right to be heard during trial proceedings at any court level.

Furthermore, in practice, the Federal Supreme Court Cassation Division has been using Article 13(2) of the FDRE Constitution to interpret domestic laws in conformity with international norms. Two cases are used for illustration.

Case 1: *Harar St. Michael Church v. Minyahleshal Abera*[86]

Minyahleshal Abera, ex-orthodox Christian, had built family grave within the compound of the Harari St. Michael Church based on the consent of the Church. After she converted, she no longer needed the family grave and for this, she wanted compensation for her investment in building the grave. Then, she sued the Church to pay her compensation in return for building the family grave. Consequently, the Harari High Court and Supreme Court awarded her ETB 50,153.40 pursuant to Article 1179 of the Ethiopian Civil Code. However, the Federal Supreme Court Cassation Division reversed the decisions stating that Minyahleshal had the privilege to build family grave within the compound of the Church because she was a member of the Church. So, when she voluntarily leaves the religion, she will not be entitled to compensation since it is not possible to claim compensation in a relationship based on privilege, which cannot be considered as any limitation to enjoyment of her right to freedom of religion pursuant to Article 13(2) of the FDRE Constitution and Article 18(1) of the ICCPR, Article 18 of the UDHR, and Article 27 of the FDRE Constitution.

Case 2: *Fantu Buche v. SNNP Regional State Prosecutor*[87]

After courts sentenced him to three years and Birr 1,000.00 fine on charges of fraud in SNNP Regional State, Fantu Buche lodged an appeal stating that his right to defend himself was violated by the courts. The Federal Supreme Court Cassation Division, after ascertaining the woreda court had only given

86 *Harar St. Michael Church v. Minyahleshal Abera* (Case File No. 85979, Federal Supreme Court Cassation Division, 24 March 2013), Federal Supreme Court Cassation Division, vol. 15, p. 286.

87 *Fantu Buche v. SNNP Regional State Prosecutor* (Case File No. 100860, Federal Supreme Court Cassation Division, 22 July 2015), Federal Supreme Court Cassation Division, vol. 15, p. 292.

the accused four days to present defense while he was in prison, held that it is the responsibility of courts according to Article 13(1) of the FDRE Constitution to respect and enforce the right to defend oneself against evidence presented by the prosecutor, as enshrined under Articles 20(4) and 13(2) of the Constitution and Article 14(3)(d) of the ICCPR. Accordingly, the Court reversed the lower courts' decision and remanded the case for fresh proceeding.

Nevertheless, the Federal Cassation Division's decision has never been consistent in using Article 13(2). In *Wolday Zeru and 71 other persons v. Ethiopian Revenues and Customs Authority*[88], for example, the Court failed to invoke the right to be heard and access to justice as enshrined under Articles 2(3) and 14 of the ICCPR through Article13(2) of the Constitution in relation to Regulation No. 155/2008 that bans judicial review of dismissal of an employee by the Director General of the Ethiopian Revenue and Customs Authority on account of corruption suspicion. Instead, depending merely on Proclamation No. 578/2008 and Regulation No. 155/2008, the Court held that courts have no judicial power in matters that are reserved exclusively to administrative decision. As noted earlier, in *Administrative Tribunal of the Civil Service Ministry v. Ethiopian Revenues and Customs Authority*, the CCI and HoF reversed this decision claiming the Regulation violated the right to be heard, access to justice, and equality as enshrined under the FDRE Constitution and the ICCPR. Unfortunately, since 2016, the Federal Supreme Court Cassation Division has also abandoned the practice of referring to Article 13(2) of the FDRE Constitution in its decisions whenever international treaties are relevant to the cases under its consideration. The decisions which explicitly refer to Article 13(2) of the Constitution are only five cases, one unpublished, the others published, two in Volume 15 and two in Volume 18 of Federal Supreme Court Cassation Division Decisions. Yet reference to international human rights, though limited in number and diminishing from time to time, has continued and

88 *Wolday Zeru and other 71 persons v. Ethiopian Revenues and Customs Authority* (Case File No. 51790, Federal Supreme Court Cassation Division, 24 May 2011), Federal Supreme Court Cassation Division, vol. 12, p. 482.

appeared in the latest decisions of the Court, as published in Volume 23 of the publication of Federal Supreme Court Cassation Division decisions.[89]

In addition to the FDRE Constitution, the duty to interpret domestic laws in conformity with international norms can be also derived from subsidiary laws. The CCI Proclamation and the Consolidation of the HoF Proclamation oblige the Council and the House to interpret the fundamental rights and freedoms in conformity with international norms. However, the latest CCI Proclamation (No. 798/2013), which repealed Proclamation No. 250/2001, has removed the duty to interpret the fundamental rights and freedoms in light of international norms. Still, the removal of the duty cannot extinguish the CCI's obligation to conduct conforming interpretation so long as the duty has a constitutional basis. The removal, therefore, could not diminish the use of conforming interpretation by excluding it from the purview of interpretative function.

Regarding courts' obligations under other national laws to apply the principle of conforming interpretation, there is no national law that explicitly obligate or empower courts to interpret domestic laws in conformity with international norms. The Federal Courts Proclamation No. 25/96, however, empowers Federal Courts to exercise jurisdiction over cases arising under, *inter alia*, federal laws and international treaties. This directly permits courts to decide cases submitted to them based on international treaties. In doing so, courts may face cases that arise under federal laws and international treaties, particularly having varied standards. Under normal circumstances, courts are expected to give indirect effect to international human rights treaties by applying conforming interpretation principle, at least, to avoid non-compliance of international obligations. Courts' obligation to exercise conforming interpretation under the subsidiary laws has not been supported by any judicial practice in Ethiopia, however. As shown above, the Federal Cassation Division's practice regarding conforming interpretation has been justified by reference to Article 13(2) of the FDRE Constitution.

89 *Amare Reta v. FDRE Attorney General* (Case File No. 151034, Federal Supreme Court Cassation Division, 7 November 2018), Federal Supreme Court Cassation Division Decisions, vol. 23, p. 432.

Conclusion

The increasing internationalization of issues, such as human rights, has brought about the need to conform national laws and actions to international standards. Among other means, the principle of conforming interpretation helps to integrate national laws and decisions with international standards. The principle is widely practiced throughout the world, particularly in regions characterized by advanced regional integration such as EU and in the area of human rights. Within such a larger picture, Ethiopia, as a member of the international community, has also incorporated the principle of conforming interpretation in its 1995 Constitution as a means to assign meanings to the fundamental rights and freedoms that are in conformity with international human rights treaties.

Unlike many states, there is an explicit constitutionally stipulated principle of conforming interpretation in Ethiopia. The origin of the principle is thus embedded in the constitutional arrangements rather than in the judicial practice, like the European experience. Its content also fits to the ideal meaning or definition of conforming interpretation as found in the relevant literature. In terms of clarity of the concept and its entrenchment, there seems to be no vagueness in the constitutionally incorporated principle. Along with this, the duty bearers are easily identifiable, except the courts. The CCI and HoF have the power to interpret the Constitution, including interpretation of constitutionally protected rights and freedoms in conformity with international human rights treaties. The courts' duty, on the other hand, can be inferred from the cumulative reading of their responsibility to respect and enforce the rights and freedoms enshrined under the FDRE Constitution and their inherent adjudicative/interpretative function. In fact, the Federal Supreme Court Cassation Division has identified itself as a duty bearer through its practice.

Nevertheless, the practical role of the principle in the promotion of fundamental rights and freedoms is very limited in Ethiopia due to the neglect of the principle in practice. Particularly, the CCI and HoF have barely put the principle into practice. In this regard, its role is almost non-existent. On the other hand, the Federal Supreme Court Cassation Division has put the principle into practice in five cases. Yet, the application of the principle suffers from irregularity, inconsistency and selectivity. Unfortunately, the principle

is even getting out of the Court's interpretative exercise. In the last five published volumes of the Federal Supreme Court Cassation Division Decisions, the Court has never used the principle, although there were cases that warrant the application of the principle. This does not mean that the principle is no longer useful as an instrument to promote the fundamental rights and freedoms. The potential usefulness of the principle remains unexplored. To reap its benefits, the Court needs to switch from an emphasis on principle of direct effect, such as supremacy clause, requirements of publication and hierarchy, towards the principle of conforming interpretation, ensure clarification, and systemic approach for the protection of human rights in Ethiopia.

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Enforcement of Constitutional Review Decisions in Ethiopia: Challenges and the Ways Out

Teguadda Alebachew[*]

Abstract

Effectiveness of constitutional review is dependent on execution of review decisions. Resistance by administrative bodies, courts and legislatures to execute review decisions, however, is not uncommon. This chapter explores enforcement of constitutional review decisions in Ethiopia focusing on enforcement challenges, availability of enforcement mechanisms including a coercive system, and institutional monitoring and follow-up of execution. To do this, empirical and desk research methods have been used. Analysis of relevant cases and interviews from the House of Federation and the Council of Constitutional Inquiry has also been undertaken. Accordingly, the finding indicates that resistance from courts and state bodies to execute decisions of the House has lately become a challenge. As there is no predetermined enforcement mechanism, the problem will likely continue. Resistance to enforce constitutional review decisions undermines the constitutional role of the House and the supremacy of the Constitution. A preparation of execution procedure including sanctioning is therefore important. Pending the formulation of a comprehensive procedure, the House needs to be progressive and creative to develop a case law that would increase its influence and control over the execution of its decisions. It is also important that the House avoids ambiguities in its decision to facilitate quick execution of decisions.

Introduction

Constitutional review is a widely used system of constitutionality control. According to a research by Tom Ginsburg and Mila Versteeg, constitutional

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review systems in the world grew from 38% in 1951 to 83% in 2011.[1] Constitutional review as a system of constitutionality control is acknowledged as an effective means of realizing constitutional rights and values.[2] The promise of a constitutional review system, however, is realized only upon the execution of review decisions. Whether review decisions are executed promptly and properly is very important in a constitutional system. This is because, for one thing, constitutional review decisions involve matters that have a broader legal and political significance for the overall constitutional system.[3] Moreover, a law or an act of a state body that has been found unconstitutional must not stay in effect burdening citizens.[4]

In Ethiopia, constitutional petitions and constitutional rulings are rising from time to time. However, resistance to implement the decisions has lately become a practical challenge. Given the rise in the number of constitutional petitions, the prompt and proper implementation of review decisions is particularly important.

This chapter aims to show challenges related to enforcement of constitutional review decisions that have been encountered in recent years and also explore whether Ethiopia's constitutional system has envisaged enforcement mechanisms to constitutional review decisions. It is specifically interested to find out: whether there is a specific enforcement procedure? Whether there is a body mandated to ensure or follow up the execution of constitutional review decisions? Whether there exists a coercive system of execution? And what role do the Council of Constitutional Inquiry (CCI) and House of the Federation (HoF) have in ensuring enforcement of their decisions? Does the HoF provide, in its decision, a specification on how and who shall execute its decision? And what is the experience in other constitutional systems?

1 T. Ginsburg and M. Versteeg, "Why Do Countries Adopt Constitutional Review?", Journal of Law, Economics and Organization (2014), p. 2.

2 G. Dannemann, "Constitutional Complaints: The European Perspective", the International and Comparative Law Quarterly, Vol. 43(1) (1994), p. 142.

3 S. Bross, Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany, p. 2, venice.coe.int/webforms/documents/default.aspx?pdffile= CDL-JU(2009)001-e.

4 *Id.*, p. 6.

In answering these questions, a combination of empirical and desk research methods has been used. Analysis of instances of reluctance to enforce decisions of the House and interviews with relevant persons in the House has been undertaken.

This chapter has five sections. The first section defines terminologies so as to delimit the scope of the discussion. As a way of setting the background, the second section describes the system of constitutional review in Ethiopia and discusses the nature and effect of the decisions of the HoF as they both impact the success of the execution of decisions. The challenges with regard to implementation of constitutional review decisions, in Ethiopia and in selected other jurisdictions, are discussed in section three. The fourth section focuses on the implementation mechanisms in Ethiopia and in other jurisdictions. The chapter ends with a conclusion.

I. Defining Key Terms

Constitutional review bodies, in the course of interpreting a constitution, may give a variety of decisions. They may declare a challenged law or an act of a state body unconstitutional or may make other decisions including orders, resolutions, directions, guidelines and remedies. In this chapter the term constitutional review, or interpretive decision, refers to any of the above forms of decisions which the HoF may render and which are binding up on the addressees.

In describing the situation that arises after a constitutional review is rendered, it is common to see terminologies such as "implementation", "execution", "compliance" and "enforcement." According to the Cambridge dictionary, these terminologies refer to very closely related concepts. *Implementation* is an act of putting a plan into action; *Execution* is carrying out of a plan or order or a course of action; *compliance* is an action or fact of complying with a wish or a command; and *enforcement* is the act of compelling observance or compliance with a law, rule or obligation. Yet, the use of each term may be more appropriate depending on the type of decision. For instance, the term *compliance* may be more appropriate to describe the enforcement of a decision of a review body that imposes a negative than positive obligation on the recipient. Isaac Unah in his chapter discussing the impact of decisions of the U.S. Supreme Court described the

term *implementation* as "the process of putting in to effect policies or orders announced in Supreme Court decisions". It involves what happens after the Supreme Court speaks and, in particular, the set of activities and policy projects developed to ensure that the Court's decisions and orders achieve their desired effect.[5] Yet, *implementation* of constitutional review decisions may also be used to refer to the broader concept of realization of the essence of the review decision beyond compliance and execution in specific cases. It may hence refer to the impact of the decisions at a larger scale beyond the direct execution of the decisions. However, this chapter focuses only on the narrow meaning of the term. Generally, the terms "*implementation*", "*execution*" "*compliance*", and "*enforcement*" are used interchangeably to the extent each describes the scope and objective of this chapter.

II. The Ethiopian Constitutional Review System

2.1 House of Federation as Constitutional Review Body

In Ethiopia, constitutional review power is vested in the HoF, which is the upper House of the Parliament.[6] The HoF is composed of representatives of nations, nationalities and peoples in Ethiopia. Each nation, nationality or people will have one member and an additional one member for an additional one million population.[7] The members are appointed by regional councils.[8] In practice, regional councils elect representatives from among regional government officials. As such, the HoF, as a review body, is not separately established from the other branches of the government. Although a review power resides in the HoF, the CCI provides the House with a professional assistance. The CCI is an advisory body composed of eleven members, most of whom are legal professionals.[9] Of the eleven members, six of them are appointed by the President of the Republic upon the recommendation of the House of People's Representatives (HPR), while three are appointed by the HoF from among its members.[10] The President

5 I. Unah, The Supreme Court in American Politics, (2009), p. 166.

6 The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Article 61(1). See also article 83(1).

7 *Id.*, Article 61(1).

8 *Id.*, Article 61(2).

9 *Id.*, Article 82(1) & (2).

10 *Ibid.*

and Vice-President of the Federal Supreme Court, on the other hand, are *ex-officio* members and also serve as the President and Vice-President of the CCI.[11] The Council receives and investigates constitutional petitions, and if it takes a view that the petition merits constitutional interpretation, it refers the petition to the House along with its recommendation.[12] However, if the CCI takes a view that the petition does not merit a constitutional review, it can reject the petition. In this, the petitioner retains a right to appeal to the HoF against a decision of the CCI.[13] Accordingly, the ultimate power to decide on whether to proceed or not with such petition remains with the HoF. If a petition is filed directly to the HoF instead of the CCI, the House must refer the petition back to the CCI.[14] The HoF, once it has received recommendations from the CCI, gives final interpretive decision adopting, rejecting or modifying the CCI's recommendations.[15] It can thus be said that, in Ethiopia, constitutional review is somehow a shared responsibility between the HoF and the CCI. In fact, in practice, only in a few occasions did the HoF depart from recommendations of the CCI.[16] In the majority of the cases, the HoF has merely adopted interpretive recommendations of the CCI.

11 *Ibid.*

12 *Id.*, Article 84(1) & (3).

13 *Id.*, Article 83(3)(a). See also The Proclamation to Consolidate the Powers and Function of the House of Federation of the Federal Democratic Republic of Ethiopia, No. 251/2001, Article 5(2).

14 Proclamation No. 251/2001, cited above at note 13, Article 6.

15 *Ibid.*

16 Until a year ago, the HoF declined only one recommendation from among 44 cases referred to it by the CCI. This means that the HoF automatically approved 43 out of the 44 recommendations suggested by the CCI as needing constitutional interpretation. On the other hand, the HoF gave interpretive decision on one case, which was rejected by the CCI as lacking a constitutional cause following an appeal by the applicant (Dr. Ashber Woldgiorgis Case). Therefore, the House has given interpretive decisions on a total of 44 cases. Recently, the CCI has forwarded 35 more recommendations to the HoF. The HoF has, however, rejected 11 of the recommendations and the other 24 cases are pending before it. Interview with Rahel Birhanu, Director of Case Flow Management of the CCI, 19 November 2019, Addis Ababa, Ethiopia.

2.2. Nature of Constitutional Review Decisions of the HoF

The nature of review decisions is among the important elements that determine the execution of decisions. Whether review decisions are commanding or permissive, engaging or mere declaration of constitutional status of a legislative or executive act, and so on determine the prospect of execution. Whether the review body is empowered or not to issue a mandatory order, injunctions and damages, for example, is important in determining the success of the implementation of the decisions.

As stated under Article 84(2) of the FDRE Constitution, the HoF is mandated to test the constitutionality of laws enacted by both federal and state legislative bodies. Beyond what is generally stated under Article 84(2), the Proclamation to Establish the Council of Constitutional Inquiry has somehow extended the power of the HoF also to review constitutionality of any customary practices, decisions of government organs and government officials.[17] A "Government organ" in this case is meant to refer to the legislative, executive and judicial organs both at federal and state levels.[18] It also rules over cases of human rights violations resulting from unconstitutional actions of state bodies or officials.[19] In fact, nearly all petitions submitted to the CCI/HoF constitute a petition against alleged violation of human rights. The majority of the petitions object final administrative and regular court decisions. Only in few cases was the HoF presented with petitions related to constitutionality of laws of the parliament.[20] In the majority of the cases, the HoF ruled over the challenged actions without challenging the law based on which courts or administrative organs have acted. As such, the HoF is often blamed for functioning as the highest appeal court rather than as a constitutional review body.

17 A Proclamation to Re-Enact for the Strengthening and Specifying the Powers and Duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia, No. 798/2013, Article 3(1).

18 *Id.*, Article 2(6).

19 *Id.*, Article 5(1).

20 Adem Abebe, "Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia", in C. M. Fombad (ed.), Constitutional Adjudication in Africa (2017), No page number is available, <http://oxcon.ouplaw.com/view/10.1093/law/9780198810216.001.0001/law-9780198810216-chapter-9>, last visited on 12 November 2019.

The HoF does not have *ex-ante* review power. Neither does it have a power to review the constitutionality of a promulgated law in *abstracto*. It only sees constitutionality of laws as applied in practice. This is clear from Article 83 (2) & (3) of the Constitution and Article 5(3) of the Proclamation for the Establishment of the CCI. Access to the CCI is limited to "the interested party" who is directly affected by the law as applied or to referrals from a court where the constitutionality of a law is contested in a case before it.[21] Where the constitutionality of a law or an action of a government body is contested outside the regular court, application to the HoF is possible only on the final decision of the state body having competence to render final decision.[22] In Ethiopia, there is generally a restricted access to the HoF. That has also limited the reach and the type of decisions of the House.

The HoF, if it discovers a law to be unconstitutional, it can void the law as a whole, a part or a provision of it.[23] Also, before it declares the law unconstitutional, the HoF may require the federal or state legislative bodies to amend, modify or replace a law within six months pending the final decision.[24] Whether the HoF can issue reparation when it finds a violation of human rights is not stated in the Constitution. Nor is it addressed under the two relevant proclamations detailing the powers and responsibilities of the HoF and CCI. The CCI and the HoF have so far never issued such a remedy.[25] Whether the HoF can issue an interlocutory decision in the form of an injunction order has also not been addressed in any of the relevant laws or the Constitution. Recently, however, the HoF, following a persistent demand from petitioners, has prepared a directive that guides it to issue an injunction when it foresees a severe disadvantage, imminent violence or a public interest at risk.[26] Accordingly, the HoF now issues an injunction

21 Proc. No 798/2013, cited above at note 17, Article 4(1).

22 *Id.*, Article 5(2).

23 Proclamation No.251/2001, cited above at note 17, Article 12.

24 *Id.*, Article 16(2).

25 Adem Abebe, cited above at note 20.

26 Directive No 1/2017(2009 E.C), Article 13. The Directive is published and is available at Directorate of the Constitutional Interpretation and Identity Issues of the House of Federation.

order pending its final decision.[27] The CCI as well, following a persistent demand from the petitioners, has started issuing such an order.[28]

The law states that the content of the decision of the HoF shall contain the subject of the constitutional dispute, the justification for a constitutional interpretation and the final decision.[29] However, it is not clear from the law what kind of final decision the HoF would give. In practice, the nature of the final decision is largely limited to a declaratory decision, i.e. simply declaring an act of a state body or a decision of a court unconstitutional. Beyond declaring the challenged act unconstitutional, it is not common to see in the final decision of the HoF damages, directions, guidelines or specific orders that demand the addressee to take follow-up measures. However, the HoF, in its recent decision declaring Article 37 of the Ethiopian Regulation No. 155/2008 (a regulation issued by the Council of Ministers concerning the administration of employees of Ethiopian Revenues and Customs Authority) unconstitutional, interestingly ordered the Council of Ministers to amend the specific provision which was found to be contrary to Articles 25 and 37(1) of the Constitution. This decision, however, does not provide a time frame and a guideline for the Council of Ministers to act. The provision of a timeframe, in particular, has the advantage of forcing the recipient to respond to the order promptly. Though we have not yet heard a resistance from the Council of Ministers to comply with the order, it has now been seven months, since the HoF made the order, without the provision being amended.

The HoF – as a constitutional review body – generally exercises self-restraint to develop a case law that would expand the nature of its decisions. The Constitutional Court of Benin, which is an emerging constitutional review body in Africa, has a better experience in this regard. The Benin Constitutional Court, despite the limited powers it has under the law, has managed to expand its impact and influence through its decisions. Whether the Court can issue orders and injunctions beyond declaring

27 Interview with Ato Muleye Welelaw, former Director of Directorate of the Constitutional Interpretation and Identity Issues of the House of Federation, 12 December 2019, Addis Ababa, Ethiopia.

28 Interview with Rahel Birhanu, cited above at note 16.

29 Proclamation No.251/2001, cited above at note 13, Article 15.

unconstitutionality is not stated in the Constitution and other laws.[30] The Constitutional Court has also defended the position that the principle of separation of power forbids the Court from issuing an order against state bodies.[31] The Court, however, gradually changed its position and started issuing orders such as a reinstatement orders, reparation for human rights violations, order of release of wrongly convicted or imprisoned persons, and injunction orders. For instance, the Court, following the failure of the Parliament to comply with its initial decision in DCC-03-077 (which declared the suspension of the election of the Bureau of National Assembly unconstitutional), in its later decision (DCC 03-078, 2003), ordered the Parliament to take specific measures.[32] In its later decision, the Court ordered the Parliament to resume the election process within 48 hours of the decision of the Court; if not, the incumbent oldest Member shall be replaced by another oldest Member of the Parliament in accordance with the parliament's rules of procedure.[33] In another similar case (DCC 04-065, 2004), the Court ordered the parliament to undertake the election within 72 hours of the decision of the Court.[34]

The Court (in DCC 02-052 of 31 May 2002), contrary to its previous position in DCC 02-037 in which it said the Court could not order damage and reparation, has made a ground-breaking decision ordering compensation for the victim of a violation of human rights resulting from the unconstitutional act of a state body.[35] In another case (in DCC 02-002),

30 H. S. Adjolohoun, "Centralized Model of Constitutional Adjudication: The Constitutional Court of Benin", in C. M. Fombad (ed), Constitutional Adjudication in Africa, (2017), no page number is available, <http://oxcon.ouplaw.com/view/10.1093/law/9780198810216.001.0001/law-9780198810216-chapter-9>, last visited on 12 November 2018.

31 *Ibid.*

32 K. Bado, "Judicial Review and Democratization in Francophone West Africa: The Case of Benin", **VRÜ** Verfassung und Recht in Übersee, vol. 51 (2018), p. 231.

33 *Ibid.*

34 *Ibid.*

35 See generally A. Rotman, "Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights", Harv. Hum. Rts. J., vol. 17 (2004), p. 304.

the Court made a judgment ordering the prison center to improve the treatment of the applicant in prison.[36]

In Germany, despite the absence of an elaborate provision in the Basic Law stipulating the specific power of the Constitutional Court, the Constitutional Court Act of 1967 has provided detailed provisions. Accordingly, in Germany, there is relative clarity on the scope of the power of the Constitutional Court and the kind of decision the Court can make. Irrespective of the type of the proceeding (whether it is a concrete review, an abstract review, or a constitutional complaint proceeding), whenever the constitutionality of a statute comes into question, the Court may render the following decisions as regards the law: null and void, incompatible, compatible, and declaring the constitutional interpretation of a statute.[37] In a decision declaring a law unconstitutional, the Court can issue guidelines, principles, directions and orders.[38] Good examples often mentioned are the Party Finance case II and the Abortion case I. In the Party Finance Case II, the Court after declaring the law unconstitutional indicated that the Parliament needed to make a new law that allows parties with 0.5 % votes in national election to receive state funding.[39] As such, the Court not only stated a follow up action, it provided the legislature a substantive standard by stating the constitutionally protected minimum threshold of votes for parties to be eligible for funding. In the Abortion Case I as well, the Court suggested content for the new law to be enacted by the legislature by indicating grounds for abortion and prohibiting abortion on demand.[40] In some instances, the Court also provided an interim legislative solution or an executive order pending the legislation by the Parliament. For instance, in 1991, in its decision invalidating the provision of a law, which stated that the name of the husband would automatically appear as a family name where the spouses had not indicated another family name, the Court provided an

36 *Id.*, p. 302.

37 Federal Constitutional Court Act of Germany, 1967, Article 31(2).

38 D. P. Kommers and R. A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany, (3rd ed., 2012), p. 37.

39 *Ibid.*

40 *Id.*, pp. 380 & 37.

interim legislation saying that 'if the spouses do not choose a common family name, they both retain their respective names for the time being.'[41]

The Court, in its review power to declare a political party unconstitutional, also gave a decision that required a follow up action by concerned state bodies. In such proceedings, the Court gives decisions such as confiscation of property of the party, forfeiture of rights of leaders or members of the party or prohibition of establishment of a substitute party.

Pending the final decision, the Court can also order an injunction order as per Articles 32 and 25(3) of the Constitutional Court Act. Moreover, according to Article 38(1) of the Act, the Court can also issue order of seizure and search in accordance with the criminal procedure law.

2.3. Effects of Constitutional Review Decisions

Whether a constitutional review decision has a force of law and binds everyone also determines the manner of execution of the decision. In some constitutional systems, the binding nature of constitutional review decisions is acknowledged at a constitutional level.[42] However, in Ethiopia, the Constitution is generally silent about the effect of the interpretative decision of the HoF. The matter, however, has been addressed by Proclamation No. 251/2001. The decision of the HoF is final and has a binding effect on all state organs and in all similar future cases.[43] The decisions of the HoF are equally binding upon state bodies at regional level. It is not, however, addressed in this law whether the reasoning part of the judgment is equally binding. Unless stated otherwise in the decision, the review decision of the HoF will be binding as of the date of the delivery of the judgment.[44] This indicates that the decision of the HoF, unless it states a specific date otherwise, will have a prospective effect. This implies that the HoF enjoys a discretionary power in determining the effective date of the decision. The

41 See note 3, citing BVerfGE 10, 59, p. 7.

42 See for instance, The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 24.

43 Proclamation No. 251/2001, cited above at note 13, Article 11(1) & Article 56(1).

44 *Id.*, Article 16(1).

judgments of the HoF are also required to be published in a special Journal.[45]

In any democratic system based on the rule of law, the recognition that the decision of review bodies is binding should be enough to oblige the recipients to execute. In practice, however, such legal recognition has never been sufficient to ensure the execution of such decisions.

III. Enforcement of Constitutional Review Decisions: Exploring the Challenges

Constitutional recognition of rights does not by itself ensure realization of rights. A mechanism that can translate them into reality is, therefore, necessary. Constitutional review is one such mechanism for enforcement of constitutionally protected rights. A system of constitutional review is an important aspect of any credible system of constitutionalism.[46] To this end, most constitutions have provided a review mechanism to control the conformity of laws and decisions with the standards, norms and contents of constitutionally protected rights and freedoms.[47] Constitutional review is particularly significant to enforce the human rights provisions, which are the major and most important component of constitutions in the modern era.

45 *Id*., Article 11(2). In Germany, decision of the Constitutional Court declaring a law compatible or incompatible with the Basic Law is required to be published in the Federal Law Gazette by the Federal Ministry of Justice and Consumer Protection. As well, in Benin the decision is required to be published in the official Gazette. See the Organic Law of the Constitutional Court of Benin, 91-009 of March 1991, Article 28.

46 H. Prempeh, "Marbury in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa", Tulane Law Review, vol. 80(4) (2006), p. 80; Seton Hall Public Law Research Paper No. 1018752. <https://ssrn.com/abstract=1018752>, last visited on 6 December 2017.

47 G Dannemann, cited above at note 2, p. 142. Nevertheless, in many countries - such as in the United Kingdom, judicial review of acts of administration and public authority is severely limited, and some States (such as the Netherlands) prohibit judicial review of the constitutionality of Acts of Parliament unless it is contrary to international treaty obligations such as the European Convention on Human Rights. See article 120 of the Grondwet (Dutch Constitution).

Nevertheless, a constitutional review system is meaningful to the extent review decisions are complied with and executed properly and timely. In the absence of execution, the whole system of constitutional review would remain an empty gesture. Unconstitutional acts shall not exist and be applied in any constitutional system. The Ethiopian Constitution under Article 9 (1) states that any law, customary practice or a decision of a state organ which contravenes the Constitution shall be of no effect. To this end, norms or actions which are declared unconstitutional must not stay in effect. A decision of a review body declaring an act contrary to the Constitution must be complied with promptly or as required in the decision.

However, despite this, incidence of non-compliance and resistance to comply with such decisions is common across democracies and constitutional review systems. Yet, the extent and frequency of non-compliance and resistance may not be the same across democracies and systems of constitutional review. For instance, in a decentralized constitutional review system, given that such a system relies conveniently on the decision of regular courts,[48] the problem may not be the same as in a centralized system. Where constitutional review is exercised by a judicial body, the judiciary can execute its own decision through law enforcement.[49] However, in a centralized system, as the review body is separate from the regular court structure, the review body may not command the regular law enforcement. Therefore, in the later system, unless a separate mechanism is provided, there will be difficulty in executing review decisions. Besides, regular courts may not be happy to see their decisions challenged by another body which is separately situated, and hence may not enthusiastically enforce review decisions. Likewise, the extent and frequency of the challenge may not be the same across democracies. In democracies- where rule of law is the culture among citizens and government officials, the challenge may be less than in other systems where there is a weak culture of rule of law.

48 P Paczolay, Experience of the Execution of Court's Decision Declaring Legislative Omission in Hungary, a paper presented in a Conference on the 'Execution Decisions of Constitutional Courts: A Cornerstone of the Process of Implementation of Constitutional Justice', Vince Commission in Collaboration with the Constitutional Court of Azerbaijan 14-15, July 2008, p. 1.

49 *Ibid.*

Constitutional review bodies, as protectors of the Constitution, may give different decisions, which in turn require actions of the other branches of government. When it declares unconstitutional an act of the legislature, the judiciary or the executive, a constitutional review body does not make new law or a decision replacing the act which it declared unconstitutional. As a result, unless a specific procedure is available, the execution of review decisions may depend on the commitment and willingness of other branches of the state or on the general legal and political culture. Even in a decentralized system, the regular law enforcement may not be appropriate to ensure the execution of review decisions by state bodies. For instance, if the legislature refuses to amend or repeal a law declared unconstitutional by a review body, it may not be appropriate to employ the regular law enforcement to force the legislature comply with decision. Therefore, the execution challenge of review decisions is also attached on the very nature of such decisions.

Generally, specific mechanisms that make sure that not only individuals but also state bodies execute review decisions are necessary in any constitutional review system.

3.1. Enforcement Challenges in Other Jurisdictions: An Overview

The problem of implementation of constitutional review decisions is a common phenomenon across the world. It has happened in every system irrespective of the type of the constitutional review system and level of democracy. A disregard by judges, administrators, and legislators of a constitutional review decision is abundant in many constitutional systems. Regardless of the tremendous role and influence of the U.S. Supreme Court in American constitutionalism, the implementation of its decisions has, for instance, sustained, at several occasions, a resistance from judges, administrators and legislators. This is particularly so against the decisions of the Court in 1950s to 1960s.[50] Despite the decision of the *Supreme Court in Brown v. Board of Education*, schools in several states in the South stayed segregated for more than ten years after the decision.[51] The same has

50 L Baum, "The Implementation of the U.S. Supreme Court Decisions", in R. Ralf and G. Thomas (ed.), Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court, (Revised edition, 2016), p. 193.

51 *Ibid.*

happened to other decisions of the Court in this period including the decision of the Court regarding the practice of religion in public schools and the rights of a criminal suspect.[52] Though not comparable with those times, problems of implementation still exist in the USA.[53] In France, as well, studies have shown similar challenges concerning the decisions of the Constitutional Council.[54] There were also times when the execution of the decision of the Constitutional Court of Germany, which is now the most reputable and influential institution in Germany, was resisted and delayed by the legislature. For instance, with regard to the decision of the Court declaring unconstitutional the amended section 1628 of the Civil Code, which used to give the father a casting vote to decide on parental custody when the two parents were unable to come to an agreement on the matter[55], the legislature was hesitant to actively react to the decision of the Court. The legislature responded to the decision of the Court in 1980, twenty years after the decision of the Court.[56]

The German Constitutional Court, however, has played a great role in making sure that its decisions are executed. The Court in accordance with Article 35 of the Federal Constitutional Court Act is empowered to dictate the manner and the responsible entity. The Court, hence, can choose the manner of and body responsible for executing its decision as it sees fit to the individual case. The Court further controls the execution of its decision through the grievance procedure. As the Constitutional Court doesn't execute its own decision, an entity or individual in whose favor the decision was passed may take a view that the decision has not been executed as stated by the Court. To this end, the Court - in one of its decisions (in BVerfGE 2, 139) - has developed a grievance procedure.[57] Accordingly, any person or an

52 *Ibid.*

53 *Ibid.*

54 Aboudou Latif Sidi (Directeur des études juridiques et de la gestion des recours à la Cour constitutionnelle), La Mise A Execution Effective Des Decisions De La Cour Constitutionnelle, Seminaire Sur 'La Cour Constitutionnelle Et Le Pouvoir Judiciaire' Date: Du 18 au 19 décembre 2017 Lieu: Hôtel du La, Citing Guillaume DRAGO's "L'exécution des décisions du Conseil constitutionnel: l'efficacité du contrôle de constitutionnalité des lois" (translated using DeepL translation), p. 1.

55 See note 3, p. 7.

56 *Ibid.*

57 See note 3 citing BVerfGE 2, 139, p. 5.

entity to whose favor a decision has been made may file a complaint to the Court if he/she has a view that the decision has not been executed in accordance with the specifics of the Court's decision. The procedure will be summoned when the Court's decision has provided a specific solution or detailed set of procedure for the execution or has not given the recipient discretion to determine the manner of execution. However, if the decision of the Court has provided autonomy to the executor, the relevant regular procedure applies (e.g. action to oppose execution).[58]

The Constitutional Court of Germany has gone further by indicating a punishment for failing to comply or intentionally obstruct the enforcement of the decision in two party dissolution cases. In the Socialist Reich Party Case in 1952 and the German Communist Party Case in 1956, the Court indicated in its decision that any intentional infringement of the decision of the Court or impediment of the effort to enforce the decision is punishable with six months' imprisonment.[59] In another case, in order to persuade the legislature to implement the decision promptly, the Court set conditions. In a case concerning a civil service law and a law dealing with federal judges, the Court ordered for a payment to be made to judges and civil servants if the parliament failed to enact the law within the deadline set by the Court.[60]

In Benin, the Constitutional Court, since its establishment in 1993, has made decisions which restrained government power and promote rule of law and human rights. It has also on several occasions resisted an incumbent constitutional amendment proposal, which is the common challenge in Africa.[61] It has also served as a protector of human rights through resolving several cases of human rights violations.[62] Citizens have increasingly shown their confidence in the Court by seizing the Court's jurisdiction. It is generally reported that there is a better compliance and implementation of the decisions of the Constitutional Court in Benin.[63] Yet, its decisions have also sustained implementation challenges. Aboudou Latif

58 *Id.*, p. 6.

59 The Communist Party Case (1956) & The Socialist Reich Party Case (1952).

60 See note 3 citing BVerfGE 99, 300 (304), p. 7.

61 Bado, cited above at note 32, p. 216.

62 *Ibid.*

63 *Id.*, p. 226. Also see Adjolohoun, cited above at note 30.

Sidi (Director of Legal Studies and Recourse Management of the Constitutional Court of Benin) once stated that:

> "We can without hesitation affirm that the Achilles' heel of this jurisdiction is the problem related to the execution of its decisions by both the public authorities and the individuals. The phenomenon is so obvious that it inspires, on a theoretical level, many doctrinal writings and, on a practical level, exchanges between the constitutional judge and his different interlocutors as attested by this seminar."[64]

An attempt to disregard and resist the decision of the Court has happened in some cases. For instance, in the decision DCC- 03-077, concerning the suspension of election of Bureau of the Parliament by the oldest Member of the Parliament, the Court declared the suspension unconstitutional.[65] The oldest Member of the Parliament sustained the suspension despite the decision of the Court declaring the action unconstitutional.[66] This oldest Member of the Parliament resisted compliance claiming that the Court had not made clear subsequent measures. Then the applicants took the case back to the Court, requesting for specific subsequent measures. The Court consequently asserted that the continuation of the suspension or the failure to proceed with the election is a non-compliance with the Court's first decision.[67] The Court also stated, as discussed above, the follow up actions to be taken by the Parliament. The second decision of the Court was, however, observed by the Parliament.[68] Similarly, in 2008 in DCC 08-072, the Parliament resisted the decision of the Court declaring unconstitutional the decision of the Parliament postponing, without any future date, the adoption of a bill enabling the government to conclude loan for coastal erosion projects.[69] The Parliament refused to proceed with the decision of the Court arguing that the decision of the Court was contrary to the

64 Sidi, cited above at note 54, p. 3. (*Translated using DeepL translator*).

65 Bado, cited above at note 32, p. 231.

66 *Ibid.*

67 *Ibid.*

68 Adjolohoun, cited above at note 30, p. 30.

69 *Ibid.*

principle of separation of power.[70] The Parliament finally approved the bill in accordance with the specification of the Court.[71]

There were also few instances of resistance by the executive branch. The first such incident relates to a case of failure of the government to release an imprisoned person whose conviction and sentence had been declared unconstitutional by the Court.[72] The other case relates to the government's failure to pay reparation for victims of human rights violations.[73] Regarding compliance by the regular judiciary, the researcher was not able to find cases of resistance. Yet, generally, regular Courts are said to have good response to the Constitutional Court's decision.[74] In enforcing the decision of the Constitutional Court ordering compensation for human rights violations, the lower court had condemned the Beninese State and ordered a sum of five million CFA francs as compensation to the individual victim of violation of human rights.[75]

The Court at various occasions has indicated that the *res judicata* effect of the decision of the Court, based on Article 124 of the Constitution, imposes a positive and negative obligation on the addressee to enforce the decision of the Court.[76] Accordingly, addressees, depending on the type of the order issued in the Court's decision, are bound to enforce the order by taking the necessary measure or by refraining from their unconstitutional act. The Court, despite a temptation by state bodies to disregard its decision, and often seen defending its decision, makes sure that its decisions are executed.[77] The Court also affirmed that the principle of *res judicata* indicates that 'what has been judged cannot be judged again; what has been

70 *Ibid.*

71 *Ibid.*

72 Bado, cited above at note 32, p. 226.

73 *Ibid.*

74 Sidi, cited above at note 54, p. 13.

75 *Ibid.*

76 *Id.*, p. 10-11.

77 Adjolohoun, cited above at note 30.

judged cannot be disregarded; and what has been judged must be enforced.'[78]

3.2. Enforcement Challenge in Ethiopia

In Ethiopia, constitutional review is an experience only as old as the FDRE Constitution. Even after the introduction of the system, there were very limited petitions and, therefore, few constitutional rulings until recently. Until 2014/2015, there were only three constitutional rulings given by the HoF. Recently, however, the number of constitutional petitions filed to the CCI/HoF has risen extraordinarily. It has risen, for instance, from 2,610 in 2017[79] to 3,350 in 2018[80] and to 4,894 by mid-November 2019.[81] The number of constitutional rulings has also increased. From only three constitutional rulings in 2014/15, the total number of constitutional rulings has now reached 44.[82]

Yet, despite the rising number of petitions and rulings, resistance to execute the rulings promptly and in accordance with the decision has lately become a challenge and constitutes a future concern to the HoF.[83] Citizens in whose favor a decision has been given have to keep coming back to the HoF to file

78 Sidi, cited above at note 54, p. 12.

79 Gebremeskel Hailu and Teguadda Alebachew, "Increasing Constitutional Complaints in Ethiopia: Exploring the Challenges", Hawassa University Journal of Law, vol.2 (2018), pp. 61-62.

80 በኢ. ፌ. ዴ. ሪ. የሕገመንግሥት ጉዳዮች አጣሪ ጉባዔ ጽ/ቤት የተዘጋጀ, የሕገመንግሥት ጉዳዮች አጣሪ ጉባዔ የውሳኔ ሀሳቦች, ሕገ መንግሥታዊ ጆርናል, ቅፅ 1፣ ቁጥር 1, page 3, available at https://www.cci.gov.et/wp-content/uploads/2019/01/CCI-Journal-2011.pdf.

81 Interview with Rahel, cited above at note 16.

82 From the total of 4,894 petitions submitted to the CCI until 19 November 2019, while a total of 2,538 submissions have been rejected by the CCI for lack of a constitutional cause, CCI has provided a recommendation on a total of 79 cases. The remaining 2,277 submissions are still pending awaiting the decision of the CCI on admissibility. From among the 79 cases on which CCI submitted a recommendation to the HoF, the House gave a constitutional ruling on 44 cases, rejected 11 and the remaining 24 cases are still waiting for the final ruling of the House. *Ibid.*

83 Interview with Ato Muleye Welelaw, cited above at note 27. Also interview with Ato Yawekal Bekele, Director (Current) of the Constitutional Interpretation and Identity Issues Directorate of the HoF, on 12 and 13 December 2019, Addis Ababa, Ethiopia. See also Teguadda and Gebremeskel, cited above at note 79, p. 67.

a complaint of non-compliance and non-execution. Resistance to comply with the decisions of the HoF comes from both courts and administrative bodies. Yet, in a majority of the cases, the resistance comes from courts.[84] Courts are usually unhappy to execute a decision of the HoF that declares their original determinations unconstitutional.[85] Courts also have a view that the decision of the HoF in some cases meddle with the court's jurisdiction.[86] Because the HoF has not yet sufficiently dealt with laws of the parliament, the compliance of the Parliament is not yet tested in Ethiopia.

For instance, in a case between *W/ro Azeb Tufa v. Alemyahu Mingstu* (2016) the Adama Zone High Court refused to execute the decision of the HoF claiming that the decision was sent to it without the signatures of all members of the HoF. However, according to the HoF, the claim was unfounded, as there was no law which required the decision to be signed by all of the 159 members of the House.[87] Later, the HoF sent a letter to the Zone High Court demanding the court to execute the decision reminding that the decision of the House is binding on all state bodies.[88] Nine months after the decision was rendered, W/ro Azeb filed another complaint to the HoF.[89] In her letter, she complained that after the execution was already initiated by the Zone High Court, following a request by the defendant, the Federal Supreme Court Cassation Division issued an injunction order against the execution of the decision of the HoF. Ultimately, after a continuous discussion between the officers of the HoF and the judges of the Cassation Division, the Court lifted its injunction order. Therefore, the Zonal High Court executed the decision. In another case – *Ato Kidanmaraym Tiklu v. Ato T/Mikale Endeya,* the execution of the decisions was resisted by the Tigray Regional State Supreme Court. However, later the

84 Interview with Birtukan Melese, Team leader at the Constitutional Interpretation and Identity Issues Directorate of the HoF, 13 December 2019, Addis Ababa, Ethiopia.

85 *Ibid.*

86 *Ibid.* Also interview with Ato Muleye, cited above at note 27.

87 *Ibid.*

88 A letter addressed to the Oromia Regional State, Adama Zonal High Court concerning the execution of a decision in a case between *W/ro Azeb Tufa v. Alemyahu Mingstu* (2016) (on file with the author).

89 A complaint filed by w/ro Azeb Tufa to the registrar of the House of Federation on 23 June 2017 (on file with the author).

decision was executed after a discussion between officials of the HoF with the Supreme Court of Tigray.

In a case between *Negash Dubale v. Addis Ababa Bole Sub-City,* the HoF decided that the decision of the Federal Supreme Court justifying the act of the *Sub-City's Bureau of Works and Urban Development* annulling the applicant's certificate of ownership at a time when it was a judgment debtor in a previous court proceeding was contrary to Article 40 of the Constitution. Consequently, instead of enforcing the decision of the HoF, which was deemed final, the Office of Attorney General filed an application requiring the HoF to revise its decision claiming that the decision harmed state interest. Later, the case was resolved in a discussion where experts and officers from both sides (the HoF and Attorney General) were involved.

Given the HoF is a political body, it is surprising its decisions encounter resistance. As a political body, its decisions should have, at least, exerted a political influence on the addressees to abide by it. In Ethiopia, the fact that constitutional review is the task of a political body should have helped the effective enforcement of review decisions.

Nevertheless, the execution challenge is generally the result of the absence of a defined procedure for the implementation of review decisions. Beyond conferring the HoF this very important power, the Ethiopian Constitution is silent on how and who enforces the review decisions and on the consequences of failure to execute. Neither is this addressed in the relevant subsidiary laws. The stipulation of modalities for the implementation of review decisions is, however, critical for proper and timely execution of the decisions.

Resistance from regular courts, while it is partly the result of views of courts that the HoF is interfering in their jurisdiction, might also be because courts are generally unhappy to see the overturning of their decisions by the HoF. Sometimes, the resistance is a result of absence of clarity of the HoF's decision. For instance, in a case between *Andnet Kebede v. Afar Regional Justice Bureau*, the Justice Bureau of Afar had to write a letter back to the

HoF requesting an explanation about the decision and what exactly was to be executed.[90]

In a nutshell, decisions of the HoF, as a guardian of the Constitution, need to be enforced directly without further negotiation. In principle, unconstitutional acts ought not to exist. Accordingly, acts that are declared unconstitutional must cease to have effect as of the date when lack of conformity is discovered. More so, the legal recognition that the decision of the HoF is binding should force individuals and state bodies to directly execute and comply with it. The HoF must also make its decision clear and further assert a power to ensure the implementation of its own decisions.

IV. Mechanisms of Execution of Constitutional Review Decisions

4.1. The Case in Other Jurisdictions

What happens after a decision is made by a constitutional review body is not clear in many constitutional systems. While review bodies are often boldly noted and are established as a constitutional organ in many constitutions, the mechanisms of implementation of their decisions are often unaddressed. As opposed to judicial decision of regular courts, how and who executes a constitutional review decision is usually not clear in many legal systems. Yet, a closer look at some legal systems shows that there are different experiences in this regard.

In some countries, the responsibility to execute the decision of the review body is given to the executive. For instance, in Croatia, the Constitutional Court Act states that the government shall ensure, through the bodies of the central state administration, the execution of the decision of the Court.[91] In some other countries, the review body ensures the execution of its own decision. For instance, in Russia, a department within the Constitutional Court ensures the execution of the decision and monitors the

90 Letter sent to the House from Afar Regional Justice Bureau (on file with the author).

91 The Constitutional Act of the Constitutional Court of the Republic of Croatia, the Official Gazette No. 49/02 of May 3, 2002, Article 31(3).

implementation of the decision of the Court.[92] The other type of mechanism of implementation is where the review body determines in its decision how and who may execute its decision. A good example of this model is Germany. As per Article 35 of the Federal Constitutional Court Act, the Court is empowered to indicate in its decision how and who may execute its decision. The experience in many other nations, however, shows us that a law only declares the binding nature of the decision of the review bodies while not addressing how and who executes the decision. In fact, in these countries, the recognition of the binding nature of the decision of review bodies assumes that the body or a person to whom the decision is addressed ensures the execution of the decision. As such, the responsibility to execute the decision rests on the recipient of the decision.

The other issue in relation to the mechanism of enforcement of constitutional review decisions is what will happen if the party against whom a constitutional review decision is passed refuses to comply or implement the decision. This issue is not addressed by law in many jurisdictions. Remarkably, however, some constitutional systems have stipulated some forms of legal responsibilities. The Constitutions of Ghana and Gambia have, for instance, provisions providing specific sanctions for failure to comply with constitutional review decisions. Under the Ghanaian Constitution, any person or group of persons who refuses to comply with the orders and direction of the Supreme Court is/are subject to a criminal punishment (Article 2(2&4). If it is the President or the Vice President who refused to comply or implement, her/his refusal would cause her/him to be removed from office (Article 2(2&4)). Also, under the Gambian Constitution, failure to comply with a constitutional review decision of the Supreme Court is criminally punishable, and in the case of the President and Vice President, it will cause an impeachment procedure (Article 5 (3) (A & B)). The Constitution of Sierra Leone (Article 127(4)) also provides a criminal sanction against the recipient who refuses to comply with the constitutional review decision of the Supreme Court.

92 A Manasyan, "Execution of the Constitutional Court Decisions as a Guarantee for Strengthening the Constitutionalism: Example of the Republic of Armenia", Juridiska zinatne/Law, No 8, (2015), p. 194.

What would follow if it were the legislature that refused to comply with the review decision, however, is not addressed in the constitutions of these countries. The 2010 Kenyan Constitution, in an effort to ensure constitutional implementation, stipulates a time limit within which the Parliament must enact a list of laws that are required to be enacted. In the event of a failure of the Parliament to enact laws within the deadline provided, the Constitution entitles citizens to file a petition in the High Court demanding the Parliament to enact the required laws.[93] In such a case, the High Court may give a direction to the Parliament to take the necessary steps to ensure the required laws are enacted.[94] However, if the Parliament fails to comply with the direction of the High Court, the Chief justice can advise the President to dissolve the Parliament and the President shall dissolve the Parliament.[95] The Kenyan experience is useful when it comes to the implementation of review decisions when refused by the parliament. Constitutional systems may apply such procedures to make sure the parliament complies with review decisions of a constitutional interpreting body.

In Germany, as discussed above, even if the Basic Law is silent on the mechanism of enforcement, the Parliament has later enacted the Federal Constitutional Court Act which provided a procedure for and empowered the Constitutional Court to dictate the manner and the person who shall execute review decisions. As mentioned above, the Court has further developed a case law which enabled it to control and influence the enforcement of its decisions not only by individuals but also by state bodies.

4.2. The Case in Ethiopia

In Ethiopia, it is specified neither in the Constitution nor in other laws how and who shall execute or follow-up the execution of review decisions. A procedure that facilitates a prompt and proper execution of such decisions is not available. Yet, Proclamation No. 251/2001 in its Article 56 (2) imposes a duty on all bodies to respect and abide by the decision of the HoF.[96]

93 The Constitution of Kenya, 2010, Article 261(5).

94 *Id.*, 261(6).

95 *Id.*, 261(7).

96 Proclamation No 251/2001, cited above at note 13, Article 56(2).

Accordingly, in principle, all bodies implicated in the decision of the HoF are legally bound to comply with or enforce the decision. A specific body purposely established to follow-up and monitor the execution of the review decisions is not available. The responsibility of ensuring the execution of the review decision is generally left to the recipient of the decision or the body specifically mandated by the decision to ensure execution of the decision. In some cases, the HoF specifically instructs its Secretariat to follow up the enforcement of its decisions in particular cases.[97] However, the Secretariat is not organized and staffed in such a way that it can effectively follow up the enforcement of decisions of the HoF. If staffed properly and given relevant legal powers, the Secretariat could serve as a department, within the HoF, which is in charge of monitoring, studying and identifying challenges pertaining to the execution and implementation of review decisions. For instance, in 2018, the Secretariat has undertaken a tour to some regional states to monitor and have a discussion with regional supreme courts concerning the execution of the decisions of the HoF.[98] However, the tour did not continue in subsequent years. It would have been very useful if the Secretariat had performed the tour on a regular basis and with a defined purpose of monitoring the enforcement of review decisions. Regular monitoring is particularly important given that constitutional decisions are supposed to have greater impact beyond resolving cases at hand.

The HoF, however, oftentimes leaves the enforcement of decisions to the addressees. In a letter notifying a recipient of its decision, the HoF reminds the recipient that the decision is final and binding and that it obliges the recipient to observe and execute in accordance with Articles 11(1) and 56(2) of Proclamation No 251/2000.

The consequences of failing to comply with or enforce constitutional review decisions are not specified in any of our laws either. A system of coercion or sanction for non-compliance with the review decision of the HoF is not provided for in the Constitution and other subsidiary laws. In practice,

97 For instance, the letter of the HoF addressed to the Federal Supreme Court and the Supreme Court of Oromia Regional State to notify its decision in a case between *Ato Aleye Dawi v. Mumed Adem* (2015). Also, a letter of the HoF addressed to the Supreme Court of Oromia Regional State to notify its decision in the case between *W/o Halima Mohamed v. Ato Adem Abdi* (2015). (On files with the author).

98 Interview with Ato Yawekal Bekele, cited above at note 83.

when the execution of the decision of the HoF is refused or delayed, the House usually uses diplomacy and engages in discussion with the concerned bodies of the state.[99]

The CCI, even if it cannot make a final decision which imposes an obligation to enforce, it has recently started issuing an interim order pending its decision on whether the complaint warrants constitutional interpretation. Execution challenges with regard to decisions of the CCI would thus only be raised in relation to its interim orders. When compared to the decision of the HoF, the orders of the CCI are relatively better complied with. According to the Director of the Case Flow Management of the CCI, this better compliance is attributable to the fact that the orders of the Council are signed by the President of the Federal Supreme Court who is also the chair of the CCI.[100] The Director is of the view that courts, particularly the Federal Supreme Court, are more regarded than the CCI and House.[101] Yet, in a case between *Fatuma Hussein v. Kolfe-Keranyo Sub-city Government House Administration Office,* the order of the CCI has encountered a refusal.

The applicant petitioned the CCI for a temporary injunction order against the decision of the Cassation Bench of Supreme Court which confirmed the lower courts' decision requiring her eviction from a government owned house. Accordingly, the CCI issued an injunction order so that the applicant could remain in the house until it rendered a final decision on whether her claim deserved a constitutional interpretation. In the meantime, despite the order of the CCI, the respondent forced the applicant to leave the house. As such, the respondent violated the CCI's order. The officials who were involved in the act were summoned by the CCI and asked to explain why they did not observe the injunction order. They claimed that they already had a prior court decision that affirmed the applicant had no right to stay in the house.[102] The head of the Kolfe Sub-City Government House Administration Office who was summoned by the CCI to respond to the

99 *Ibid.*

100 Interview with Rahel Birhanu, cited above at note 16.

101 *Ibid.*

102 Interview with Mr. Tekleweld Tilahun, Former Constitutional Researcher at the CCI.

violation of the temporary injunction responded that he was advised by the legal service of the Sub-city that the CCI had no such mandate under the Constitution and that there was therefore no obligation to abide by it.[103] The CCI warned the head and excused him without any repercussion.[104] Consequently, the CCI continued to look into the substance of the case while the applicant stayed homeless.

Whether the HoF can command the execution of its decision by choosing the method and the body which shall execute the decision is not explicitly addressed under the relevant laws.[105] Accordingly, the extent of the competence of the HoF to take measures necessary to ensure the proper and prompt execution of its decision is unknown. Yet, a specific restriction or prohibition to use such power is not imposed either. It should be possible for the HoF to choose a specific body or the manner of execution, if the need arises. As discussed above, the HoF, in some of its decisions, assigns to its secretariat a responsibility to follow up the proper implementation of the decision. The HoF can also include in its decision the manner how the decision should be executed, a time limit within which the decision should be executed and the sanction for failure to execute the decision in accordance with the manner and time limit provided in the decision.

Conclusion

Constitutional review is an aspect of a constitutional system. It is an important mechanism to ensure realization of the guarantees enshrined in constitutions. Nevertheless, a constitutional review system without a proper and prompt implementation of constitutional review decisions is an empty gesture. In a constitutional system, acts which are declared unconstitutional ought not to stay effective. Accordingly, review decisions declaring acts of the state unconstitutional must be enforced promptly. However, in practice, incidences of resistance and non-compliance are common across democracies and constitutional review systems. This is because of the very

103 *Ibid.*

104 *Ibid.*

105 The relevant subsidiary laws are Proclamation No. 251/2001 and Proclamation No. 798/2013.

nature of review decisions and because of the absence of specific enforcement mechanisms that fit the nature of such decisions. Specific mechanisms, which make sure that not only individuals but also branches of the government comply with such decisions, are necessary.

In Ethiopia, beyond the problem attached to the very nature of the constitutional review system, problems related to non-compliance and resistance to decisions of the HoF have recently become another set of challenges. The fact that the HoF is a political body could not ensure compliance of its decisions by state bodies as desired. Pending a comprehensive law of enforcement procedure and legal consequences for failure to enforce, the HoF needs to be progressive to develop a case law which would increase its control over the execution and compliance with its review decisions. As part of its responsibility to control the constitutionality of actions of individuals and state bodies, it should logically be possible for the HoF to make sure that its decisions are enforced. To this end, the HoF can develop a case law which would set a procedure that makes sure that its decisions are executed appropriately and promptly.

The HoF must also try to make its decision clear to avoid confusion and delays of execution of its review decisions. It is important that the HoF clarify in its decision the specific compliance required and what is to be executed beyond declaring an act in question unconstitutional.

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Regional Constitutional Interpretation: The Experience of the Constitutional Interpretation Commission of Tigray

Gebremeskel Hailu[*]

Abstract

Following the Ethiopian federal arrangement, regional states introduced their own constitutional review organs. The Constitution of Tigray entrusts the task of constitutional interpretation to the Constitutional Interpretation Commission (CIC), which is assisted by the Council of Constitutional Inquiry (CCI). Though the Commission is engaged in entertaining constitutional complaints, there are questions with regard to its design and composition and how the latter affect the independence, impartiality, and effectiveness of the Commission. Hence, this chapter intends to scrutinize the independence, impartiality, and effectiveness of the Commission by taking into account its experience. In so doing, the research uses both primary and secondary data sources. Federal and regional constitutions and the establishment proclamations of both the Commission and the Council are duly referred to. The cases addressed by the Commission and the Council are also investigated. Key informant interviews have been conducted with members of the CCI and judges of regional courts. Finally, the research found that the design and composition of the Commission have become challenges to its independence, impartiality, and effectiveness. Moreover, the absence of clarity on the borderline of the powers of the Commission and the House of the Federation (HoF) and the lack of oral hearing in the Commission are problems affecting the task of constitutional interpretation.

Introduction

The experience of federal systems reveals that there are at least two levels of governments with their own powers defined by the federal constitution. In such systems, regional governments will also have their own constitutions.

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Ethiopia introduced federalism, *de jure*, with the coming into force of the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution.[1] The FDRE Constitution divides state powers between the federal and regional governments under Articles 51 and 52.[2] The practice in federal systems reveals that regional constitutions are necessary to ensure self-rule inherent in the system. In this respect, the FDRE Constitution explicitly recognizes the right of states to make and implement their own constitutions.[3] Article 52(2b) of this Constitution stipulates, "States shall have the power to enact and execute state constitution and other laws."[4] The same is also provided under Article 50(5), which says, "the State Council has the power … to draft, adopt and amend state constitution." Accordingly, all the nine states in Ethiopia have adopted their own constitutions. Most of them have been adopted in 1995 except for the Afar Constitution, which was adopted in 1998.

According to Hans Kelsen, a constitution without constitutional review is like not having a constitution at all since the constitutional adjudication system is an institutional safeguard for maintaining the supremacy of the constitution and thereby constitutionalism.[5] The FDRE Constitution assigns the task of constitutional interpretation to the House of the Federation (HoF) while regional governments, including the Tigray Region, have given the task of constitutional interpretation to a Constitutional Interpretation Commission (CIC or the Commission) to be assisted by a regional Council of Constitutional Inquiry (CCI or the Council), which follows the format and design of the federal Council of Constitutional

1 Muluken Kassahun, "The Relationship between the Federal and Regional States' Constitutional Review System in Ethiopia: The Case of Oromia Regional State", Oromia Law Journal, vol. 7(1) (2018), p. 2.

2 C. Van der Beken, Sub-national Constitutional Autonomy in Ethiopia: On the Road to Distinctive Regional Constitutions, Paper Submitted to Workshop 2: Sub-national constitutions in federal and quasi-federal constitutional states, p. 1, <https://biblio.ugent.be/publication/4428977>, last visited on 5 December 2019.

3 *Ibid.*

4 Tsegaye Regassa, State Constitutions in Federal Ethiopia: A preliminary Observation, a summary for Bellagio conference, March 22-27, 2004, p. 6.

5 D. Grimm, "Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics", NUJS Law Review, vol.15(4) (2011), p. 18.

Inquiry.[6] Though the choice of a constitutional review body is always a contested matter, the suitability or otherwise shall not be judged in the abstract, rather it should be examined by investigating the design, composition, and the actual functions of such bodies. In this regard, the choice of Constitutional Interpretation Commission as constitutional review body in Tigray could be contested.[7]

The practice on the ground reveals that the Commission has entertained several constitutional complaints. Of these complaints, 98.5% relate to land cases. Yet, the way the Commission addresses these cases is being seriously contested by some individuals and judges. In this regard, in order to scrutinize the origin of the problems, it is momentous to investigate the design, composition, and mandates of the Commission and how these matters affect the tasks of constitutional interpretation. With respect to the mandates of the Commission, its functional relationship with the federal HoF is difficult to determine considering that a large part of the regional Constitution is the direct copy of the federal Constitution.[8] Hence, it is not clear which organ will decide over which matter and whether the cases decided by the CIC can be overruled by the HoF and if so, how, and to what extent.

Despite these and other issues surrounding the Commission, few scholarly works have so far focused on regional constitutional interpretation in general and on the CIC of Tigray, in particular. This research intends to fill this gap by studying the Tigray CIC through considering its design, composition, and mandate, and by investigating how these matters affect the outcome of constitutional review. In so doing, the author has used both primary and secondary data sources. Among others, the work scrutinizes the federal and regional constitutions and the establishment proclamations of both the Commission and the regional CCI. The chapter also reviews cases decided by the CIC, and has been informed by interviews with key members of the regional CCI and some judges from the regional courts.

6 The Revised Constitution of Tigray National Regional State, Article 68, Proc. No.45/2001, 10th Year, November 6/2001. Mekelle.

7 *Ibid.*

8 Chapter three of the FDRE constitution, 1995, is directly copied and incorporated into the existing regional constitutions.

In terms of structure, following this brief introduction, the chapter tries to indicate the importance of constitutional interpretation and the need for constitutional review bodies. The second section provides an overview of the regional Constitution of Tigray, which overview will serve as a basis for subsequent deliberations. The third section assesses the legal regime which governs the Tigray Constitutional Interpretation Commission. The fourth section discusses the actual experience of the Constitutional Interpretation Commission and the challenges it is facing. Finally, the chapter winds up the discussion with some conclusions.

I. Why Constitutional Interpretation?

Constitutional recognition of rights and the stipulation of limitations on the powers of the government alone cannot ensure constitutionalism unless supported by institutional backups.[9] In this regard, constitutional review is considered as one of the most powerful mechanisms for the protection and enforcement of constitutions and constitutional rights.[10] It is an essential component of any credible system of constitutionalism.[11] As a result, most constitutions in the world have provided some sort of review mechanism to ensure the conformity of laws, decisions and actions of the government with the supreme law of the land and thereby maintain the supremacy of the latter.[12] Constitutional review is particularly significant to enforce the

9 Gebremeskel Hailu and Teguada Alebachew, "Increasing Constitutional Complaints in Ethiopia: Exploring the Challenges", Hawassa University Journal of Law, vol.2(1) (July 2018), p. 45.

10 G. Dannemann, "Constitutional Complaints: the European Perspective", The International and Comparative Law Quarterly, vol. 43(1) (1994), p. 142.

11 H. Prempeh, "Marbury in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa", Tulane Law Review, vol. 80(4) (2006), p. 80; Seton Hall Public Law Research Paper No. 1018752. Available at SSRN: https://ssrn.com/abstract=1018752 , last visited on 6 December 2017.

12 G. Dannemann, cited above at note 10, p. 142. Nevertheless, in many countries (such as the United Kingdom), judicial review of acts of administration and public authority is severely limited, and some countries (such as the Netherlands) prohibit judicial review of the constitutionality of Acts of Parliament unless it is contrary to the international treaty obligations such as the European Convention on Human Rights. See Article 120 of the Grondwet (Dutch Constitution).

human rights provisions, which are among the major and most important ingredients of constitutions in the modern era.[13]

Therefore, constitutional review is important in so many counts; first and foremost, constitutional review is important because constitutional language may often be imprecise, inconclusive, and the circumstances of its application may often become unforeseeable by its authors.[14] This legitimizes the intervention of a constitutional review body to discover the appropriate meaning and scope of a disputable constitutional question. Thus, constitutional review bodies make the imprecisely provided constitutional contents practically enforceable; it defines the meaning and ramification of constitutional subjects, including rights. Second, constitutional adjudication, beyond resolving controversies at hand, may still guide future treatment of similar rights and thus increases future compliance of individuals and government bodies with such norms and practices.[15] Third, constitutional review is capable of shaping public policy through challenging the existing political and social status quo regarding the understanding and treatment of human rights and government practices.[16] For instance, the recognition of civil rights entitlements to all, including Black Americans, in the 1960s in the US, the recognition of the rights of sexual minorities in South Africa, and the recognition of socioeconomic rights as justiciable rights in India are all the results of constitutional review

13 Human rights are one of the 21st century values that make up or are supposed to make up contemporary constitutions. Human rights are, in fact, validation requirements for modern constitutions. To this end, many modern constitutions comprise human rights provisions. For instance, 1/3rd of the provisions of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) address human rights. Furthermore, the FDRE Constitution has given special emphasis/focus to chapter three (which address human rights). See the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution, Proc. 1/1995).

14 J. J. Brudney, "Recalibrating Federal Judicial Independence", Ohio St. L. J. vol. 64(1) (2003), pp. 173 & 175.

15 Adem Abebe, the Appropriateness of Constitutional Review as a tool of the Realization of Human Rights, University of Pretoria citing interview with Ndubisi Obiorah in litigating human rights: Promise Perils, Human rights Dailogue 22, Carnegie Council on Ethics and International Affairs, 2002, p. 29.

16 R. B. Cown, "Women's Rights through Litigation: An Examination of the American Civil Liberties Union, Women's Right Project, 1971-1976", Colum. Hum. Rts Rev, vol. 8 (1976-1977), p. 373.

works.[17] Fourth, constitutional review is a viable means for individuals to defend their rights against violations by a government, especially against those committed systematically through the enactment of laws, policies, and practices.[18]

However, the particular significance of constitutional review for the enforcement of human rights is highly intertwined with the overall design of the institution entrusted with the task of constitutional interpretation including its independence, impartiality, and efficiency.[19] This underscores the fact that the establishment of a constitutional review body is not by itself sufficient. Rather, it matters most how it is designed, how its members are selected and how independent and impartial it is, etc. Thus, it would be fair enough to evaluate such institutions by examining their overall design in relation to their experience on the ground.

Besides, one has to note that, as is often the case in federal systems, in Ethiopia there are federal and regional constitutions and regional states have their own regional bodies designated to interpret their respective constitutions. Therefore, all constitutional review bodies, whether established at federal or regional levels, need to be studied with regard to their overall design and their specific experience. Hence, this work investigates the constitutional interpretation organ in Tigray by taking into account the aforementioned variables. Before doing so, the following section provides an overview of the Tigray regional Constitution, which governs the Constitutional Interpretation Commission (CIC) of the region.

II. Overview of the Regional Constitution of Tigray

On the basis of the powers granted to regional states in Ethiopia, the Regional State of Tigray promulgated its first Constitution in June 1995.[20] The same Constitution was revised with a view to strengthen transparency

17 P. Bhagwati, "Judicial Activism and Public Interest Litigation", Columbia Journal of Transitional Law, vol.23(1) (1984), p. 561.

18 Adem Abebe, cited above at note 15.

19 Gebremeskel Hailu and Teguada Alebachew, cited above at note 9, p. 46.

20 The Federal Democratic Republic of Ethiopian Constitution, Article 52(2b), Federal Negarit Gazette, Proc. No. 1/1995, 1st Year No.1, Addis Ababa, 21st August 1995.

and accountability of the regional governmental institutions and the revised version was promulgated in 2001. Few provisions were again amended in 2006, which amendments were driven by the aim to decentralize mandates to *Woreda* and *Kebele* administrations.[21] The Constitution has the goal of safeguarding respect for the rights of the people, guaranteeing accountability and transparency of the regional public institutions, and maintaining peace and democratic order by nurturing the language, culture and history of the people.[22] The Constitution therefore could be understood as an expression of the right to self-determination and sovereignty of the people in the region. In the words of Tsegaye Regassa, regional constitutions regulate and guide the behavior of state governments in the region.[23] It also helps states to endorse state powers enumerated in the federal Constitution and to further articulate them in a way that fits the local situation.[24]

In terms of constitution making, the regional Constitution hardly followed the standards of constitution making. As opposed to the FDRE Constitution, which passed through the conventional stages of constitutional drafting by the drafting commission, deliberation by the public and later by the constitutional assembly and adoption by the constitutional assembly, the Tigray regional Constitution was simply adopted by the state legislature.[25] The reading of the preamble of the revised Constitution, Proc. No. 45/2001, confirms that the first Regional Constitution, Pro. No. 12/1995, was adopted by the then Regional Council and the same was maintained in the subsequent revision and amendment of the same Constitution.[26]

21 An amendment proclamation of the Tigray National Regional State Constitution, Proc. No.105/2006, 14th Year, No. 12, 16 April 2006. See also, Samrawit Tadesse, A Comparative Analysis of the State Constitution of Tigray in Light of the FDRE Constitution and Amhara State Constitution, Addis Ababa University: Center for Human Rights (unpublished), available at: https://www.academia.edu/7617303/A, p. 8.

22 *Ibid.*

23 Tsegaye, cited above at note 4, pp. 6-7.

24 *Ibid.*

25 *Ibid.*

26 The Revised Constitution of Tigray, cited above at note 6, the preamble.

The function or purposes of a regional constitution, as is the case in other federal systems, can be categorized into three: "To allocate the powers of the state among the various state organs or institutions; to place proper limitations on the powers of the regional institutions; and, to further provide additional protection to the rights of citizens."[27]

As a result of its importance, the Constitution enjoys supremacy in the hierarchy of laws in the state. Yet, in the words of Tsegaye "for large part, state constitutions in Ethiopia have been documents invoked rather ceremonially to conduct the rituals of state politics such as nomination and appointment of state officials, inauguration of the state parliaments' annual 'business' etc."[28] Yet, all state constitutions have established their own institutions designated to interpret the respective regional constitutions.

State constitutions in general and the Constitution of Tigray in particular contain provisions on human and democratic rights that are almost identical to those enshrined under chapter three of the FDRE Constitution. Thus, one might question the extent to which state constitutions have exploited the constitutional space granted to them in the FDRE Constitution. The existence of identical provisions in both the federal and regional constitutions is likely to pose challenges in identifying the scope of the constitutional interpretation powers of the CIC and HoF.[29] For instance, the Constitution of Tigray under Article 70(2) states that the regional CCI – and thereby the CIC – have a constitutional mandate, among others, when laws and decisions are

27 Tsegaye, cited above at note 4, pp. 6-7.

28 *Ibid.*

29 Yet, there are some scattered provisions in the FDRE Constitution that can possibly guide such relationship. For instance, the preamble focuses on building one political and economic community, there is the principle of supremacy of the federal Constitution (Article 9), the principle of federal comity (Article 50/8), the government's duty towards fundamental human rights and freedoms specified in chapter three (Article 13) and the consistency clause (Article 50/5) that mandate the central and regional governments conform with these provisions in performing their tasks. In the broadest sense, these clauses can also serve as guiding principles in dealing with the linkage of federal and regional states' constitutional review system in Ethiopia.

alleged to contradict the regional Constitution. Yet, there is confusion on whether the CIC has exclusive jurisdiction on human and democratic rights entrenched in the Constitution which are copied from the federal Constitution. If the reply is positive, the question again would be whether the decisions given by the CIC would bar the HoF from entertaining the same constitutional questions. These and other constitutional loopholes are possible challenges which are awaiting practical tests.

III. The Legal Regime Governing Constitutional Interpretation in Tigray

As is the case in other Ethiopian regional states,[30] the revised Constitution of the National Regional State of Tigray entrusts the function of constitutional interpretation to the Constitutional Interpretation Commission.[31] The Commission is composed of members drawn from the Woreda Councils (one from each) in the region and of members who represent the region in the HoF.[32] In addition, the Constitution established an advisory body to the CIC, the regional Council of Constitutional Inquiry, composed of eleven members, whose composition is similar to the federal CCI.[33]

The establishment laws of the CIC and the regional CCI enacted by the State Council are Proc. No. 228/2013 (as amended by Proc. No. 335/2019) and

30 The experience in other regional states is also similar to that of Tigray with some variation in some of them. For example, the Constitutional Interpretation Commission in the Amhara National Regional State is composed of members drawn from representatives of all Nationalities' and Woreda Councils in the Regional State (Article 71). The Afar (Article 70/1), Oromia (Article 67/1) and Somali (Article 71/1) Constitutions have established Commissions drawn from representatives of woreda councils. The Constitutions of the regional states of Benishangul Gumuz (Article 71/1) and Gambella (Article 72/1) provide for a Commission representing the indigenous nationalities of the respective regions. The SNNPRS Constitution provides for the establishment of a Council of Nationalities with representatives from all nations, nationalities and peoples of the region and with a broad mandate similar to the House of Federation at the federal level including constitutional interpretation (Article 58).

31 The revised constitution of Tigray, cited above at note 6, Article 68(1).

32 *Ibid.*

33 *Id.*, Article 69 (1 and 2).

Proc. No. 229/2013, respectively. The CIC is authorized to address constitutional complaints about alleged contradictions with the regional Constitution. As implicated in the preamble of the amended proclamation of the CIC, the latter has the duty to ensure the supremacy of the regional Constitution. According to the Constitution, the CIC comprises representatives drawn from each of the woreda councils but the newly amended proclamation in its Article 5 elaborated this by saying "the commission shall comprise members of the regional council which are elected to the HoF, one member from each of the rural woreda, town and sub-city councils of the region.[34] Consequently, while until recently the CIC comprised 60 members, the current woreda restructuring in the region, which increased the number of woredas from 35 to 52, will to lead to a commensurate increase in the number of members of the CIC.

The Regional CCI, an advisory body to the CIC, has the mandate of investigating constitutional complaints and submitting recommendations to the CIC if it finds a particular constitutional complaint merits constitutional interpretation.[35] In terms of composition, the regional CCI, like its federal counterpart, holds eleven members. These are: President and Vice President of the regional Supreme Court serving as *ex officio* chairperson and vice chairperson of the regional CCI respectively; six lawyers appointed by the regional State Council up on the recommendation of the regional President and three other persons elected by the regional State Council from among its members upon the nomination of its Speaker.[36]

From the reading of Article 7(2) of Proc. No. 335/2019, one can infer that the CIC is empowered to entertain constitutional interpretation in its broadest conception, including political and non-political constitutional questions, either in the abstract (abstract review) or in concrete cases (concrete review). In terms of effect, the decisions of the Commission have an *erga omnes* effect i.e., it has a general and mandatory applicability to

34 A proclamation issued to determine the powers and functions of the Constitutional Interpretation Commission, Proc. No. 335/2019, 27th Year No.4, Mekelle 335/2019, Article 5.

35 The revised constitution of Tigray, cited above at note 6, Article 70(2).

36 *Id.*, Article 69 (2 (A, B, C and D).

future similar cases if the Commission finds a given law or decision or act of government or official thereof contradicts the Constitution.[37] But the effect of the decisions of the CIC might not always be immediate. As clearly stated under Article 28(1) of the amended proclamation on the Commission, the latter has the power to delay the enforcement of its judgment. However, there is no any indication as to when and on what grounds the Commission could fix such precise dates. Besides, before providing a final decision on a certain constitutional matter, the Commission is given the mandate to inform concerned organs so that the latter could amend, modify or repeal laws or could correct decisions within six months if the same are found to have contradicted the Constitution.[38] Nevertheless, the CIC will not be compelled to give advisory opinions.[39]

IV. The Experience and Challenges of Constitutional Interpretation in Tigray

The discussion in section III reviews the legal regime governing constitutional interpretation in Tigray with specific reference to the Constitutional Interpretation Commission. With this background, the subsequent discussion examines the overall experience of constitutional interpretation in the region. Besides, it scrutinizes the specific challenges the Commission faces in its activities. For doing so, the author uses data sources collected from the common office of the CIC and the regional CCI which is at the same time the office of the Regional State Council. A modest effort is exerted to triangulate such data sources, either to fortify or refute the same, with the information collected from key interviews made with some members of the CCI.

4.1. The Experience of the Commission

The CIC, with the help of the regional CCI, is charged with the power to ensure the supremacy of the regional Constitution through constitutional interpretation. It is mandated to safeguard the constitutionality of laws and

37 A proclamation to determine the powers and functions of the CIC, cited at note 34 above, Article 24(1).

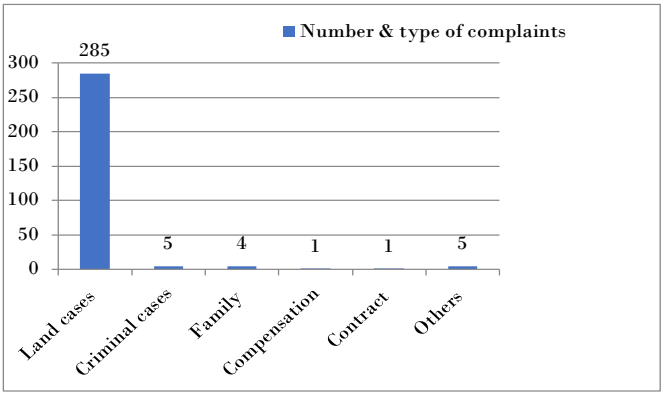
38 *Id.*, Article 28(2).

39 *Id.*, Article 7(2).

decisions of the regional government and its officials with a view to protecting individual and collective rights entrenched in the Constitution. In this respect, the flow of constitutional complaints has been increasing significantly from time to time. Since the establishment of the Commission (2012) until March 2016, only four complaints were brought to the CCI. However, afterwards, in less than three years (from March 2017 to Nov 2019), 298 complaints were brought to the regional CCI. At this juncture, it might be important to investigate why the flow of cases has increased so drastically. Before doing this, it is imperative to briefly see the type of constitutional complaints that are coming to the Commission as this might help us to indicate the reasons for the growth of such case flows.

The succeeding graph summarizes the total number and type of complaints brought to the CCI since its establishment.

Figure 1- Type of complaints filed to the CCI by percentage



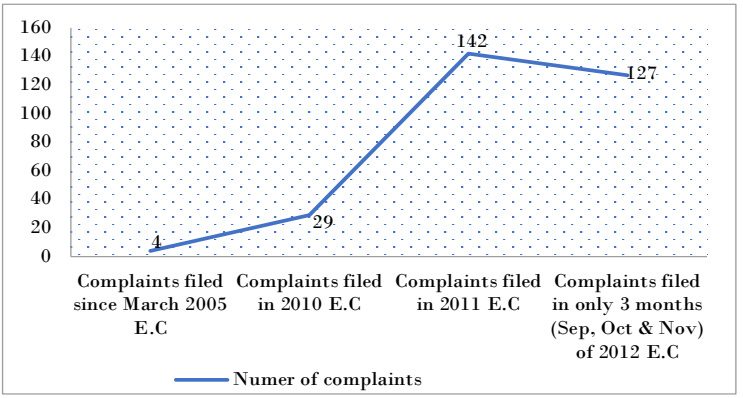
Source: data obtained from the office of the CIC.

From the graph depicted above, land related constitutional complaints constitute more than 94% of all the complaints (302) filed in the CCI. One may wonder why land cases occupy the biggest percentage of the total complaints. The lion's share of these complaints is instituted by municipalities against individuals who happen to have won court judgments. Again, above half of these cases come from one sub-city, '*Hawelti*' sub-city, one of the seven sub-cities of Mekelle. The data in the office of the regional CCI shows that 85.2% of constitutional complaints

filed so far are brought by government institutions, principally by the sub-city municipalities of the capital city of the region. The trend in the decisions of the Commission reveals that the latter supports the cause of the municipalities and this trend encouraged the latter to institute more cases whenever courts judge against their interest. The decisions of the Commission have the same pattern in overturning the court judgments granted against the government through the act of constitutional interpretation. As a result, this has currently become a serious and critical issue of justice in the region.[40] The regional court judges and individuals whose cases are overturned in the Commission are questioning the neutrality and impartiality of the Commission.

This said, it might also be important to appreciate the yearly case flows to the regional CCI to substantiate the above assertion and to set a broader perspective for the discussion.

Figure 2- Complaints filed to the CCI on a yearly basis



Source: data from the office of the CIC.

From this graph, we can comprehend that constitutional complaints significantly increased since the second half of 2009 E.C. In the first five years since the establishment of the Commission, only four cases were

40 An interview with W/ro Meseret, a lawyer working at the office of the secretariat of the CCI and CIC, 10 December 2019, interview conducted at the Tigray State Council building, Mekelle, Secretariat of the CIC and CCI, 2:00-5:00 PM.

brought to the CCI. However, in 2010 E.C., the case flow reached 29. In 2011 E.C. the number of complaints increased significantly to 143. In the first three months of the subsequent year (2012 E.C.) the number of complaints reached 127 files, in just only one-fourth of the year. This shows that the flow of constitutional complaints is steadily increasing since the time when the Commission started to nullify the court judgments to the advantage of the municipalities as opposed to individuals. The municipalities in return are massively using this opportunity and hence bringing as many cases as they can. Therefore, there appears to be a direct causation between the decisions of the Commission and the escalation of constitutional complaints.

The Experiences of the Commission as Compared to the Council: Who Does What?

This section uncovers the experiences of the Commission and the Council with reference to their constitutional interpretation involvement. It further tries to divulge their experience in their interpretations and the possible divergence and convergence they may have. It then discloses the pattern of constitutional interpretation in these institutions.

It was already mentioned that more than 94% of the constitutional cases brought to the Council are related to land and these cases are of two types in nature. The subsequent discussion relies on these cases and investigates how both institutions responded to these constitutional complaints.

The nature of the first category of cases is as follows: there were individuals who resided in the rural areas surrounding the capital city of the region and who had pieces of land as original holdings ('*nebar tihizto*') or given to them by the concerned rural administrations for constructing rural houses, technically termed as *'metesha'*. After some time, these rural residences were incorporated into the city administration. The concerned administration of the city expropriated the land holdings of those individuals for 'public purposes' by providing exchange land in some other sites of the city. But in many cases, the size of the land holding given to them was smaller than the original possession. The individuals, whose lands were expropriated, used to hold land amounting to roughly 400 to 500 square meters. However, the exchange land offered by the city administration ranged from 140 to 250

square meters and was noticeably dependent on the assessment of the persons in charge of land administration.[41]

The farmers who were offered smaller land holdings as an exchange due to expropriation brought court actions against the administration claiming additional portions of land to make their total allotment commensurate to their original holding. The regional courts of different hierarchies, by investigating the facts of the cases, approved the claim. The courts argued that, in the absence of clear and consistent laws setting a standard as to what amount of land should be offered to persons whose land holding is expropriated by the government, the concerned municipalities should not decide arbitrarily on the exchange land. The courts at different hierarchies consistently maintained this stance and argued that the applicants have the right to acquire an amount of land equal to what was expropriated by the government.[42]

Nevertheless, once the Commission showed positive signals, all sub-city municipalities aggrieved by these judgments brought constitutional complaints to the Commission with a view to challenging the constitutionality of these decisions. In doing so, they reasoned that the mandate of granting a specific amount of land is part and parcel of the power of land administration, which is an exclusive mandate of the administrative organ of the state, and thus the courts do not have jurisdiction to entertain these cases. They further argued that the courts, by doing so, violate the federal and regional laws.[43] Yet, it was not evidently displayed how such judgments contradicted the regional Constitution so as to necessitate constitutional interpretation by the Commission.

After investigating these cases, the regional CCI, by a majority of votes, decided and presented a recommendation to the Commission that the

41 The city administrations customarily grant to the farmers either 140 M2 or 200 M2 or 250 M2 and sometimes 400 M2 or even 500 M2 and there is no standard followed while doing this.

42 Judgments given by different courts of the region, as observed from the files attached to the constitutional complaints brought to the CCI, 10 December 2019.

43 A proclamation to provide for the expropriation of land holdings for public purposes and payments of compensation proclamation, Proc. No. 455/2005, 11th year, No.43, Addis Ababa, 15th July 2005, Article 11(1).

courts' judgments needed constitutional interpretation. The Council argued that land belongs to the people and the government and yet the government is empowered to administer the same on behalf of the people. Besides, by reference to the federal government laws such as Proc. No. 455/2005, a proclamation issued to provide for the expropriation of land holdings for public purposes and payments of compensation,[44] the Council contended that land administration including expropriation is the exclusive mandate of the administrative organ of states and the court does not have jurisdiction to entertain and decide on these matters unless it concerns issues of compensation.[45] The recommendation of the Council was approved by the Commission. The majority of the members of the Council and the Commission display similar attitudes with regard to these types of complaints. Yet, the decisions do not properly address the following issues. What if the administrative body manipulates its power given by the proclamation to the extent of committing obvious discrimination among individuals? Neither the Council nor the Commission indicated how the court judgments actually contradicted the regional Constitution as opposed to the proclamation and other subsidiary laws. Furthermore, if the judgments rendered by courts were alleged to have contradicted the federal and regional laws, wouldn't this be a matter that needs to be corrected through cassation decision within the hierarchy of courts?

The decisions of the Council as opposed to the Commission show that there are dissenting opinions disapproving the recommendations made by the Council arguing that the complaints do not call for constitutional interpretation. A valid argument, given the fact that no constitutional provision is cited to have been violated by the courts' judgment; it is hardly possible to argue that the complaints need constitutional interpretation. Hence, the judgments given by the courts are consistent with their duties of granting justice to individuals who have justiciable matters as stated under Article 37 of the FDRE and the regional Constitution.

The nature of cases and the relief sought in the second class of complaints are slightly different from the first type. Like the first types of cases, these cases are brought by individuals who used to have land holding while

44 *Ibid.*

45 *Ibid.*

joining the city. After they joined the city, these persons claimed site plans and title deeds for their land holding from the respective sub-city municipalities. However, the municipalities failed to do so. Finally, the applicants brought court cases soliciting the latter to order the municipalities to issue such documents. The courts at different levels of the region rendered judgments in favor of the applicants arguing: if individuals have sufficient evidence proving their land holding, the concerned municipalities have the obligation to issue site plan and title deeds. Conversely, the municipalities being aggrieved by such judgments, submitted constitutional complaints to the Commission. In their complaints, they argued that granting or denying site plan and title deeds are part of the mandates of the land administration that should not be interfered with by the courts. Hence, they argued, the decisions of the courts given without jurisdiction shall be nullified as unconstitutional.

The standpoint of the Council of Constitutional Inquiry on these "constitutional complaints" is different from their position in the first type of cases. The Council rejected the complaints of the municipalities contending that these matters do not contain constitutional questions and hence do not need constitutional interpretation. They further opined, if the municipalities could not issue or else failed to issue site plan and title deeds to the applicants, the latter would have an entitlement to seek access to justice by the courts as enshrined under Article 37 of the federal Constitution. Therefore, the courts' judgments that command the municipalities to issue documents related to the applicants' land holding entitlements are constitutional.

Yet, the municipalities, dissatisfied by the decision of the Council, brought their complaints to the Commission in the form of appeal. The Commission overturned the judgments given by the Council arguing the complaints need constitutional interpretation. The Commission's reasoning in this type of cases is similar to the first type of cases. What we see here is that the Commission has deviated from the Council in the second type of cases while they have convergence in the first type of cases.

According to this author, the arguments made by the Commission to nullify the decisions of the court are hardly plausible from the perspective of constitutional interpretation. In the strict sense of 'constitutional interpretation', the types of land cases discussed above do not involve

constitutional questions. In both types of cases, the decisions granted by the Commission didn't show how the specific cases involved constitutional questions demanding constitutional interpretation. Rather, the arguments were made in reference to subsidiary laws in the sense that the courts' decisions contradicted these laws and not the regional constitution as such. Neither the decisions of the courts nor the laws referred by such decisions are exposed to have contradicted any of the regional constitutional provisions.

Nevertheless, the story does not end here. Those individuals aggrieved by the verdict of the Commission are taking constitutional complaints to the HoF though the latter has not given a decision yet. This might help to clarify the jurisdictional confusion between the HoF and the regional constitutional interpretation organs.

4.2. The Challenges of the Commission

Whether envisioned or not, the Commission seems to face challenges impeding it from accomplishing its constitutional mandates. In this regard, there are questions as to whether the Commission is designed as an independent and impartial institution that is able to provide neutral assessments on constitutional complaints brought to it by different parties; whether it is competent to deliver constitutional decisions effectively; and whether it has mechanisms of enforcing its decisions etc. The subsequent discussion tackles these and other questions one by one.

4.2.1. Impartiality or Independence of the Commission

All members of the Commission are members of *Woreda*, town, and sub-city councils of the region. As a result, the composition of the Commission gives the impression that it is a political organ. Specifically, the President and Vice President of the region (chief executive organs of the region) and the speaker of the State Council are members of the HoF and thereby automatically members of the regional Commission.[46] These individuals, together with other members of the HoF representing the region, are executive committee members of the incumbent party in the region. Moreover, besides their legislative mandates either at regional or woreda

46 The Tigray revised Constitution, cited above at note 6, Article 68(1).

levels, many of the members of the Commission work at different levels of the regional administration. In terms of structure, the Commission and the Council are compelled to share the secretariat office of the regional State Council.[47] This means that the secretariat office of the State Council serves as the secretariat office of the Commission and the Council. This shows the marginal level of attention given to the mandate of the Commission.

As it appears, the Speaker of the State Council is at the same time the chair of the Constitutional Interpretation Commission, which is supposed to control the constitutionality of the laws of the former. As such, we fail to see the institutional independence or autonomy of the Commission.[48]

Other challenges relate to conflicts of interest in the members of the Commission. These basically originate from the fact that members of the Commission are drawn from the legislative organs of the region and from the fact that some of its members are also key political figures of the region at various hierarchies of the administration. This means that, in one way or the other, members of the Commission may involve in the making of the laws and of the decisions whose constitutionality is supposed to be checked by the same Commission. Despite the possibility of such conflicts of interest, there is no clause in the relevant laws that require a member of the Commission to withdraw from participating in cases involving such matters.

The question here would be, when laws or decisions adopted by the regional or *Woreda* legislative or administrative organs are contested as unconstitutional, would it be sensible to expect an impartial decision from the Commission? In such situation, members of the Commission may become a party to their own case. Therefore, save for cases of minor implications, the design and composition of the Commission do not give confidence about its neutrality. Consequently, the composition and institutional design of the Commission can be considered as a challenge for

47 A proclamation to determine powers and functions of the CIC, cited above at note 34, Article 17(1) and A proclamation to determine the powers and functions of the Tigray Council of Constitutional Inquiry Proc. No. 229/2003, 20th Year No.2, Mekelle, Article 29(1).

48 An interview with Tsegai Berhane (PhD), member of the CCI, 23 December 2019, at MU Law School, conducted from 11:30 to12:40.

an entrenched constitutional interpretation practice and for constitutionalism at the regional level.

The composition of the regional Council of Constitutional Inquiry, which assists the Commission in investigating constitutional complaints, raises some other concerns. First, the fact that the President and Vice-President of the regional Supreme Court are respectively the chairperson and deputy chairperson of the Council[49] triggers unwarranted conflict of interest in the sense that they may have the chance to entertain cases in the courts and also in the Council.[50] They may entertain cases in the administrative wing of the Supreme Court as President and Vice President of the same and again in the Council if the same case is alleged to have contradicted the Constitution. Despite these potential and actual conflicts of interest, there does not seem to be an obligation to recuse in such instances.[51]

Second, the fact that members of the regional CCI, except the chairperson and deputy chairperson, can be removed by the State Council with ordinary majority vote deteriorates the appearance of the Council to stand the test of independence, including tenure.[52] Article 7 of the Council's proclamation, Proc. No. 229/2013, underscores that members of the Council, except the chairperson and vice chairperson, can be removed from their responsibility with simple majority vote by the State Council if the latter finds a good cause. Yet, it does not state in advance what exactly "good cause" in this particular case refers to. In the absence of clarity, the law is bound to lack predictability as to when a member of the Council is going to be dismissed from his duty as it simply depends on the will of the State Council. Hence, it can be argued that the regional CCI's independence is likely to be affected by the fact that the removal of its members from office is left at the mercy of the State Council.

49 The revised Tigray Constitution, cited above at note 6, Article 69(2(a & b)).

50 A proclamation to determine powers and functions of the CIC, cited above at note 34, Article 11(1 & 2).

51 Tsegai, cited above at note 48.

52 African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part A (4), Available at <http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf>, last visited on 24 October 2017.

4.2.2. Effectiveness of the Commission

Even though constitutional review should be a full-time responsibility, the design and composition of the members of the Commission and the Council speaks otherwise. Members of both institutions are part-timers as far as their mandate with regard to constitutional interpretation is concerned. For instance, all members of the Commission are members of either the regional, *Woreda*, town, or sub-city councils. They are assumed to conduct a normal meeting twice a year though they could also make urgent hearings.[53] Hence, one may say, constitutional interpretation in the region is given to a part-time institution. An empirical investigation of the matter reveals that there are a lot of cases decided by the Council and yet awaiting the response of the Commission for more than six months as the latter is practically holding its meeting twice a year.[54] From the existing cases in the Council and Commission, constitutional complaints are bound to stay in the shelves of both institutions for more than a year. With the current vast flow of cases, the backlog of constitutional complaints is going to increase substantially.

Not only the members of the Commission but also the members of the Council are part-timers. The Council has eleven members with different backgrounds. As mentioned, it includes the President and Vice President of the regional Supreme Court, who *ex officio* serve as chairperson and deputy chairperson of the Council, six legal experts of proven professional competence and high moral standing to be appointed by the State Council upon the recommendation of the regional chief executive (the regional President), and three members elected by the State Council nominated by its Speaker.[55] Among the six members nominated by the regional President and approved by the State Council, there are two university professors, the head and vice head of the anti-corruption commission, and a director from the Justice Bureau of the region. The other three elected from the State Council also have different executive positions including the head of the Civil Service Bureau of the region.

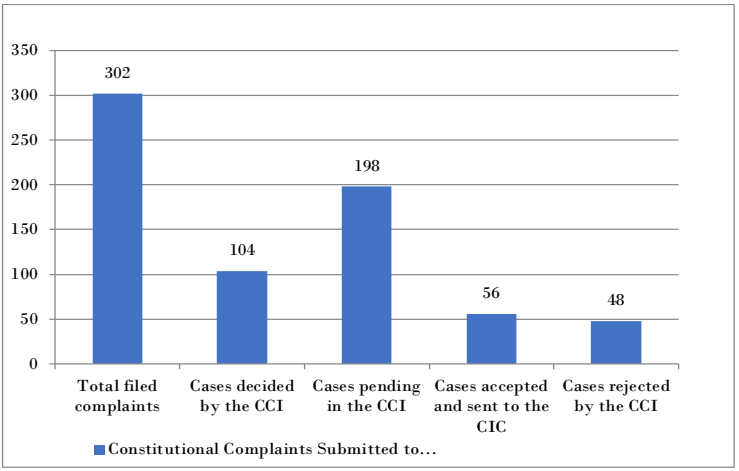
53 A proclamation to determine powers and functions of the CIC, cited above at note 34, Article 11(2).

54 Meseret, cited above at note 40.

55 The revised Tigray Constitution, cited above at note 6, Article 69 (2(a, b, c, & d).

This being as it is, it might be important to look at the accomplishments of the Council in the past seven years. The following chart summarizes these facts numerically.

Figure 3- Number of complaints filed and their status in the CCI



Source: information gathered from the office of the CCI.

The graph reveals that in the past seven years a total of 302 cases have been submitted to the Council. With the exception of four cases, all complaints were brought to the office in the last two and a half years. From the total complaints, the Council addressed 104 cases. Of these, 48 constitutional complaints were rejected as not necessitating constitutional interpretation on procedural and substantive grounds. Again, out of the total complaints, 198 cases are still pending before the Council.

4.2.3. The Functional Relation of the CIC and the HoF

The Tigray regional Constitution is expected to be consistent with the federal Constitution without the need to repeat what is already stated in the federal Constitution. The regional Constitution is there to provide additional rights, protection, and institutions to the regional people without affecting the minimum schemes of protection provided under the federal Constitution. Nevertheless, many of the contents of the regional Constitution are the carbon copy of the federal Constitution, particularly the

human and democratic rights part of the regional Constitution. The fact that the Commission gives a final constitutional decision if any law or decision contradicts the regional Constitution triggers many theoretical and practical questions.[56] With the existing similarity in content of the federal and regional Constitutions, would it be constitutional for the Commission to give final decisions on such common provisions and at the same time bar the HoF from entertaining such constitutional cases. Setting aside the counter arguments on this particular point, the proclamation prescribing the powers and functions of the Commission states that the decisions of the Commission are final.[57]

Having said this about the theoretical contention, it is true that a lot remains to be done in resolving such real and perceived controversies. However, individuals aggrieved by the verdict of the Commission have taken constitutional complaints to the HoF.[58] In terms of dissatisfaction, there are also regional judges who express their disappointment with the decisions of the Commission.[59] However, the respective jurisdiction of the HoF and CIC needs to be governed by the supreme federal constitution which divides power between federal and regional governments. Thus, with regard to those powers exclusively granted to regional states, whether we like or not, the decision of the CIC is going to have final authority. Yet, a lot remains to be done in demarcating the jurisdictional boundary between the HoF and CIC with regard to chapter three of the federal constitution, which is largely replicated in the regional Constitution.

56 The revised Tigray Constitution, cited above at note 6, Article 68(1).

57 A proclamation to determine powers and functions of the CIC, cited above at note 34, Article 30(1).

58 Information from the regional office of the CCI reveals that there are currently many constitutional complaints that have been brought to the HoF, 10 December 2019.

59 An interview with a judge from the regional Supreme Court, conducted at the Supreme Court compound, 4:00-5:00 pm, 5 December 2019. For instance, this interviewee argued that the decisions of the Commission, in relation to land cases, basically go beyond its mandate as the same power is granted to the federal government under Article 51 of the FDRE Constitution and likewise constitutional interpretations which touch up on these matters should be the mandate of the HoF. Nonetheless, the real contention is about to come after the decision of the HoF.

4.2.4. Absence of Oral Hearing

The Constitution mandates both the Commission and the Council to adopt rules of procedure that can ensure a fair hearing process in carrying out constitutional interpretation. However, there are no such rules yet. Moreover, complainants are required to present their case only through a written application and complainants do not have the chance to be heard orally nor to produce responses to what the other party might reply. This falls short of the 'right to be heard', including the right to defense. Both the Council and the Commission are investigating complaints in closed doors. The author's investigation of the experience of the Council and the Commission has found that complainants as of right can neither present their cases in person nor examine the evidences presented by the opposing party. As an "adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence"[60] is one of the core elements of a fair hearing, it is clear that the procedure before the Commission and the Council cannot qualify as such.

Part of the problem derives from the unmanageable number of members of the Commission supposed to hear constitutional complaints. Let alone hearing cases, the Commission is challenged to have a detailed deliberation on the constitutional complaints submitted to it. This substantially affects the degree of deliberation that should have existed. Practically, it is the committees established within the Commission, which deliberate on specific cases, and they simply present the summary of cases for approval to the Commission. It is very difficult to formulate arguments and counterarguments within the Commission.

4.2.5. Remedies and Enforcement of Remedies

It is obvious that an organ like the Commission, empowered to interpret the highest law, must be given the power to grant final remedies for constitutional violations that can address a wide range of situations. What is the sort of constitutional interpretation given by the Commission? Should the decision of the Commission be expected to be declaratory or detailed and specific? Moreover, once a final decision is given by the Commission,

60 Mulu Beyene, "Assessing the House of Federation in Light of the Exhaustion of Local Remedies Rule under the African Charter", unpublished article, (2019), p. 22.

how is it going to be enforced and who is in charge of enforcing it, remain baffling concerns. There are practical dilemmas and instances in such scenarios and it is being an evolving test to the Commission.

Conclusion

Constitutional adjudication makes sure that actions of government bodies and officials are in line with the constitution. The choice of the body which interprets the constitution is as important as the task of constitutional interpretation. Particularly, the design, the composition, and the powers given to this organ are of the utmost importance.

In Tigray, the task of constitutional review is entrusted to the Constitutional Interpretation Commission, as assisted by the regional Council of Constitutional Inquiry. The Commission is composed of representatives of the *Woreda*, town, and sub-city councils in the region and of State Council members that are represented in the HoF. Thus, all members are political representatives and the Commission is consequently a political institution. One of the challenges related to this composition is that the Commission may lack impartiality when complaints involving political interests are submitted to it. Furthermore, some of the Commission's members could be interested parties when laws and decisions made by the legislative and executive organs are challenged before the Commission. Thus, in the face of all these issues, it is highly unlikely to trust the Commission as an impartial and independent constitutional umpiring organ. Additionally, the fact that the Commission is chaired by the Speaker of the State Council tests the institutional independence of the Commission. The large number of members of the Commission hinders the necessary degree of deliberation required in making constitutional interpretations. The fact that the Commission meets twice a year makes it a part time institution. The same fact also affects the effectiveness of the Commission in addressing constitutional complaints. Therefore, the composition and overall design of the Commission have become a challenge to the task of constitutional interpretation in Tigray.

The experience of the Commission indicates that there are functional misapprehensions between the mandates of the HoF and the Commission mainly because substantial parts of the regional Constitution are copied from the federal Constitution and yet the decisions of the Commission are

meant to be final in all matters if a law or decision contradicts the regional Constitution. Nevertheless, it is questionable whether a decision given by the Commission with regard to the provisions copied from the federal constitution would be able to bar the HoF from entertaining the same matter.

Furthermore, neither the Commission nor the Council allows oral hearing to the parties having constitutional complaints and neither do parties have the chance to examine and defend what the counterpart produced. This experience falls short of the 'right to be heard', including the right to defense. Moreover, there is no clarity as to who is or should be in charge of enforcing the decisions rendered by the Commission.

With the current increase in case flow, it seems very difficult to address such cases duly and timely with the existing part-time institutions (CCI and CIC), apart from the issues of lack of impartiality and independence affecting these institutions.

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The Struggle for Recognition and the Fault Lines of Ethnic Identity Determination in Ethiopia

Beza Dessalegn[*] *& Christophe Van der Beken*[**]

Abstract

The Ethiopian federal system is conspicuous for its grant of extensive rights to the country's "nations, nationalities and peoples" or ethnic groups. Ethnic groups do not only have language rights and cultural rights but also rights to political participation and territorial self-rule. Yet, the entitlement of a group to these rights is contingent on the group being officially recognized as a "nation, nationality or people". This has spurred a multitude of groups to claim such status and submit distinct identity determination petitions to the responsible state institutions. This chapter presents several such petitions originating from three regional states and examines how they have been handled by the responsible federal and regional institutions. The research finds that the federal and regional governments' response is based on political expediency rather than clear and consistent criteria. This may incentivize groups to deviate from the legal path and hence be a catalyst for ethnic tensions and conflict.

Introduction

For almost 25 years now, Ethiopia has been using ethno-territorial federalism as a mechanism of nation and state building. The core idea behind the federal arrangement – justifying its designation as "ethno-territorial" – is the empowerment of Ethiopia's ethnic groups through the establishment of ethnically carved out territorial units. All Ethiopia's ethnic

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groups ("nations, nationalities and peoples", to use the constitutional jargon) are constitutionally entitled to extensive rights such as language rights and cultural rights, political representation, and participation as well as self-rule. For fulfilling these rights, ethnic territorial units have been established in the form of nine regional states (hereafter regions) and of dozens of ethnic-based sub-regional administrations (or local governments).

The constitutional allocation of group rights and the attendant establishment of ethnic-based territorial units have arguably brought significant cultural, socio-economic as well as political benefits to the empowered ethnic groups. However, the entitlement of a group to the aforementioned rights (constitutionally subsumed under "the right to self-determination") – and thus to an ethnic-based territorial unit – depends on the group being officially recognized as a "nation, nationality or people". This discrepancy between groups with and without official recognition is at the heart of the politics of identity determination in Ethiopia since those without official political recognition as distinct "nation, nationality or people" are unable to benefit from the overall federal dispensation.[1] Given the "rewards" bestowed on groups recognized as nations, nationalities and peoples, it should not surprise anyone that a multitude of distinct identity determination petitions have been submitted to the responsible state institutions. In this regard, it is regrettable that these institutions seem neither ready nor willing to respond to new identity recognition claims, which require dealing with issues such as ethnic boundary delimitation at intra-group level. The absence of a comprehensive and consistent government response has propelled processes of ethnic fragmentation as many groups (or communities) have filed identity determination petitions in order to establish their distinctness from their recognized parent ethnic group.[2] The indeterminate meaning given to the "nation, nationality or people" (hereafter NNP) concept by Article 39(5) of the federal Constitution as well as the ambiguity created by the (limited) identity determination decisions rendered by federal and regional government institutions seem to have opened an opportunity for ethnic groups to frame their status based on

1 Yonatan Tesfaye Fessha, "The Original Sin of Ethiopian Federalism", Ethnopolitics, vol. 16(3) (2017), p. 232.

2 See the discussion under Section III.

their own interest, spawning an avalanche of identity determination petitions.

The chapter, subsequent to this introduction, is organized in four sections. Section I provides the historico-political context in which the claims for distinct identity determination are situated. Section II offers an overview of the legal framework governing the distinct identity determination process. Section III quantifies the quest for recognition and discusses several identity determination petitions. It examines the requirements for distinct identity determination by analyzing the criteria included in the federal Constitution in light of the various identity determination petitions. Subsequently, legal and political responses given to these petitions by regional and federal government institutions are discussed in order to identify the fault lines of responding to identity. A brief conclusion sums up the research findings and points out possible ways forward.

I. The Politics of Identity and the Struggle for Ethnic Recognition

Identity politics in Ethiopia has unique politico-historical antecedents. This, as Tronvoll rightly asserts, is intricately related to the origin and process of the making of Ethiopia, which demonstrates distinctive features.[3] Unlike most African countries, Ethiopian state and nation building processes did not evolve in the wake of European colonial conquest, but followed in the aftermath of the expansion of the historical empire of Abyssinia in the late nineteenth century.[4] This expansion and concomitant conquest of vast territorial expanses transformed the culturally relatively homogenous Abyssinian Empire into a hugely diverse entity. Confronted with the challenge of achieving unity in a diverse polity, the imperial regime-initiated

3 K. Tronvoll, Ethiopia: A New Start?, (2000), pp. 6-11; see also D. Levine, Greater Ethiopia: The Evolution of a Multiethnic Society, (1974); Alem Habtu, "Ethnic Pluralism as an Organizing Principle of the Ethiopian Federation," Dialectical Anthropology, vol. 28(2) (2004), pp. 93-97.

4 A caveat here is that there is no consensus among elites regarding the historical processes that led to the formation of modern-day Ethiopia. See, Merera Gudina, "Contradictory Interpretations of Ethiopian History: The Need for a New Consensus", in D. Turton (ed.), Ethnic Federalism: The Ethiopian Experience in Comparative Perspective, (2006).

nation and state building policies aimed at the establishment of centralized rule corroborated by the assimilationist imposition of one national identity. This forced assimilation entailed the spread of one language, culture, and religion[5] at the expense of all others.[6] The recognition of ethnic groups, which is currently the overarching, organizing principle of the Ethiopian state, was considered as a threat and conspicuously avoided in the nation building strategy of the country.[7] The forced assimilation policy pursued by the imperial regime came to be particularly challenged as from the late 1960s by the Ethiopian Student Movement, which, *inter alia*, articulated "the question of Nationalities".[8] The strong influence of Marxist-Leninist ideas on the ideological debate within the Student Movement explains why Marxist-Leninist terms were used to refer to the imperial assimilationist policies. In this regard, one can observe that the terms "nations" and "nationalities", which were already included in Soviet constitutional documents, are today still being used to refer to Ethiopia's ethnic groups. This debate within the student movement provided the intellectual ammunition for the ignition of the struggle by several ethno-nationalist groups, demanding from the central state recognition and autonomy (up to and including secession).

The military regime, known as the "*Derg*", which toppled the last emperor of Ethiopia in 1974 and subsequently assumed state power, continued the imperial nation and state building policies. Although the *Derg*, forced by the Marxist-Leninist ideology it had espoused, paid some lip service to the "nationalities" issue, it was also convinced that a genuine recognition and institutionalization of ethnic pluralism would threaten state unity. The revolution, which many had anticipated to be a turning point in Ethiopian

5 For instance, Walelign Mekonen, a leading student radical, designated the version of Ethiopian nationalism as the alter ego of Amhara-Tigray hegemony.

6 W. Kymlicka, "Emerging Western Models of Multination Federalism: Are they relevant for Africa", in D. Turton (ed.), Ethnic Federalism: The Ethiopian Experience in Comparative Perspective, (2006), p. 47.

7 J. Markakis, Ethnic Conflict in Pre-Federal Ethiopia, Paper presented at the first National Conference on Federalism, Conflict and Peace Building, Addis Ababa, 5-7 May 2003; Merera Gudina, cited above at note 4, pp. 122-123.

8 Bahru Zewde, A History of Modern Ethiopia 1855-1991, (2001), p. 225.

politics, thus largely failed to respond to ethnic demands.[9] Pursuant to classic Marxism-Leninism, the *Derg* paid rhetorical attention to the ethnic issue, but subsumed it under class antagonisms, which it considered the main contradictions in the country's polity.[10] This position of the *Derg* led to a further strengthening of the ethnic-based movements, which intensified their struggle in the aftermath of the 1974 revolution.

Among the multitude of ethnic-based liberation or rebel (depending on one's political standpoint) movements that proliferated in the 1970s and 80s, the dominant one became the TPLF (Tigray People's Liberation Front), which struggled for the right to self-determination of the Tigray people. The TPLF – whose founding members were students, equally influenced by Marxism-Leninism – differed from the *Derg* in the way it approached ethnicity. For the TPLF, ethnic self-determination was not merely a rhetorical or instrumental issue, but a major foundation for and focus of its struggle. Having liberated the Tigrayan territories from the *Derg* by the late 1980s, the TPLF decided to widen its struggle and initiated the establishment of the EPRDF (Ethiopian Peoples' Revolutionary Democratic Front). The Front was designed as a coalition of ethnic-based liberation movements and aimed at ousting the *Derg* from state power, which objective was achieved in May 1991. The EPRDF proclaimed its intentions of doing away with the centralized and assimilationist past and initiated a new mode of nation building based on the recognition and institutionalization of ethnicity. This was clearly visible throughout the transitional process (that is, the period between the removal of the *Derg* in 1991 and the coming into effect of the new Constitution in 1995) and culminated in the establishment of an ethnic-based federation by the 1995 FDRE (Federal Democratic Republic of Ethiopia) Constitution.

The 1995 Constitution – which has hitherto been unamended – formalized the EPRDF's novel nation building policy. The preamble of the Constitution presents the Ethiopian state/federation as the result of an agreement

9 However, the most important outcome of the revolution was the rise of the hitherto marginalized groups to public visibility. Ethiopia was no more the land of Solomonic rulers with divine mandate to rule. See Teshale Tibebu, The Making of Modern Ethiopia 1896-1974, (1995), p. 168.

10 J. Young, Peasant Revolution in Ethiopia-The Tigray People's Liberation Front, (1997), p. 61.

between all "nations, nationalities and peoples" (i.e., ethnic groups), hence it presents the federation as the result of a coming together process. This is confirmed by Article 8, which stipulates that the Constitution – and therefore the state it founds – is an expression of the sovereign power of the nations, nationalities and peoples. The sovereign power bestowed on the nations, nationalities and peoples entitles them to self-determination, including the right to territorial autonomy. Pursuant to Article 39, all nations, nationalities and peoples are entitled to territorial autonomy and this has resulted in the establishment of territorial units (in the form of regional or local governments) for specified ethnic groups – which justifies the labelling of the Ethiopian state as an ethno-territorial federation.

On the ground, the novel nation building policy propelled by the EPRDF has gone through two distinct phases. The first phase is the period, largely corresponding with the transitional era, in which people were highly encouraged to organize into separate ethnic identities and assert their right to self-determination, to the extent of establishing separate ethnically carved out regional and sub-regional or local self-governing units. The second is the period that started in the aftermath of the establishment of the nine regional states by the federal Constitution. This phase, which continues up to the present, gives primacy to administrative integration, which implies that people are being discouraged from seeking separate identities as well as from requesting autonomous ethnic territorial units.

Vaughan therefore rightly designates the transitional period as the "ethnic free-for-all" in terms of political and administrative organization.[11] During this period, "groups of all sizes, claims, and credibility had been encouraged to organize and mobilize their populations for self-determination".[12] This

11 S. Vaughan, Ethnicity and Power in Ethiopia, (2003, Unpublished, the University of Edinburgh, PhD Thesis), p. 249. Others have described this moment as "a honeymoon for the people of many previously marginalized ethnic groups in southern Ethiopia", L. Aalen, The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilization under Ethnic Federalism, (2011), p. 97.

12 Vaughan, cited above at note 11, p. 249.

approach was institutionalized when the transitional government restructured the country into 14 national/regional self-governments.[13]

As Aalen keenly observed, "the administrative organization of the first years of the new regime fit well with the EPRDF's rhetoric of liberating the oppressed nationalities".[14] However, it soon became apparent that this attitude of the EPRDF was not there to stay. For instance, upon the finalization and promulgation of the FDRE Constitution, regions 7-11[15] were merged together to form the Region of SNNP (Southern Nations, Nationalities and Peoples) and Addis Ababa ceased to have a separate regional existence. The already ethnically mobilized groups within the newly formed SNNP Region had no option but to settle for ethnic territorial units below the regional level.

After 1995, even though some contend that it cannot be seen as a sudden change of position by the EPRDF,[16] primacy was given to administrative integration. This resulted in the discouragement of distinct ethnic identity claims and – consequently – separate ethnic territorial autonomy demands. This was particularly visible in the SNNP Region. Of course, the merger of the five regions (7-11) that were established during the transitional period was the first blow to the "ethnic free-for-all" and an end to the "honey moon period" of ethnic identity recognition. After 1995 onwards, the EPRDF shifted its focus from "national liberation" to stopping the process of administrative disintegration and to containing the growth of "narrow nationalism".[17] Consolidating this stance, administrative structures below the regional level, like ethnic zones and special districts, were subjected to

13 See Article 3 of Proclamation 7/1992, "National/Regional Self-Governments Establishment Proclamation No. 7/1992", Negarit Gazeta, Year 51, No. 2.

14 Aalen, cited above at note 11, p. 98.

15 These are five of the 14 regions established under Proclamation 7/1992.

16 Even during the transitional period, despite its acceptance of the secession of Eritrea, EPRDF at times tactically and at times by force eliminated all other political parties, especially those (like the OLF and ONLF) that were fighting for greater autonomy (to the extent of secession), from the negotiating process. See Berhanu Nega, "Identity Politics and the Struggle for Liberty in Ethiopia", Paper Presented for the Oromo Studies Association (OSA) 24th Annual Conference, Howard University, Blackburn Center, Washington DC, 31 July – 1 August 2010.

17 Aalen, cited above at note 11, pp. 98-99.

reorganizations. The EPRDF had also resisted the claims by the Berta and Sidama ethnic groups for the establishment of new ethnic based regional states.

The formation of the SNNP Region and the organization of its sub-regional units were first accomplished through an integrationist agenda. However, some of the sub-regional administrative units had to be quickly split up by the regional government to stop violent ethnic conflicts. In the year 2000, the North Omo Zone was split into three zones (Wolayita, Dawro, and Gamo-Gofa) and two *Liyu Woredas* (special districts) (Basketo and Konta).[18] The Kaffa-Sheka Zone was dismantled and replaced by two distinct zones: Kaffa and Sheka.[19] Similarly, Alaba managed to secede from the Kembata AlabaTembaro Zone as the Alaba Liyu Woreda and the Kembata-Tembaro Zone was established as a distinct unit. The recognition of a Silte ethnic identity, separate from the Gurage identity, not only proved to be another propellant for the increase in administrative units within the region, but has also been used as a springboard for new identity determination petitions.[20] The Silte were considered a sub-group of the Gurage and therefore did not have a separate ethnic-based administrative unit. Through a protracted process of identity recognition – which will be outlined in the next section -, the Silte not only succeeded in asserting themselves as a distinct ethnic group, but they also managed to secure a zone of their own.[21] Notwithstanding these events, the integrationist agenda of the EPRDF and its regional constituent party SEPDM (Southern Ethiopian Peoples' Democratic Movement) resurfaced in 2011 when the four separate (ethnic-based) *Liyu Woredas* of Konso, Burji, Derashe, and Kore (Amaro) were amalgamated to form the new Segen Zone.

18 Vaughan, cited above at note 11, pp. 258-260.

19 *Ibid*. Vaughan discusses three important reasons for the disintegration of the Kaffa-Sheka Zone. The first was the political dominance of the Kafficho over the Shakicho ethnic group, which resulted in the latter's demand for a separate zone. Second is the rise of the violent protests by the Majang minority for a separate administration of their own. Third is the issue of the Manja clan and their quest for proportional representation within the zone.

20 See the discussion under Section II.

21 L. Smith, "Voting for an Ethnic Identity: Procedural and Institutional Responses to Ethnic Conflict in Ethiopia", The Journal of Modern African Studies, vol. 45(4) (2007), p. 582.

However, the integrationist policies pursued by the SEPDM – and supported by the EPRDF – have been seriously undermined by the recent political developments in Ethiopia. The coming to power of Prime Minister Abiy Ahmed in April 2018 has ushered in unprecedented steps towards political liberalization but has simultaneously seriously weakened the party discipline within and centralized control of the EPRDF, which had been the ruling party's hallmark since its establishment.[22] Not only have there been serious tensions between some of the party's components such as the ADP (Amhara Democratic Party) and the TPLF, the Southern ruling party SEPDM has been weakened by conflicting views among its members on the continued existence of the SNNP Region itself. These dynamics have considerably affected the capacity of the ruling party to reign in centrifugal ethnic forces. At the time of writing this chapter (December 2019), the disintegration of the SNNP Region is an imminent possibility. In 2018, the Konso, who were administered as part of the Segen Zone, were endowed with their own zone and the Gamo-Gofa Zone was split in two.[23] Furthermore, in November 2019, an overwhelming majority of the participants in a referendum on the issue voted in favor of the establishment of a new Sidama Regional State (advancing the administrative position of the Sidama, who hitherto had their own zone in the SNNP Region), which will bring the number of regional states to ten. Moreover, about ten ethnic-based Zones in the region have submitted a demand for separate regional statehood to the SNNP Regional Council.[24] Against this background, one could perceive the recent establishment of the Prosperity Party (PP), which is supposed to unite the EPRDF components and its five affiliates into one multinational party, as an attempt to counter further political and administrative disintegration.[25]

22 Semir Yusuf, Drivers of Ethnic Conflict in Contemporary Ethiopia, (2019), p. 25.

23 Ermias Tesfaye, <Southern Comfort on the rocks, https://www.ethiopia-insight.com/2019/11/20/southern-comfort-on-the-rocks/>, last visited on 26 December 2019.

24 *Ibid.*

25 International Crisis Group, Keeping Ethiopia's Transition on the Rails, 16 December 2019. The National Electoral Board registered the Prosperity Party on 25 December 2019. This followed the decision of three members of the EPRDF (the ODP, ADP and SEPDM) and the five EPRDF affiliated parties to form the Prosperity Party on 1 December 2019.

The above outlines the historical and political context in which the various distinct identity determination petitions are situated. The next section outlines the legal provisions governing the ethnic identity determination process.

II. The Legal Framework Governing Distinct Identity Claims

Although the Federal Constitution includes the constituent elements of an ethnic group (Article 39(5)) and provides the procedure through which ethnic groups can establish a new regional state (Article 47(3)) or even an independent sovereign state (Article 39(4)), it does not explicitly mention the possibility of distinct ethnic identity claims. Yet, the constitutional ground for distinct identity claims as well as the applicable procedure were clarified by the Council of Constitutional Inquiry (CCI) and the House of the Federation (HoF) while deciding on the Silte case.[26]

The Silte case is the first ethnic identity determination case that was managed through the constitutional channel. The Silte were traditionally regarded as part of the Gurage ethnic group, who has its own zone in the SNNP Region. The separation of the Silte from the Gurage was – unsurprisingly, considering the ruling party's integrationist policy mentioned in the previous section – seriously opposed by the EPRDF and its Gurage member party, which was administering the Gurage Zone. Ultimately, the case was submitted to the HoF. However, it could not be clearly inferred from the Constitution whether the HoF had the mandate to decide on ethnic identity cases. The CCI, the body constitutionally mandated to advise the HoF on constitutional interpretation issues, argued that identity issues are issues related to the rights of nations, nationalities and peoples to self-determination, which issues are, pursuant to Article 62(3) of the Constitution, decided by the HoF. This interpretation has been

26 See the House of the Federation of the Federal Democratic Republic of Ethiopia, "Advisory opinion of the CCI on the Silte case", (2008). *Journal of Constitutional Decisions*, Vol. 1; Decision of the House of the Federation Regarding Resolution of Claim for Identity, (April 2001), document on file.

confirmed by Proclamation No. 251/2001,[27] whose Article 19(1) mentions issues related to "self-identities" as part of "questions of self-determination".

Yet, the HoF underscored that the power of deciding identity issues in the first instance lies with regional state authorities. Since the Federal Constitution does not clearly mention the federal government organ that has the power to answer identity questions, the HoF argued that identity determination matters fall under the (residual) powers of regions and in particular their respective regional councils (although the designation of the responsible regional body is ultimately part of the regional states' discretion). Such case could only be referred to the HoF if the claimant community is not satisfied with the decision of the responsible regional state body. This decision of the HoF is reflected in Article 20(1) of Proclamation No. 251/2001, which stipulates that self-determination issues shall be submitted to the HoF only if the issue has not been given "due solution by the various organs in the administrative hierarchy of the state concerned."

The HoF furthermore decided that despite the role played by the regional councils, the ultimate decision-making power regarding identity determination is the claimant community itself, which exercises this power through the organization of a referendum.

With regard to substantive matters, the HoF stated that Article 39(5) of the Constitution provided the criteria for evaluating an application for distinct ethnic identity recognition. Communities who claim distinct identity are required to show that they meet these criteria. In this regard, the HoF decided that claimants are first required to submit their petitions in writing by showing that they have their own language, culture, belief in a common or related identity, distinct psychological makeup, and territorial contiguity, in other words that they fulfill the criteria as specified under Article 39(5) of the Constitution. The primary role of the regional councils is to check whether the requirements set under Article 39(5) have been complied with before a referendum is organized. In its assessment, the regional state, through a team of professionals, checks the fulfilment of the range of substantive criteria included in Article 39(5). If the claimant community or

27 "Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001", Federal Negarit Gazeta, Year 7, No. 41.

group proves that there is a sufficient case, the regional council organizes referendum and the concerned community proceeds to decide on the final fate of the identity question via direct participation.

Contentious issues could be raised with regard to both the power of regional councils to decide on the fulfillment (or otherwise) of the criteria set under Article 39(5) and the repercussions of finally settling identity issues through a referendum.

First, if regional councils are allowed to decide on the fulfillment of the criteria set under Article 39(5), one of the major challenges will be how to assure the neutrality of these councils. In regions (like Oromia and Amhara) where an ethnic group is both the political and numerical majority, the regional councils also reflect this dominance, as a result of which communities seeking to have their distinct identity recognized will find it very hard to have their cases assessed neutrally. Distinct identity petitions aim at the recognition of communities as distinct ethnic groups separated from already recognized ethnic groups. Hence, a previously recognized ethnic group from which separation is sought participates in the deliberation and decision on the distinct identity claim. This problem is also replicated in regions like the SNNP where the second chamber of parliament (the Council of Nationalities (CoN)) is entrusted to handle identity questions. The CoN is a House composed of recognized ethnic groups of the region. In fact, the power of the regional state councils to decide on identity claims violates the legal maxim that no one shall be a judge in his own case, which raises serious concerns about the impartiality and neutrality of the process. While it may not be a bad idea to include the views of hitherto recognized ethnic groups in the recognition process, it is a step too far to make the same ethnic groups the ultimate arbiters and decision makers.

The second contentious issue is related to the referendum process. Once the prima facie determination of the fulfillment of the criteria under Article 39(5) is finalized, the organization of a referendum to decide on the ultimate fate of the identity question follows. As witnessed in the Silte case, only the members of the claimant community are allowed to participate in the referendum. Although giving the ultimate power with regard to ethnic identity determination to the claimant community is an expression of the

right to self-determination, it simultaneously entails a decision on the distinctness of the community before a referendum is held. One is therefore left to wonder whether it is the process leading to the referendum that should decide on the distinct identity rather than the referendum itself. This process also raises another problematic issue, namely who gets to decide on who the members of the claimant community are and, importantly, on the basis of what criteria? In connection to this, what say will/should members of a recognized ethnic group have, especially in circumstances when a community is seeking distinctness from an already recognized ethnic group?

III. The Rise and Rise of Identity Recognition Claims

The audacious decision of the EPRDF to use ethnicity as the main organizing principle of the state has not been able to prevent the proliferation of new ethnic identity determination petitions, but quite the contrary. This section discusses identity determination petitions that have arisen in the three regions of the SNNP, Oromia, and Amhara. They are instructive of the never-ending claims groups are bringing to government institutions to have their distinct ethnic status recognized.

Distinct identity recognition claims, even though they display common elements, largely arise due to either of the following reasons. Firstly, there are communities that strive for distinct identity recognition, not only because they are socially marginalized and discriminated against by the dominant section of their parent ethnic group, but also because they are considered as outcasts by mainstream society. Secondly, there are groups seeking recognition because they consider themselves distinct from the dominant section of society in terms of the various identity markers like language, culture, and psychological makeup, and because they live in a contiguous territory. Lastly, there are groups that seek distinct identity recognition not based on the commonly known identity markers such as language or culture, but on the basis of historical accounts according to which their distinct identity markers have been systematically destroyed by the dominant section/s of society from which they want to separate.

The below overview and discussion of identity claims in three regional states exemplify these three scenarios.

3.1. Identity Determination Issues in the SNNP Region

The SNNP Region is ethnically the most diverse of Ethiopia's regions. Although the region recognizes the presence of 56 nations, nationalities and peoples, which are consequently granted the different components of the right to self-determination by the regional Constitution, numerous groups have submitted their distinct identity determination petitions to the regional CoN and all the way to the federal HoF. The current SNNP Constitution, which came into effect in 2001, has created the institution of the CoN. The CoN was modelled on the example of the HoF, which figures in the federal Constitution. The HoF was intended as the "federal" second chamber representing the diversity in the federation. This implies that all recognized Ethiopian ethnic groups are entitled to at least one representative in the HoF. The HoF has a number of important powers such as exercising constitutional review and deciding on issues relating to self-determination, including ethnic identity claims – as mentioned in the previous section. The CoN is similarly composed of ethnic group representatives; all (56) nations, nationalities and peoples of the SNNP Region have at least one representative in the Council. Apart from constitutional review powers, the CoN has the responsibility to settle issues of self-determination arising in the SNNP Region. This means that, in the first instance, identity recognition claims by groups living in the SNNP Region need to be submitted to the CoN, whose decision (or lack of it) can be appealed to the HoF pursuant to Article 20(1) of Proclamation No. 251/2001.

From the outset, it can be pointed out that, apart from the Silte claim, none of the petitions arising in the region have been fruitful. It is only in the Silte case that a referendum was organized in April 2001. The outcome of that referendum showed unequivocal support for a distinct Silte ethnic identity, which then engendered the establishment of a separate Silte Zone.[28]

The common feature of the identity determination petitions in the region is that the claims are induced by the social marginalization and discrimination experienced by the claimant groups. Hereunder, identity determination

28 C. Van der Beken, Unity in Diversity – Federalism as a Mechanism to Accommodate Ethnic Diversity: The Case of Ethiopia, (2012), p. 204.

petitions from three communities and their handling by the CoN are discussed.

The Manja

The Manja petition is one of the oldest and most protracted. The Manja initiated their identity question well before the establishment of the CoN.[29] After its establishment, the Manja formally submitted their petition to the Council on 11 December 2003.[30] The Manja, according to their application, are predominantly found in the Kaffa and Sheka Zones. They are also found in the Dawro and Bench-Maji Zones, Konta Special Woreda, the former North Omo Zone and South Omo Zone of the SNNP Region as well as in the regional states of Gambella and Oromia.[31]

The major points of contention in the petition of the Manja are the following. They claim that they have a distinct culture and language, very different from the Kafficho and the Shakicho and that their population is well over one million. However, they have been denied the right to administer themselves. They allege that the Kafficho and the Shakicho have treated them as "sub-humans".[32] Due to this, they want to be recognized as a distinct ethnic group. Accordingly, they want to elect their own representatives and have proportionate political representation in both regional and federal state institutions.[33]

The CoN, in a rather lengthy deliberation, declared that the Manja do not have a distinct identity different from that of the Kafficho and Shakicho. The Council stated that, even if there is a recognizable marginalization of the

29 Application by the Manja to the HoF (22 *Miyazia* [April] 1993 E.C.), on file with the registrar of the HoF, Addis Ababa; see also their petition to the HoPR (29 *Tikimt* [October] 1993 E.C.), document on file.

30 Report by the SNNP State Council on the Manja Identity Question (Hawassa 1998 E.C.), document on file.

31 Application by the Manja to the HoF (22 *Miyazia* [April] 1993 E.C.), on file with the registrar of the HoF, Addis Ababa.

32 Sayuri Yoshida, "The Struggle Against Social Discrimination: Petitions By The Manjo In The Kafa And Sheka Zones Of Southwest Ethiopia", Nilo-Ethiopian Studies, vol. 18 (2013), pp. 1-19.

33 Application by the Manja to the SNNP State Council (18/3/1993 E.C.), document on file.

Manja community by the Kafficho and Shakicho,[34] the Manja, for the purpose of being recognized as a distinct NNP (nation, nationality or people), did not fulfil the requirements set out under Article 39(5) of the FDRE Constitution.[35] The CoN argued that, even if the Manja believe that they have a distinct identity, they have neither a distinct culture or custom differentiating them from the Kafficho and Shakicho nor a distinct language that is different from that of the Kafficho and Shakicho. Moreover, they are not found inhabiting an identifiable, predominantly contiguous territory.[36] This decision of the CoN has been affirmed by the HoF.[37]

The Kontoma

The Kontoma claim that they are found in the Gurage, Hadiya, Kembata-Tembaro and Silte Zones and in the Alaba Special Woreda (since 2018 upgraded to Zone) of the SNNP Region as well as in the regions of Oromia and Amhara and in Addis Ababa. They contend that their overall population is over one and a half million.[38] Their petition to the CoN included the following major claims. First, having for long been a subject of marginalization and discrimination they wanted their right to equality to be respected. Second, they complained about denial of access to justice. Third, they asserted having been systematically denied participation in the various realms of society and most importantly political participation. Fourth, and

34 See, Decision of the SNNP Council of Nationalities on the Manja Identity Question (Hawassa, 13 *Ginbot* [May] 2000 E.C.).

35 The CoN in its decision, interestingly, suggested that the requirements set under Article 39(5), since they are connected by the word "or" seem to be alternative rather than cumulative. See *Ibid.* However, the CoN seems to have changed this position in the Danta case, where it adhered to the idea that the requirements set under Article 39(5) are cumulative and not alternative. See the Danta decision below under footnote (44).

36 Decision of the CoN on Manja, cited above at note 34.

37 See the Decision of the HoF on the appeal of the Manja Identity Question, rendered at its fourth parliamentary term, 2nd ordinary meeting (21 *Ginbot* [May] 2006 E.C.).

38 Application by the Kontoma to the SNNP State Council (14/12/1994 E.C.), document on file.

most notably, they wanted to be recognized as a distinct ethnic group capable of administering themselves.[39]

The CoN, after considering their request, argued that the Kontoma do not have a distinct language, culture, and history different from that of the Mareko (an officially recognized ethnic group)[40] and that they do not inhabit a contiguous territory.[41] These arguments founded the CoN's decision that the Kontoma cannot be considered as a distinct ethnic group.

The Kontoma appealed this decision to the HoF. Yet, the HoF unanimously affirmed the decision of the CoN. However, the HoF rejected the finding that the language of the Kontoma (Kontomigna) is similar to that of the Mareko. Rather, the House found that the language of the Kontoma is similar to that of the Hadiya while the languages of the Kontoma and Mareko are mutually intelligible.

The Danta[42]

The Danta argue that they are marginalized communities predominantly found in the Hadiya Zone, Soro and Duna Woredas. Their major claim, apart from distinct identity recognition, was respect for their basic human and democratic rights as well as the right to promote their language (Kizegna) including the right to receive education in it. Furthermore, they petitioned that their right to political participation be respected and have their representatives elected in local government structures, the regional council and in the federal institutions.[43]

39 See, Decision of the SNNP Council of Nationalities on the Kontoma Identity Question, (Wolayita Sodo, 21 *Sene* [June] 2004 E.C.).

40 *Ibid.*

41 *Ibid.*

42 The initial petition of this group was submitted under the name "Danta-Dubemo-Kenchechela".

43 Application by the Danta to the CoN (27/12/1996 E.C.) and (03/12/1998 E.C.), on file with the registrar of the CoN, Hawassa; letter to the HoF (8/02/1992 E.C.), document on file.

The CoN, in its decision, stated the following reasons to deny the Danta a distinct identity.[44] The CoN argued, even though the Danta language (Kizegna) is different from the language of Hadiyigna, it is found to be similar to the languages spoken by the Kembata, Tembaro, and the Donga.[45] Furthermore, culturally speaking, the Danta are not different from the Hadiya.[46] However, the CoN established that the Danta have a sentiment of solidarity and a feeling of distinctness from the Hadiya and at the same time are found inhabiting a contiguous territory.[47] Nevertheless, the CoN decided that since the group does not have a distinct language, even if it fulfils the other requirements, the Danta could not be considered different from the Hadiya.[48]

As can be observed, in this case the CoN seems to consider the requirements under Article 39(5) cumulative rather than alternative. The Danta fulfil the requirement of sentiment of solidarity and a feeling of distinctness as well as territorial contiguity. Despite this, they were denied distinct recognition because their language failed to be recognized as a different language. The Danta eventually were considered Hadiya even though their language was adjudged different from Hadiyigna. The Danta subsequently appealed the decision of the CoN to the HoF, yet the HoF has not yet decided on the appeal.

Which criteria are used for identity determination in the SNNP Region?

It is possible to make the following inferences from the preceding three cases. It is clear that identity determination cases in the SNNP Region are exclusively decided on the basis of the requirements provided under the definition of a NNP included in Article 39(5) of the Constitution. Yet, it is not clear how some of the subjective requirements under Article 39(5) like "belief in a common or related identity" and a "common psychological makeup" were ascertained. In the three cases discussed above, the CoN sent

44 Decision of the SNNP Council of Nationalities on the Danta Identity Question (Hawassa, 21 *Meskerem* [September] 2008 E.C.).

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

a taskforce (composed of experts) to study the particular petitioning group and determine the presence or not of the previously mentioned requirements. However, the question remains whether the fulfilment of these requirements should be established by a taskforce of professionals or rather by unambiguously formulated questions to be answered by the concerned petitioning group through a referendum?

On top of this, in the three cases discussed above, one cannot help but notice the strict reliance on language as a distinct identity marker. According to the CoN, if the language, which is a subject of consideration/determination, is found to be mutually intelligible with another language, then the speakers of the former cannot be considered as belonging to a distinct ethnic group. The mutual intelligibility of languages is, however, also observable among already recognized ethnic groups. The WoGaGoDa project is a very good example of this. This project was an attempt on behalf of the SNNP regional government to amalgamate the related languages of four ethnic groups in the then North Omo Zone – Wolayita, Gamo-Gofa, and Dawro – in one artificial language, WoGaGoDa. The newly created language would then serve as the language of administration and education in the zone. Yet, the project faltered and contributed to the split of the North Omo Zone in 2000, as mentioned in Section I. Separate zones were subsequently bequeathed to the Wolayita and Dawro, while the Gamo and Gofa were brought together in one zone (since 2018 again split in two). Mutual intelligibility of their languages has thus not affected the distinct ethnic status of these four groups. If that is the case, how can the decisions of the CoN denying distinct ethnic status on the basis of mutual intelligibility of language be justified? On this point, the CoN argues that though mutual intelligibility of languages exists between the four ethnic groups (i.e., Wolayita, Gamo, Gofa, and Dawro), their ethnic distinctiveness was already acknowledged before the coming into effect of the federal Constitution. Hence, if mutual intelligibility of languages between the claimant community and an already recognized ethnic group is identified after the coming into effect of the new constitutional order, the applicant group cannot be recognized as a distinct nation, nationality or people.[49]

49 Interview with the Speaker of the Council of Nationalities, Hawassa, 12 July 2017.

Another argument used by the CoN to deny these marginalized groups a distinct ethnic identity was that the petitioning communities were only "clans" or sub-groups of already recognized ethnic groups. Yet, how can such argument be aligned with the recognition of the Silte who for long were considered to constitute a sub-group of the Gurage rather than a separate ethnic group?

It is also interesting to see here the effect of the three decisions of the CoN on future identity determination issues. It is provided under Southern Proclamation 60/2003[50] that the decisions of the CoN have the effect of being binding on similar constitutional matters submitted to it in the future. For instance, in the case of the Manja, the issue entertained is the case of Manja found within the Kaffa and Sheka Zones only. However, Manja also reside in other zones like the Dawro, Bench-Maji, and Konta Liyu Woreda. Does this imply that the Manja in other areas are bound by the decision of the CoN or can they apply to be considered distinct in the localities not deliberated upon? Unless there is a significant (substantive) difference with the already adjudicated case, minor changes to petitions, like the residence of a claimant community, will probably not convince the CoN to consider the case afresh. Nonetheless, the politics of the day may lead to a reopening of the case.

Surely, there is a duty on the part of the CoN (and more so on the HoF, whose constitutional interpretation sets binding precedents and can therefore engender a consistent approach to ethnic identity determination issues) to clarify the above issues in future decisions.

The indefinite meaning of the requirements included in Article 39 of the federal Constitution, the inconsistent handling of ethnic identity petitions, and the absence of precedent-setting decisions by the HoF have encouraged many communities in the SNNP Region to submit ethnic identity determination petitions, in the hope of emulating the Silte example.[51] A

50 See Proclamation 60/2003, "The Consolidation of House of Council of Nationalities and Definition of its Powers and Responsibilities", Debub Negarit Gazeta, 8th Year No. 9.

51 Interview with Ato Yared Banteyidagne, Head of the Constitutional Matters Core Process, Council of Nationalities, Hawassa, 8 February 2016. He pointed out the

large number of petitions are therefore still pending jointly before the CoN and the HoF. Among others, the Hadichos in the Sidama Zone; the Dorze, Mello, Qucha, and Sayek-Ari in the Gamo-Gofa Zone; the Wollene[52] in the Gurage Zone; Bahirwork-Mesmes and Gafate in Hadiya Zone; and Goza-Zefte in the South Omo Zone have formally submitted their claims and are waiting for a response.

The CoN, which is vested with the task of entertaining the aforementioned very sensitive matters, has used two approaches in "addressing" the petitions. The first is denying recognition to the communities without consistent criteria while the second is unduly delaying the consideration of cases.[53] The likelihood of the latter petitions receiving a positive reply is low. Of course, it can be observed that since the transitional period until today the number of "indigenous" ethnic groups recognized in the SNNP Region has risen from 45[54] to 56. Apart from the Silte, whose identity recognition was the outcome of a formal process, the newly recognized ethnic groups informally negotiated their distinctness through the political apparatus. Yet, the chances that the CoN will reply positively to the new identity demands are not high.[55] It has to be pointed out that all members of the Council are politicians selected by the regional ruling party SEPDM, which, as mentioned before, emphasizes administrative integration. The underlying concern is that once a community is recognized as a separate ethnic group, this group will subsequently request an ethnic motherland. The fear about further administrative disintegration, at a time when the region is already

fact that many ethnic groups cite the Silte case, and they raise the question that since the Silte are allowed to be distinct, why can't we?

52 Other groups in the Gurage Zone are carefully watching the developments in the Wollene case. If the outcome is favorable, there is a high probability that it will open the floodgate to identity determination petitions from the zone. Interview with Ato Yared Banteyidagne. It can be safely assumed that this fear not to encourage other groups to petition for new identity determination affects the CoN while considering cases.

53 Some of the petitions requesting for recognition of distinct identity are as old as the establishment of the CoN itself.

54 See Proclamation 7/1992, Article 3.

55 C. Van der Beken, "Federalism in a Context of Extreme Ethnic Pluralism: The Case of Ethiopia's Southern Nations, Nationalities and Peoples' Region", Verfassung und Recht in Uebersee, (2013), pp. 16-17.

overwhelmed by numerous requests for new ethnic based Zones, causes the government to give chilling responses to identity claims. The powers and functions of the CoN, as mentioned in the SNNP Constitution[56] and elaborated upon in its consolidation proclamation,[57]evoke this political stance and indicate that the CoN should be more concerned with promoting the unity of the region than with the recognition of new ethnic groups. Hence, one could argue that the CoN is both politically and legally instructed to give chilling responses to distinct identity determination applications. Of course, one may anticipate that the internal divisions in the fragmented SEPDM (as mentioned in section I) and the possible coming to power of non-SEPDM (or rather non-PP, since the SEPDM is now part of the Prosperity Party) ethnic nationalist politicians in the region in the aftermath of the planned 2020 elections may lead to a more collaborative stance towards or even strong support of new ethnic identity claims.

3.2. Identity Determination Issues in the Oromia Region

Different groups residing in the Oromia Region have submitted their distinct identity determination petitions to the HoF. The HoF has referred two of the petitions (Zay and Tigri Werji) to the regional government, ordering the applicants to first exhaust the available remedies at regional state level. None of the petitions (including those referred to the regional government) has, however, come to fruition and they are still cumulatively pending before the regional government and the HoF. Contrary to the SNNP Region where the CoN is legally mandated to entertain identity determination issues, the Oromia Region has no clearly empowered institution to decide identity petitions. Nonetheless, the Zay and Tigri Werji cases are currently under consideration by the regional Constitutional Interpretation Commission (hereafter CIC), the institution legally empowered to interpret the regional constitution.[58] Proclamation No. 167/2011, which enumerates the powers and functions of the CIC, not only fails to mention whether the CIC entertains cases of identity determination

56 See Article 59(4) of the SNNP Constitution.

57 See Proclamation 60/2003, Articles, 3(3), 20, and 21(3).

58 Interview with Ato Abdi Kedir Filcha, Senior Legal Expert, Constitutional Interpretation Commission of Oromia, Addis Ababa, 7 June 2016.

by ethnic groups other than Oromo, but also does not give a hint as to whether such matters are within the explicit jurisdiction of the CIC.

The identity determination cases that have arisen in the Oromia Region are further discussed below. As will be demonstrated, except for the case of the Zay and Dube, which argue for identity recognition on the basis of the standard criteria stipulated under Article 39(5) of the federal Constitution, the remaining petitions demand recognition mainly on the basis of historical accounts, since their distinct identity markers have allegedly been systematically destroyed by the dominant section/s of society.

Zay

The Zay people are found in the Arsi Zone (Ziway and Dugda *Woredas* as well as on the islands of Lake Ziway) and in the East Shewa Zone (Dugda and Adami Tulu Jido Kombolcha *Woredas*) of the Oromia Region. They live territorially concentrated in and around Ziway town, in particular on the islands of Lake Ziway. They are also present in and around Meki town. The Zay unequivocally argue that they have what it takes to be considered as a distinct NNP within the Oromia Region. Among others, they argue that they have their own distinct language, culture and traditions, psychological makeup as well as territorial contiguity (particularly on the islands of Lake Ziway).[59]

As is evident from their numerous petitions, their quest for recognition as a distinct NNP is accompanied by the following demands. The first is the demand that the Zay People be given political representation in the HoF, the HoPR (House of People's Representatives, the first chamber of the federal parliament), the Oromia regional State Council (*Caffee*) as well as at the zone, *woreda*, and *kebele* levels of administration where they reside.[60] The second is the petition for special protection for the ethnic identity of the Zay

59 Petition by the Zay People to the Regional Government of Oromia, dated 26 Megabit 2000 E.C., on file with the registrar of the HoF.

60 Letter by the ZPDO (Zay People's Democratic Organization) to the HoF, No 137/01/02, (29/06/2002 E.C.), on file with the registrar of the HoF, Addis Ababa; petition by the Zay People to the Regional Government of Oromia (26 *Megabit* [March] 2000 E.C.), on file with the registrar of the HoF, Addis Ababa; petition by the Ziway Dugda *Woreda*, Tulu Gudo Fisheries Association, No 239/1-58/200, (25/2/2000 E.C.), on file with the registrar of the HoF, Addis Ababa.

People in order to counter the threat of extinction and assimilation. Especially, they demand positive protective measures from the regional as well as federal governments to promote their language and culture.[61]

As is apparent from their petitions, which span more than two decades,[62] they have received no formal response, neither from the regional government nor from the HoF. One development, however, is the study conducted by professionals on the situation of the Zay people commissioned by the regional government of Oromia in 2005 E.C. (Ethiopian Calendar). Apparently, the Council of Constitutional Inquiry (the advisory body to the CIC) and the CIC of the region, which are the organs supposed to give a formal response to the petitions, are still considering the report and no answer has been given yet.[63]

Tigri Werji

The Tigri Werji are also among the oldest petitioners for distinct identity recognition in Oromia. In spite of the official political non-recognition of the Tigri Werji as a distinct NNP, in the population census, including the most recent one, Werji are recognized as a distinct ethnic group.[64] However, Tigri Werji, since they don't have official recognition as a separate ethnic group, do not have political representation, neither in the federal HoF and HoPR, nor in the *Caffee* or other political institutions of the Oromia Region.

Since 1991, Tigri Werji have petitioned for distinct identity recognition.[65] Moreover, Tigri Werji, on top of petitioning for being recognized as a distinct group, have also raised the question of minority political

61 *Ibid.*

62 Petition by the Zay to the HoF (16 *Miyazia* [April] 2004 E.C.), on file with the registrar of the HoF, Addis Ababa.

63 Interview with Ato Abdi Kedir Filcha, Senior Legal Expert, Constitutional Interpretation Commission of Oromia, Addis Ababa, 7 June 2016.

64 Under the 2007 population census, their presence in Oromia is put at 5,091 and at country-wide level at 12,847. However, this number is highly disputed by the Tigri Werji petitions, which put the group's overall number in the country close to 100,000. See the petition of the Tigri Werji to the HoF (28/12/98 E.C.), on file with the registrar of the HoF, Addis Ababa.

65 See for instance their petition to the HoF (01/4/2003 E.C.), on file with the registrar of the HoF, Addis Ababa.

representation in the HoF, HoPR, and in the *Caffee*.[66] In addition, they have claimed a distinct, self-administering territorial unit around Alem Gena (particularly around Daleti locality) so that, similar to other ethnic groups of the country, they will also have the chance to manage their own affairs.[67] Despite the fact that the Tigri Werji application has been referred back by the HoF to the Oromia regional government, the regional government has officially stated that their issue is not within the jurisdiction of the Oromia regional state.[68]

Two important hurdles impede the Tigri Werji's claim for distinct identity recognition and, consequently, minority political representation in the different political institutions at the regional as well as federal level. First, some contend that the strong resistance by the Oromia regional government to acknowledge the Tigri Werji as a distinct ethnic group is induced by the government's desire to massively and involuntarily evict Tigri Werji from their traditional territories without adequate compensation. The traditional land claimed by Tigri Werji is in high demand for agricultural investment and their recognition as a distinct ethnic group risks complicating the eviction process.[69] The second and perhaps most cumbersome hurdle is the absence of a distinct language for the Tigri Werji.[70] However, as the petitioners argue, the absence of a distinct language results from the oppression and marginalization that the group has been subjected to and this should not be used against the Tigri Werji to deny them a distinct identity. Rather, this should be taken as an opportunity

66 Petition by the Tigri Werji to the HoF (22 *Ginbot* [May] 1999 E.C.), on file with the registrar of the HoF, Addis Ababa.

67 Petition by the Tigri Werji to the HoF (28/12/98 E.C.), on file with the registrar of the HoF, Addis Ababa.

68 See, letter signed by the Deputy Speaker of the Caffee Oromia National Regional Government addressed to the Tigri Werji Nationality Democratic Unity Party, No. Arada 320/2000, (09/08/2000 E.C.), on file with the registrar of the HoF, Addis Ababa.

69 Getachew Assefa Woldemariam, Constitutional Protection of Human and Minority Rights in Ethiopia: myth v. reality (2014, Unpublished, Melbourne Law School PhD Thesis), p. 131.

70 As Ato Abdi Kedir commented, it is impossible to differentiate Tigri Werji from Oromo as they have no distinct language, and the language they use is entirely Afaan Oromo. Interview with Ato Abdi Kedir Filcha, Senior Legal Expert, Constitutional Interpretation Commission of Oromia, Addis Ababa, 7 June 2016.

to protect the group from extinction because of forced assimilation.[71] It remains to be seen whether the petition of the Tigri Werji will simply be discarded due to the absence of a separate language, or, whether the regional government as well as the HoF, by taking into account historical factors, will look into the distinctness of the Tigri Werji based on the remaining grounds under Article 39(5) of the FDRE Constitution.

Dube

The Dube community (or "nationality", as stipulated in their numerous petitions to the HoF)[72] is found in the border areas between the Oromia and Somali regions. In the Oromia Region, they particularly reside in the Bale, Arsi, and East Hararghe Zones, mainly along the banks of the Shebele River. The Dube claim that they are distinct from both ethnic Somali and ethnic Oromo, and assert that they should be recognized as a separate NNP.[73] In addition to their quest for a separate identity and apart from their claims against the Somali regional government and ethnic Somali,[74] they allege the following points against the Oromia regional government. First, although they have a language, culture, history and psychological makeup distinct from the Oromo, they are largely denied the right to use their language and develop their culture within the region. They furthermore allege having been denied equitable representation at the regional level and in the localities where they live. As a result, they have pleaded with the HoF to organize a referendum for them so that they can establish their own region based on Articles 46(2) and 47(3) of the FDRE Constitution.

Although no formal response is given to the claims of the Dube "nationality" regarding their demands from the Oromia regional government, the HoF has decided on their identity determination petition

71 Petition to the HoF (2002 E.C.), on file with the registrar of the HoF, Addis Ababa.

72 The Dube petition is also one of the oldest petitions spanning more than 15 years.

73 See the various petitions by the Dube to the HoF (25 *Miyaza* [April] 2000 E.C.), (4 *Meskerem* [September] 2002 E.C), (17 *Sene* [June] 2001 E.C.), (11/09/98 E.C), (27 *Megabit* [March] 1993 E.C.), on file with the registrar of the HoF, Addis Ababa.

74 A review of the numerous Dube petitions reveals that they do not consider themselves as one among the several clans of the Somali ethnic group.

regarding the Somali Region.[75] The decision states that the Dube should be integrated into mainstream politics and other socio-economic activities and that the Somali regional government should play a leading role in this regard. Even though the HoF does not unequivocally deny separate ethnic status to the Dube, the core of its decision that their petitions should be resolved within the umbrella of the Somali regional government is in a way instructive of the House's consideration of the Dube as one clan among the Somali and not as a distinct NNP.[76] It is interesting to point out the implications of this decision on their application to be considered distinct from the Oromo. Obviously, the HoF's consideration of the Dube as one clan within the Somali ethnic group extinguishes their claim of being considered as a distinct ethnic group of their own. As Somali, they can't claim territorial autonomy under the Oromia Constitution either.[77]

The various recommendations forwarded by studies commissioned by the HoF and the Oromia regional government on the issues raised by the Dube stated that even though the Dube are very different from Oromo in every aspect of ethnic group determination, they are, however, not different from ethnic Somalis.[78] Apart from this, the Oromia regional government has stated that the demand of the Dube is not the question of the Dube community. The Oromia regional government alleges that it is a maneuver

75 See the decision of the HoF in its third parliamentary term 5th year 2nd Regular Meeting on the Dube Community (30 *Sene* [June] 2002 E.C.), document on file.

76 *Ibid*.

77 Yonatan Tesfaye Fessha and C. Van der Beken, "Ethnic Federalism and Internal Minorities: The Legal Protection of Internal Minorities in Ethiopia", African Journal of International and Comparative Law, vol. 21(1) (2013), p. 42.

78 For instance, see the report commissioned by the Oromia Regional Government Office of the President, A short Study on the Dube Community (Finfine, *Yekatit* [February] 1996 E.C.), document on file with the registrar of the HoF, Addis Ababa. This is also a position taken by the Regional Government of Somali: see, Letter from the Somali Regional State Office of the President to the House of the Federation, No. MK5/80/6T/97, (8/1/97 E.C.), on file with the registrar of the HoF, Addis Ababa, stating that the Dube clan has equitable political representation from top to bottom in the Somali Region.

by ethnic entrepreneurs and some rent seekers, who intend to mislead the community for their personal gains.[79]

Garo

The non-responsiveness of the Oromia regional government as well as of the HoF to the preceding identity issues has not helped in stopping new identity petitions from emerging. In this respect, the petition of the Garo is instructive of the never-ending battle regional minorities are waging against the regional government. The Garo, as can be gathered from their numerous petitions, have been pleading with both the Oromia regional government and the HoF since September 2006 E.C. in order to be recognized as a distinct NNP.[80]

As a review of the Garo applications reveals, the Garo community is found in and around Jimma. The petitions assert that the size of the population is about one million and that, even though the Garo have a distinct language, at present most of them only speak Afaan Oromo.[81] The petitions furthermore claim that the Garo are of Omotic origin and are thus markedly different from the Oromo, who have Cushitic roots.[82] The Garo also complain that they are marginalized by the larger Oromo society.[83] They claim that the Oromo administrators of their territory subject the Garo to hate speech, civil service discrimination, and unlawful dismissal from their jobs.[84] According to the petitions, 65-70% of the Jimma area population belongs to the Garo community. The aforementioned assertions constitute the basis of the Garo claim for a distinct identity separate from the

79 Letter from the Oromia Regional Government Administration and Justice Affairs Supreme Office, to the House of Federation, No. BMNO7/211/M1, (07/08/1996 E.C), on file with the registrar of the HoF, Addis Ababa.

80 See the various Petitions by the Garo to the HoF (27/10/2006 E.C.), (21/02/2007 E.C.), (17/02/2008 E.C.), (26/04/08 E.C.), on file with the registrar of the HoF, Addis Ababa.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*, apart from their distinct identity claims, the Garo also contend that they are a very backward people as there are very few educated individuals within the nationality.

84 *Ibid.*

Oromo ethnic group. In addition, and most importantly, they ask for the right to self-administration.

Which criteria are used for identity determination in the Oromia Region?

Even though no formal response from the Oromia regional government or the HoF has been given to the preceding claims, it is possible to make the following inferences from the various distinct identity determination petitions. First, it is possible to draw similarities between the claims of the Zay and Dube since both groups claim to fulfil all the criteria of Article 39(5). The Dube and Garo petitions are also similar in the way that both groups claim to be marginalized minorities as they face additional exclusion and marginalization from the larger Oromo society. Third, it is also possible to observe a resemblance between the case of Tigri Werji and Garo, as both admit in their petitions that their languages have died or are on the verge of extinction and do not as such claim distinctness on the basis of language. Both groups argue for a separate identity mainly on the basis of historical grounds. It remains to be seen whether the recognition given to the Kemant people in the Amhara Region – an issue discussed below – will in any way be instructive, as the Kemant language was on the verge of extinction and few members of the Kemant were versed in the Kemant language. Yet, the Kemant people managed to be recognized as distinct from the Amhara and were able to secure a *Liyu Woreda* [special district] in the region.[85] All groups also claim to have a contiguous territory, which should enable them to exercise territorial self-rule.

The political composition of the Oromia CIC does not augur well for a positive answer to these identity requests. Similar to the Council of Nationalities in the SNNP Region, all members of the Oromia Constitutional Interpretation Commission are members of the regional ruling party ODP, a member of the EPRDF coalition. Considering the strong party discipline characterizing all EPRDF organizations, it is highly doubtful that these personalities will operate free from the political wishes of the ODP and impartially address the requests of the various ethnic groups

85 See Proclamation 229/2015, "The Kimant Nationality Special Woreda of the Amhara National Regional State Establishment Proclamation", Zikre Hig, Year 21, No. 20.

for identity determination. In this regard, it has to be pointed out that the ODP shares the EPRDF's integrationist views. Its ambition to be perceived as a strong defender of Oromo interests furthermore militates against the recognition of new ethnic groups in the Oromia Region. The Oromia regional Constitution, which recognizes Oromia as the exclusive motherland of the Oromo people, does not have space for the recognition of new ethnic groups either. This situation is unlikely to change irrespective of whether political power in the region will continue to be exercised by the ODP (which at the time of writing has morphed into the Oromia regional branch of the integrationist PP) or whether regional political power will shift to an Oromo nationalist party or to a coalition of Oromo nationalist forces in the aftermath of the 2020 elections.

3.3. Identity Determination Issues in the Amhara Region

One of the most intractable identity recognition claims – and one of the few successful ones[86]- originated in the Amhara Region. The petition revolved around the recognition of the Kemant (Qemant) "people" as distinct from the Amhara ethnic group. Despite previous elite-based movements, the Kemant formally started their claim for separate identity determination in the wake of the release of the result of the 2007 population census,[87] which (unlike previous population census reports) failed to incorporate the Kemant among the country's ethnic groups.[88]

86 The other successful identity determination petition is that of the Silte which managed to secure their distinctness from the Gurage.

87 A caveat here is that, despite the Kemants' recognition in the population census, they were not counted as one among those ethnic groups entitled to establish national self-governments under Proclamation 7/1992. Hence, it can be argued that they did not have political recognition from the very outset.

88 Belay Shibeshi Awoke, Minority Rights Protection in the Amhara National Regional State: The Case of the Kemant People in North Gondar, (2010, Unpublished, Addis Ababa University, LLM Thesis); Yeshiwas Degu Belay, "Kemant (ness): The Quest for Identity and Autonomy in Ethiopian Federal Polity", Developing Country Studies, vol. 4(18) (2014), pp.161-165.

Succinctly put, the Kemant asserted that they fulfilled all the identity markers provided under Article 39(5) of the FDRE Constitution.[89] They therefore petitioned for political recognition and to be given a separate ethnic territorial administration. After a prolonged appeal and referral process that also involved the HoF,[90] the Amhara regional State Council recognized the Kemant and granted them a special district/Woreda in an attempt to satisfy their quest for recognition and self-rule.[91] Nonetheless, a lingering dispute with the Amhara regional government over the territorial scope of the Special Woreda has continued to generate serious conflict in the area.

Which criteria are used for identity determination in the Amhara Region?

Although both Article 39(5) of the FDRE Constitution and (the similarly worded) Article 39(7) of the Amhara regional Constitution were used as foundations for determining the validity of the Kemant identity recognition petition, the following discourses are worthy of discussion in understanding the matrix regarding the politics of recognition in the region.

The decision to ultimately award the Kemant political recognition was undertaken, unlike that of the Silte, without putting the matter to a referendum,[92] which would have required/permitted the claimant community to decide on its ultimate fate.

Second, the regional government, at one point, argued that the Kemant were not denied the right to promote their language and culture, but that since they were not found in a territorially contiguous position, they did not

89 See for instance the petition by the Kemant Nationality self-administration coordinating committee to the HoF, dated *Meskerem* [September] 2006 E.C., document on file.

90 See for instance the decision of the HoF on the Kemant community appeal, 4th Parliamentary Term, 5th year, 2nd Ordinary Meeting, 17 Sene 2007 E.C., document on file.

91 See the decision of the Amhara region State Council delivered in its 14th assembly held in March 2015 at Bahir Dar, document on file.

92 Not submitting the matter to a referendum raises the worry that the State Council, at a later time, could/would reverse the decision to recognize the Kemant making their recognition to remain precarious.

have a right to territorial self-rule.[93] It seems that the regional government wanted to make the point that the Kemant were not prevented from exercising their cultural and linguistic rights and therefore should not push their claim to the extent of political self-determination. Hence, the resistance on the part of the regional government to recognize the Kemant appears to have originated from the fact that, if their claim to political recognition is positively answered, it will ultimately force the regional government to grant them a separate ethnic territorial administration. Subsequent developments on the ground have affirmed this fear of the regional government to be true and the Kemant people remain locked in a battle with the regional authorities regarding the extent of their self-rule rights, despite successfully winning the battle for identity recognition.

What is further interesting in the Kemant case is that, at first, they did not claim for recognition based on one of the prominent identity markers like language,[94] as they admit that their language is not widely spoken and is/was on the verge of extinction.[95] In the end, this has not hindered their recognition as a distinct ethnic group and they have managed to "recapture their lost identity". This is in stark contrast to the practice in the SNNP Region, which strictly relies on language for granting political recognition to claimant communities. In addition, the demand of the Kemant to separate themselves from the Amhara has been fueled, as they claim, by the latter's stigmatization and identification of the Kemant in demeaning terms.[96] In this respect, their claim shares similarities with most identity determination petitions originating in the SNNP and Oromia regions, which are also driven by deep-rooted societal marginalization.

Conclusion

The indeterminateness of the meaning of "nations, nationalities and peoples" in Article 39(5) of the federal Constitution and, consequently, the

93 See the letter dated 03/12/2005 E.C. written by the Amhara National Region State Council, Office of Speaker of the House, document on file.

94 Expectedly, as the struggle for recognition gained momentum, the Kemant started to argue that they had a distinct language and culture separating them from the Amhara.

95 Belay Shibeshi, cited above at note 88, pp. 13, 15.

96 Yeshiwas Degu, cited above at note 88, p. 162.

ambiguity of what needs to be fulfilled to qualify as a NNP, has not been remedied by the practice in ethnic identity designation or denial. Most of the formally submitted identity petitions have hitherto been unanswered and the three decisions handed down by the CoN demonstrate an inconsistent approach. The HoF has also failed to develop precedent-setting jurisprudence. This has stimulated a vast number of groups to claim separate ethnic identity recognition. The CoN in the SNNP Region in particular has been swamped with petitions thereto, which, if all accepted, open the door to extreme ethnic fragmentation and administrative division of the regional state. Consequently, the CoN – and the regional ruling party providing its membership – is very wary of accepting new identity recognition demands. The same attitude characterizes the Oromia regional government and ruling party and could also be observed in the Amhara regional government's approach to the Kemant case.

Understandable as this reluctance may be, it engenders a dichotomy between the FDRE Constitution, which does allow and provides the criteria for new identity recognition, and political practice, which impedes constitutional implementation. The risks for constitutionalism that this entails are compounded by a political practice that has recognized distinct ethnic groups, not on the basis of objectively verifiable and consistent criteria, but as an expedient strategy to prevent or mitigate ethnic tensions and conflicts, as is *inter alia* illustrated by the Kemant case. Such informal political approach rather than decision-making on the basis of clear and consistent criteria may incentivize groups to deviate from the procedural path and hence be a catalyst for ethnic tensions and conflict. Therefore, rather than creating undue procedural and substantive hurdles for ethnic identity petitions, it would be advisable if the responsible federal and regional government institutions adopt an approach that is based on the verification of clear and consistent criteria for ethnic identity recognition. Yes, this may result in the recognition of new groups and, subsequently, the establishment of new ethnic-based units, but it would likewise send the message that many of the group demands cannot be accommodated through new identity recognitions. This approach needs to be accompanied by alternative and complementary measures to address the multifarious complaints that compel groups to demand distinct identity recognition in the first place. Looking at the claims included in the various petitions, one can legitimately argue that a better enforcement of constitutionally

entrenched individual rights could go a long way in addressing most of the demands. This necessitates a government approach, which is based on the principles of equality, predictability, and consistency rather than on political expediency.

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Right of Access to Justice in the Constitutional Jurisprudence of Ethiopia

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Abstract

Access to justice is one of the rights recognized under the FDRE Constitution and international instruments ratified by Ethiopia. The Constitution recognizes access to justice under Article 37 leaving some clue of its substance. The Council of Constitutional Inquiry (CCI) and the House of the Federation (HoF) have adopted varied definitions of access to justice. Under this chapter, the issue of whether the CCI/HoF has developed clarity to the meaning and scope of the right of access to justice that could help in identification of what it is and what it is not and what it includes and what it does not, is dealt with. A number of cases were selected for analysis of CCI/HoF's understanding of the scope of this right. The analysis has shown that the CCI and HoF have generally restricted themselves to the literal meaning of Article 37 of the Constitution. In other cases, as in the right to appeal in civil cases, they create tacit analogies to Article 20(6), which deals with appeals in criminal cases. Even if the HoF has passed decisions duly protecting the right of access to justice, developing a workable definition to fill gaps in Article 37 requires a lot of effort and assertiveness to make future decisions predictable.

Introduction

The FDRE Constitution incorporates fundamental rights and freedoms recognized under international human rights instruments ratified by Ethiopia by devoting one third of its provisions to enunciate fundamental rights and freedoms. One of the mechanisms to enforce these fundamental rights is through constitutional adjudication.

The Constitution empowers the HoF as constitutional adjudicator assisted technically by the CCI. It has been more than two decades since the HoF

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started its operation as constitutional adjudicator. Its roles in the protection of human rights and freedoms in Ethiopia might be examined from various aspects. This chapter examines the constitutional jurisprudence of the HoF/CCI in order to assess the HoF's role in the protection of the right of access to justice in Ethiopia.

This chapter first tries to capture the definition and scope of the right of access to justice from an international perspective and explores the extent of its constitutional recognition. It, then, analyses the practical cases decided by the HoF/CCI in relation to guaranteeing the right of access to justice.

I. The Definition and Scope of the Right of Access to Justice

Access to justice is one of the fundamental rights recognized under international human rights instruments. The United Nations has also included it under the Sustainable Development Goals as one of the potential focus areas.[1] This is because of the very nature of the right of access to justice, which is instrumental to realize other fundamental rights. "When a right is violated, access to justice is of fundamental importance for the injured individual and it is an essential component of the system of protection and enforcement of human rights."[2] As access to justice is one of the main mechanisms to protect rights and remedy violations, it is no surprise that due emphasis is given to it under both international and national human rights regimes.

Recently, attention has been given to access to justice owing to its connection with many spheres of life. It is noted in a commissioned report, for example, that "Strengthening legal frameworks and justice institutions that fight corruption, attract investments, redress inequality, improve security or broaden individuals' access to resources has gained momentum

1 UN Sustainable Development Goals 2030 available at https://www.undp.org/content/undp/en/home/sustainable-development-goals.html

2 F. Francioni, "The Rights of Access to Justice under Customary International Law", in G. de Búrca and M. Cremona (eds.), Access to Justice as a Human Right, (2007), p. 64.

among governments and international actors."[3] If disputes are not resolved in a timely and fair process, people may lose trust in institutions.

Access to justice has been defined in different ways. In its ordinary sense, it may mean "the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law."[4] One can grasp from this definition that access to justice includes seeking remedy from an impartial court or tribunal.

Broadly defined, access to justice may mean not only judicial redress but also redress from legislative and administrative entities.[5] There are also scholars who argue that redress from not only formal institutions but also informal ones like customary and religious institutions should be included in the definition of access to justice.[6] Alternative dispute resolution mechanisms are also considered as covered by the notion of the right of access to justice.

An important aspect of access to justice relates to the substance of decisions (redress) obtained from either formal or informal institutions. Some writers argue that the redress that state courts or informal institutions deliver

3 T. Marchiori, A Framework for Measuring Access to Justice Including Specific Challenges Facing Women, Report commissioned by UN Women in partnership with the Council of Europe, October 2015, available at https://rm.coe.int/1680593e83

4 Francioni, cited above at note 2, p. 67.

5 *Id.*, p. 68.

6 See for instance M Castles, "Expanding Justice Access in Australia: The Provision of Limited Scope Legal Services by the Private Profession?", Alternative Law Journal, vol. 41 (2) (June 2016): pp. 115–17; United Nations General Assembly, Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, A/HRC/27/65, https://www.refworld.org/pdfid/53f1d89c4.pdf; T. Farrow, "What is Access to Justice?", Osgoode Legal Studies Research Paper Series, vol. 10 (12) (2014) http://digitalcommons.osgoode.yorku.ca/olsrps/12?utm_source=digitalcommons.osgoode.yorku.ca%2Folsrps%2F12&utm_medium=PDF&utm_campaign=PDFCoverPages

should be "individually and socially just".[7] In this sense, making courts "equally" accessible may not be sufficient.

Even if the right of access to justice is recognized under international human rights instruments, none of them give a definite answer as to what the right constitutes. The Universal Declaration on Human Rights (UDHR), Article 8, and the International Covenant on Civil and Political Rights (ICCPR), Article 14, recognize access to justice with differing scope and expressions. The UDHR guarantees everyone "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[8] The manner in which access to justice is recognized in the UDHR shows its importance in safeguarding other fundamental rights. The ICCPR elaborates the right of access to justice in the context of criminal cases.

Regarding the content of the right, the Human Rights Committee explains that access to justice should encompass equality before courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary established by law and guaranteed.[9] The Committee also notes that State reports consider these rights to be applicable only to criminal cases but indicated they should also apply in civil cases.[10] It also emphasized:

> "States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion,

7 See for example M. Cappelletti and B. Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective", Buffalo Law Review, vol. 27(2) 1978, pp. 181-292.

8 Art. 8 of the UDHR.

9 ICCPR General Comment No. 13: Art.14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, *Adopted at the Twenty-first Session of the Human Rights Committee, on 13 April 1984.*

10 *Ibid.*

transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative."[11]

The concept of access to justice has been evolving through time causing changes in its scope. Currently, the right to access to justice may encompass aspects of the justice system that affect either the procedures or substantive outcomes. Hence, the concept is used in this chapter to include the following components: legal advice and assistance; access to courts (formal and informal) that are impartial and independent; access to legal information; fair and public procedure; adequate time and facilities for preparation of defence and for consulting counsel of one's choosing; trial without undue delay; the opportunity to examine adverse witnesses and to obtain the attendance and examination of own witnesses under the same conditions as adverse ones; access to interpreter; the right to appeal...[12]

The list may not be exhaustive and this chapter has no intention of being so. As will be discussed in the next section, the FDRE Constitution recognizes only limited aspects of access to justice. But in practice, many of the components listed above have been used in submissions of constitutional complaints to the CCI/HoF. Therefore, the case analysis in the next sections takes the above list as reference.

II. Access to Justice under the Ethiopian Constitution

2.1. Access to Justice Pre-1995 Constitution

The concept of access to justice is very broad and can encompass various issues relating to the protection of litigants in the process of smooth adjudication. To avoid the complexity in understanding the legal concept, constitutions of different countries have tried to define it by incorporating

11 *Ibid.*

12 These components are discerned from definitions forwarded by scholars and practitioners. See for instance https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf; F. Francioni, "The Rights of Access to Justice under Customary International Law", in F. Francioni (ed.), Access to Justice as a Human Right, (2007); J. Bailey, J. A. Burkell, and G. Reynolds (2013), "Access to justice for all: Towards an "expansive vision" of justice and technology", The Windsor Yearbook of Access to Justice, vol. 31(2) (2013), pp. 181-207.

rights associated with access to justice. Consonant with this tradition, Ethiopia has tried to recognize access to justice one way or the other since the beginning of the first written constitution. Needless to mention, the scope of the right has changed through time with change of constitutions under successive regimes.

In this regard, the 1931 Constitution bestowed upon all Ethiopian subjects the right to be tried by a legally established court and provided protection from any deprivation of the right against their will.[13] In line with this proposition, the 1931 Constitution established ordinary and administrative courts that were mandated to adjudicate ordinary and administrative matters, respectively.[14] In the sense of the 1931 Constitution, access to justice is defined as a right to be tried by a legally established court, either by an ordinary or administrative court, depending on the subject matter.

In the Revised Constitution of 1955, in addition to access to courts,[15] access to justice encompassed the right to speedy trail, to confront witnesses, to legal assistance at state expense where the accused is unable to afford one, etc.[16] The 1955 Revised Constitution also entrusted judicial power to courts[17] and subjects were entitled to bring suit before courts against the government for wrongful acts resulting in substantial damage.[18] Moreover, it entitled everyone in the empire to submit petitions to the Emperor in accordance with the law.[19] Thus, access to justice included the right to bring petitions to the Emperor himself, as a person of last resort and fountain of justice in the Empire.

After the downfall of the emperor in 1974, the *Derg* regime came up with a brand-new constitution in 1987, which did not survive the downfall of the socialist government in 1991. The *Derg* Constitution guaranteed any

13 The Constitution of the Imperial Ethiopian Government, 1931, Art.24, July 16, 1931.

14 *Id.*, Arts. 50-54.

15 The Revised Imperial Constitution, 1955, Art. 35, November 4, 1955.

16 *Id.*, Art. 52.

17 *Id.*, Art. 108.

18 *Id.*, Art. 62.

19 *Id.*, Art. 63.

arrested person the right to be brought before court within 48 hours of his arrest.[20] It also conferred judicial power on the Supreme Court, administrative court and other courts established by law.[21] The 1987 Constitution provided very limited rights compared to its predecessor which guaranteed a multitude of opportunities for subjects to access justice. The 1987 Constitution, apart from ensuring the right of citizens to bring cases before a court and the right of arrested persons to be brought before the nearest court within 48 hours, provided nothing that could help to define the scope of access to justice.

2.2. Access to Justice under the 1995 Constitution

It is not an exaggeration to claim that the 1995 FDRE Constitution is by far the most comprehensive constitution in relation to the recognition of fundamental human rights and freedoms in the constitutional history of Ethiopia. As such, not less than one third of its provisions are devoted to dealing with fundamental rights and freedoms. The Constitution has also tried to define the scope of the right of access to justice, though there are some controversies and gaps that could be filled either through constitutional interpretation or amendment. In what seems an effort to deliberately avoid any potential misunderstanding of its scope of applicability to the states, the Constitution also requires all federal and state legislative, executive and judicial organs at all levels to respect and enforce the fundamental rights and freedoms recognized by the Constitution.[22]

The corner stone of the right to access to justice under the FDRE Constitution is laid under Article 37, which provides, "every person has the right to bring a justiciable matter to, and obtain a decision or judgment by, a court of law or any other competent body with judicial power".[23] However, this constitutional provision is so general that it has become challenging for constitutional interpreters to define words such as justiciable matter, and whether the right can be fulfilled by merely bringing a legal matter before a

20 The Constitution of the People's Democratic Republic of Ethiopia, 1987, Art. 44, Proc No. 1, Neg. Gaz. Year 47 no. 1.

21 *Id.*, Art. 100.

22 The FDRE Constitution, 1995, Art. 13 (1), Neg. Gaz. Year 1 No. 1.

23 *Id.*, Art. 37(1).

court or other competent organ with judicial power. Some members of the CCI claimed that Article 37(1) of the Constitution merely provides a procedural guarantee for persons to bring a case before a court or any other competent organ with judicial power. In this regard, they claim that it is not possible for the CCI to rely on Article 37(1) for claims such as the right of persons to fair trial or any other associated right beside the procedural guarantee to access the court.[24]

However, access to justice is also dealt with in other provisions of the Constitution. In this regard, the Constitution guarantees the right to adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.[25] The establishment and recognition of religious and customary courts is done by the House of Peoples' Representatives and State Councils, depending on the case.[26] In doing so, the Constitution recognizes the right to alternative mechanisms to settle civil disputes. Moreover, the Constitution vests the ultimate judicial power in Federal and State courts.[27] In order to safeguard the right of persons from any arbitrary decisions, the Constitution requires judges to exercise their judicial functions in full independence and to be directed solely by the law.[28] With regard to adjudication of constitutional matters, the Constitution empowers the HoF to have the final say.[29] In the exercise of this power, the HoF is assisted by the CCI.[30] The HoF is required to act on the recommendations submitted by the CCI within thirty days, thereby ensuring citizens' right to speedy adjudication of constitutional matters.[31]

The substantive protections of the right of access to justice are also scattered throughout the provisions of the Constitution. In particular, the Constitution provides various procedural and substantive guarantees during

24 More discussion on this subject is available in the later sections of this chapter.

25 The FDRE Constitution, cited above at note 22, Art. 34(5).

26 *Id.*, Art. 78(5).

27 *Id.*, Art. 79(1).

28 *Id.*, Art. 79(3).

29 *Id.*, Art. 62(1) cum 83(1).

30 *Id.*, Art. 83(2).

31 *Ibid.*

criminal proceedings.[32] The following rights are on top of the constitutional assurance that in interpreting the guaranteed rights, due consideration will be given to the UDHR, international covenants on human rights and other international instruments ratified by Ethiopia.[33]

The Constitution guarantees arrested persons the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them[34]; the right to remain silent[35], the right to be brought before court[36], the right not to be compelled to make confessions or admission, and the right to request that evidence obtained under coercion not to be admissible[37], the right to be released on bail[38], etc. In addition, accused persons have the right to public trial by an ordinary court of law within a reasonable time after having been charged[39], the right to be informed with sufficient particulars of the charge brought against them and to be given the charge in writing[40], the right to full access of any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defence, and to obtain the attendance of witnesses and examination thereof on their behalf[41], the right to be represented by a counsel at state expense when they cannot afford to get one and it is believed miscarriage of justice would happen in the absence of representation[42], the right to appeal to the competent court against an order or a judgment of the court which first heard the case[43], the

32 According to the General Comment mentioned in the above section, the protections accorded in criminal proceedings are deemed to be similarly applicable to civil proceedings too.

33 The FDRE Constitution, cited above at note 22, Art. 13(2).

34 *Id.*, Art. 19(1).

35 *Id.*, Art. 19(2).

36 *Id.*, Art. 19(3).

37 *Id.*, Art. 19(5).

38 *Id.*, Art. 19(6).

39 *Id.*, Art. 20(1).

40 *Id.*, Art. 20(2).

41 *Id.*, Art. 20(4).

42 *Id.*, Art. 20(5).

43 *Id.*, Art. 20(6).

right to get the assistance of an interpreter at state expense where court proceedings are conducted in a language they do not understand[44], etc.

The Constitution has tried to define the scope of access to justice though it requires a lot of work to unfold the true meaning of the protected rights in the process of robustly applying the right to real cases. It is also important to point out that some of the fundamental rights guaranteed to the arrested and accused persons are equally important in the adjudication of civil and administrative matters. In this regard, the right to public trial, the right to speedy trial, the right to full access of any evidence presented by the opponent party, the right to examination of witnesses, the right to appeal, the right to be represented by a counsel etc. are equally important in any proceeding regardless of its nature. But in the absence of a clear indication by the Constitution that the above rights could equally be enjoyed by parties involved in legal proceedings other than criminal proceedings, it might become a bone of contention in the adjudication of constitutional disputes.

III. Scope of Review of Constitutionality in Ethiopia

Jurisdictions provide for their own institutional choices in constitutional interpretation. Such choices may affect matters to be entertained by constitution adjudicating organs. There are roughly two modalities of constitutional adjudication: Diffused and Centralized. In a diffused model of constitutional adjudication, ordinary courts at any level can interpret the constitution. For example, in the US constitutional interpretation system, ordinary courts are empowered to interpret the Constitution while authoritative interpretation is reserved to the Federal Supreme Court. In the centralized model, a single constitutional adjudication court or organ is established. In Germany, for example, the Constitutional Court is established for the purpose of interpreting the Basic Law. Likewise, the Ethiopian Constitution empowers the HoF as a body interpreting the Constitution.

As it could be discerned from Article 62 of the Constitution, the HoF is bestowed with additional mandates. Some of these powers include determining questions of identity and self determination, finding solutions

44 *Id.*, Art. 20(7).

to disputes between states, determining division of revenues from joint Federal and State tax sources and subsidies that the Federal Government provides to the regional states, etc. A question interestingly arises as to whether decisions of the HoF with respect to these powers could be subject to review of constitutionality.

On the one hand, the supremacy clause of the Constitution declares that any law or decision of an organ of state, inclusive of the decisions of the HoF, that contravenes the Constitution, shall be of no effect. After all, review of constitutionality is done to ensure supremacy of the Constitution. On the other hand, the HoF exercises powers under Article 62 of the Constitution, other than constitutional adjudication, most of which are administrative by their nature. Therefore, it is important to explore the practice in this regard from the perspective of right of access to justice of individuals and groups that are affected by such decisions of the HoF. This is particularly unique in jurisdictions like Ethiopia where the constitutional adjudicator is entrusted with powers other than constitutional interpretation.

In the US, the political question doctrine prohibits courts from adjudicating questions which are regarded as political. The other limit is that courts cannot review the constitutionality of laws in abstract. On the contrary, the German Constitutional Court entertains political questions and reviews constitutionality of laws in abstract.[45]

In Ethiopia, the HoF is empowered to interpret the Constitution. In principle, there are no matters which the HoF cannot entertain as long as the matter relates to constitutional interpretation. However, in practice, there seem to be cases that are beyond the ambit of constitutional interpretation. This section illustrates some of these cases which cannot be reviewed by the CCI/HoF for constitutionality.

In the case of *Kontoma* Community[46], a community which lives in the Guraghe Zone of Southern Nations, Nationalities and Peoples Regional State (SNNPRS), the *Kontoma* claimed to have a distinct identity which

45 The French *Conseil Constitutionnel* reviews draft bills *a priori*. See for instance J. Beardsley, "Constitutional Review in France", Supreme Court Review, (1975), pp. 189-259.

46 Representatives of Kontoma Community, decided on 17April 2010.

needed recognition. They submitted their request for recognition of their identity to the SNNPRS Government, which rejected their claim on the ground that they did not fulfil requirements listed under Article 39(5) of the FDRE Constitution. They lodged an unsuccessful appeal to the HoF. Subsequently they submitted their petition to the CCI arguing that on the issue of their identity the HoF had violated Article 39(5). The CCI grappled with the issue of whether such decisions of the HoF, which are different from constitutional interpretation, could be subject to review for constitutionality. The majority in the CCI decided that Proclamation No. 251/2001 Article 56 provides decisions of the HoF as final so that they cannot be reviewed by the CCI for constitutionality. A member of the CCI, in a dissenting opinion, argued that the decisions of HoF other than constitutional interpretation are subject to constitutionality review like decisions of any other government organ. The dissenting opinion argued that there should not be any reason to suggest otherwise as long as the HoF's decisions violate rights. Any other conclusion violates Articles 9, 12, 83(3) and 84(3)(2)(b) of the Constitution.

In this case, the CCI, in the majority decision, excluded matters listed under Art 62 from review for constitutionality. Accordingly, the decisions of the HoF relating to mandates such as identity, disputes between states, division of revenues, and federal intervention cannot be reviewed for constitutionality.

In a similar case, the Aba'ala Community, a community living in Zone Two of Afar Regional State, claimed violations of self-administration, linguistic, cultural and historical rights by the local government. They submitted petition to Afar Regional State Council, which found problems such as lack of good governance but could not accept allegations of the petitioners. Representatives of the Aba'ala Community appealed to the HoF, which rejected the petition claiming that demand to establish Kebele, Woreda or other local self-administration falls within the constitutional mandate of the Regional State. The Aba'ala subsequently brought a constitutional complaint to the CCI. The CCI justified its rejection for the same reason it rejected the case of the Kontoma Community.

These cases indicate that there appear to be some areas which are put beyond review for constitutionality. This is partly due to the constitutional

adjudicator's broad competences other than constitutional interpretation, making such other competences not reviewable. This could also be partly because constitutional review is made by the same organ, whose decision on its other competencies should have been subject to the same review.

Constitutional adjudicators in a centralized model are usually the single and authoritative decision-makers on constitutionality. If these organs are bestowed with powers other than reviewing constitutionality of law and decisions, there is the risk that decisions on other matters would remain unchecked, which in turn might amount to denial of access to justice.

IV. Practical Cases: Access to Justice in Constitutional Adjudication

4.1. The Right to Petition

One of the aspects of access to justice is the right to present a justiciable matter to a court of law or other organs having judicial power. Article 37of the Constitution provides that everyone has the right to bring a justiciable matter, and obtain a judgment, before a court of law or other competent body with judicial power. The right to petition a court and obtain a judgment is one of the aspects of access to justice recognized under the Constitution. This section of the chapter examines how this right is being interpreted by the CCI/HoF.

In the case of *Milkiyas Chernet v. the Dembidolo Town Water Supply Enterprise*[47], the applicant submitted a complaint claiming that his employer dismissed him from work illegally and he was unable to file a suit and obtain a judgment to either an ordinary court of law or a labour tribunal. He first filed a suit against the respondent before a Woreda Court claiming that the respondent, an enterprise administered by a board, dismissed him contrary to the labour law. The Woreda Court rejected a jurisdictional objection by the respondent which claimed that as per the Region's Public Servant Proclamation No. 61/2003, it was the Region's Civil Servant Administrative Tribunal which had competence to entertain the case, not the Woreda Court. The Woreda Court heard the case, decided the

47 HoF Decision in its 5th Term 1st Year 2nd Ordinary Meeting, 12 March 2016.

dismissal was illegal, and awarded the applicant ETB 19,630 with an order of reinstatement. This judgment was reversed by the regional Supreme Court Cassation Bench arguing that the respondent was a government agency and hence the Woreda Court had no jurisdiction to entertain the case. The applicant then submitted the same application to the Region's Civil Servant Administrative Tribunal. The Tribunal, however, dismissed the case reasoning that the respondent was an enterprise that operated with its own budget, administered by a board and its structure different from government agencies and governed by the Oromia Region Public Enterprise Proclamation No. 16/1997.

The applicant petitioned to the Zonal High Court which decided that the Woreda Court had jurisdiction over the case as it was a labour relations case. After receiving petition from the applicant, the Woreda Court rejected it for two reasons: a) the court has previously tried the case and hence the case cannot be tried again; b) the judgment of the Region's Supreme Court Cassation Bench remains valid as long as it is not reversed.

The applicant, then, filed a review of judgment petition to the Region's Supreme Court Cassation Bench based on Art 6 of the Civil Procedure Code claiming that he has found new evidence that shows the respondent was not an administrative entity. The Cassation Bench again rejected the petition for not fulfilling the requirements of the law for review of judgment. The Federal Supreme Court Cassation Bench, after receiving a cassation petition from the applicant, rejected the petition for lack of fundamental error of law. It was at this point that the applicant submitted a constitutional complaint to the CCI claiming that he was not able to bring a justiciable matter and obtain a judgment either from ordinary courts or specialized tribunals.

The CCI first inquired into the legal status of the respondent from relevant regional laws and concluded that it was not an administrative agency, rather an enterprise. It also reiterated that the lower courts mistakenly assumed that they were executing the decision of the Zonal Civil Service and Good Governance Office; while the Cassation Bench of the Region's Supreme Court erroneously concluded the respondent's legal status. This, according to the CCI, has denied the applicant his right to bring a justiciable matter to

an ordinary court or other bodies competent to exercise judicial power. This recommendation of the CCI was approved by the HoF.

In this case, the CCI/HoF took the literal meaning of the right of access to justice as an individual's right to present a justiciable matter to a court of law or other organs having judicial power as the applicant was denied a forum to present his case and obtain a judgment. The Woreda and Zonal Courts at least gave remedy to the applicant even if it was based on the same erroneous conclusion that the respondent was a government agency adopting the Zonal Civil Service and Good Governance Office's decision. The Regional Supreme Court Cassation Division, went further with this argument but decided it was only the Region's Civil Service Tribunal which could entertain such cases. On its part, the Region's Civil Service Tribunal examined the legal status of the respondent and affirmed it was not an administrative agency.

After all these back-and-forth between courts and the tribunal, the applicant was not able to bring a justiciable matter and obtain a judgment. The Woreda Court's judgment which awarded the applicant with a remedy was reversed by the Cassation Bench, which literally meant no judgment from ordinary courts or administrative tribunals. The legal status of the respondent created the confusion between ordinary courts or specialized tribunal. The CCI/HoF rightly observed that decisions of the courts have denied the applicant the right to bring a justiciable matter to a court of law and obtain a judgment. As the HoF has made judgments of Cassation Benches of both Regional and Federal Supreme Courts unconstitutional, in effect *void ab initio,* the applicant could file a fresh suit to the Woreda Court based on the labour law and obtain a judgment.

In the case of *Alemtsehay Assefa Bedke* v. *Fiche City Administration*,[48] a house inherited by the applicant remained with Fitche Town Administration because the care-taker of the applicant's property was not able to live in the house. Fitche Town Administration took over the house initially to wait for the applicant but later rented it out just like other government owned houses. By the time the applicant requested her house, Fitche Town Administration refused, compelling the applicant to file a suit

48 *Alemtsehay Assefa v. Fiche City Administration*, 1700/08/CCI, 1/13/2009/.

in the Girar Jarso Woreda Court, which rejected the case claiming it had no jurisdiction as it related to powers of the Privatization Agency. The applicant then petitioned the Privatization Agency which also rejected the case on the ground that the house was not nationalized and that it therefore had no mandate over the case. Then, the applicant went back to the Woreda Court claiming that the house was not nationalized and should be returned to her by a court order. The Woreda Court again rejected the case for the reason that the case was submitted for the second time raising issue of *res judicata.* The applicant did not appeal against this decision to a higher court. She rather submitted a third suit to the same Woreda Court which was rejected again for *res judicata.* This was affirmed by the higher-level courts, including the Federal Supreme Court Cassation Bench arguing that she should have appealed to a higher court when the Woreda Court rejected her second suit.

She petitioned the CCI claiming that she could not get her case heard either before the courts or the Privatization Agency, violating her right of access to justice and her property right. The CCI inquired into the case and argued that the Federal Supreme Court Cassation Bench based its judgement on an erroneously pronounced judgment of the Woreda Court, which had rejected the case as having no jurisdiction. It also took in to account the reluctance of the applicant to appeal. According to the CCI, the actions of the courts violated the right of access to justice of the applicant by denying her the right to bring a justiciable matter and to obtain a judgment from a court of law or other organ with judicial powers. In short, the applicant was unable to file her case either in ordinary courts or in Privatization Agency. This recommendation of the CCI was approved by the HoF.

This case sets a similar precedent as the case of *Milkiyas Ayele* in affirming the rights of citizens to obtain a judgment from a court of law or other organs with judicial powers. In fact, this is one of the crucial aspects of the right in allowing citizens to obtain protection of their fundamental rights from a court. However, the CCI/HoF, once again, refrained from elaborating the scope of the right to access to justice. They only went to the extent that was necessary to resolve the case on the table. Once the HoF approved the recommendation of the CCI by declaring decisions of the court unconstitutional, the applicant could submit a fresh suit to the Woreda Court for return of her house.

The cases discussed above indicate that the confusion of jurisdiction between ordinary courts and specialized tribunals resulted in denial of applicants' constitutional right to bring a justiciable matter to a court of law or other bodies with judicial power and obtain a judgment. This aspect of the right is what the Constitution expressly recognizes.

Considering the gravity of the confusion, which could also arise both at federal and regional levels, the CCI/HoF should have set a lasting precedent that resolves similar future cases instead of approaching cases in isolation as in the case of *Berhanu Belay v. Bole Sub-city Administration.*[49] The constitutionality issue raised was similar to that of *Alemtsehay Assefa Bedke* v. *Fiche City Administration* case, i.e. confusion of jurisdiction of an ordinary court with that of an administrative organ. The decision in the case of *Berhanu Belay* makes no mention of the precedent in *Alemtsehay Assefa;* neither does it make any addition.[50] This, in the opinion of the authors, hampers the development of robust constitutional jurisprudence in Ethiopia.

4.2. The Right to be Heard and Adduce Evidence

The right to be heard and adduce evidence is one of the fundamental rights recognized by the FDRE Constitution.[51] In addition, various international treaties including the ICCPR to which Ethiopia is a party provide the same protection.[52] The CCI has investigated many constitutional complaints concerning the violation of the right to be heard and adduce evidence. The HoF has also endorsed recommendations by the CCI deciding in favour of applicants. In the cases to be considered under this part, the applicants' right to be heard is violated by the executive either through arbitrary decisions or by abusing its delegated power of law making.

49 *Birhanu Belay v, Bole Sub City Administration*, 1763/2008/CCI, 19/09/2009/, Unpublished.

50 The absence of a well-organized archiving system and rules of procedures at the CCI/HoF has caused such disconnection among the cases decided by the CCI/HoF.

51 Art. 19 cum 20, cited above at note 22.

52 Art. 14, ICCPR.

In the case of *Andinet Kebede v. Afar Regional State Justice Bureau,*[53] the applicant worked as a public prosecutor for several years at the respondent's office before he was dismissed by the head of the Bureau on June 10, 2005. The Bureau claimed that the decision was reached after a thorough discussion by the Region's Judicial Administration Council, which found the applicant liable for failure to discharge official duty and engaging in corrupt practices.[54] The applicant, aggrieved by the decision, requested the Judicial Administration Council to reconsider its decision made in absentia. He further requested the matter to be retried in his presence respecting his constitutional right to be heard.

Regardless of the repeated call to get a remedy by the applicant, the Judicial Administration Council rejected the request of the applicant which forced him to lodge an appeal with the Region's Supreme Court. The Court, after considering the matter, finally rejected the application due to lapse of time for appeal. Aggrieved by the decision of the Court, the applicant lodged a cassation petition with the Federal Supreme Court, where the case was dismissed for lack of fundamental error of law.

Finally, the applicant, in the petition he submitted to the CCI, claimed that the decision of the Judicial Administration Council dismissing him from office in absentia violates, among other constitutional rights, his right to be heard as stipulated under Article 37(1). The CCI, after considering the matter came to understand that the decision to dismiss the applicant was made by the Judicial Administration Council in its regular meeting and in the absence of the applicant.[55] According to the investigation carried out by the CCI, although the applicant has the right to get the charge brought against him together with the accompanying evidence, he was not summoned and given the opportunity to respond.[56] In addition, the CCI concluded that the right of the applicant to adduce evidence in his defence

53 *Andinet Kebede v. Afar Regional State Justice Bureau*, 1351/07/CCI, 07 December 2009, Unpublished.

54 The cause of dismissal of the applicant is indicated both in the petition of the applicant and the letter sent to CCI from Afar Region Justice Bureau in a letter number Lxima Qad/491/09 dated 20/03/2009.

55 The decision to dismiss the applicant was made during the regular meeting of the Judicial Administration Council held on 21 May 2005.

56 Afar Region Public Prosecutors Directive, No. 12/2005, Art.80/1/.

and his right to be heard were violated by the decision of the Council.[57] The recommendation of the CCI was endorsed by the HoF and the decision of the Judicial Administration Council was held to be unconstitutional.[58]

In a related case of *Federal Civil Servants Administrative Tribunal v. FDRE Revenue and Customs Authority*,[59] the Authority's Regulation, which empowers the head of the Authority to dismiss employees suspected of corruption or lack of trust, is challenged for violating the right to be heard and adduce evidence. As per the Regulation, the decision of the head of the Authority is final and conclusive.[60] In this case, the head of the Authority dismissed an employee working at its Moyale District Office on suspicion of corruption. In defiance of what the Regulation provides, the employee, considering himself a civil servant, lodged an appeal with the Federal Civil Servants Administrative Tribunal seeking revision of the decision dismissing him.[61] The Tribunal, wondering if it had jurisdiction over the matter, referred the case to the CCI for constitutionality review.

Apart from seeking clarification as to whether it can assume jurisdiction, the Tribunal requested the CCI to verify whether the head of the authority can dismiss an employee without any disciplinary charge and without giving an opportunity to defend his case *vis-à-vis* the constitutional guarantees provided under Article 20(4) of the Constitution which includes the right to get the charge filed and the right to adduce evidence. The CCI investigated the case in light of Articles 37(1) and 20(4) of the Constitution and Articles 14(3) (b) and 14(3) (f) of the ICCPR, which guarantee the right of every person to get the charges, to examine evidence brought against them, and to bring evidence in their defence.

57 *Ibid.*

58 *Andinet Kebede v. Afar Regional State Justice Bureau*, cited above at note 53.

59 *Federal Civil Servants Administrative Tribunal v. FDRE Revenue and Customs Authority*, 72/11 /HoF, 2 June 2011, Unpublished.

60 Council of Ministers Regulation to Provide for the Administration of Employees of the Ethiopian Revenues and Customs Authority, Regulation no. 155/2008, Art. 37.

61 As per Art. 80/1/b/ of the Civil Servants Proclamation No. 1064/2010, the Civil Servants Administrative Tribunal is empowered to entertain appeals from the decisions of a disciplinary committee established in each autonomous Federal Government agency.

The CCI, after rigorous discussion on the matter, concluded that the directive which gives the head of the Authority the power to dismiss an employee on the mere suspicion of corruption and lack of trust violates the constitutional right of the employee to be heard and adduce evidence guaranteed under the Constitution and the ICCPR. The HoF endorsed the recommendation of the CCI and declared part of the regulation unconstitutional.[62] The decision is a landmark precedent for the protection of the right to be heard and adduce evidence. In addition, the decision reaffirmed the power of the Federal Civil Servants Administrative Tribunal to hear appeals from the decisions of the FDRE Revenue and Customs Authority which was taken away by the Regulation.

In the two cases reviewed above, although the decision of the Judicial Administration Council and the Director General of Ethiopian Revenue and Customs Authority are ruled unconstitutional, the HoF did not provide direction to the applicants as to what to do next in the exercise of their right. However, the Constitution considers any law, customary practice or a decision of an organ of state or a public official which contravenes the Constitution to have no effect.[63] In this regard, we can assume that the decision of the Judicial Administration Council as well as Ethiopian Revenue and Customs Authority, as far as they are ruled to be unconstitutional, will have no effect on the applicants. Nevertheless, it may not necessarily mean that the applicants will be set free from disciplinary action for the alleged disciplinary misconducts. In other words, the applicants could be subjected to disciplinary measure after proper investigation respecting their constitutional right to be heard and adduce evidence.

Another case worth dealing with in this part is the case of *Ato Tariku Mekonnen v. Addis Ababa City Education Bureau*.[64] The applicant worked in Addis Ababa City Education Bureau as a physics teacher from 1999 to 2004 before he was dismissed by a letter signed by the head of Yeka Sub-

62 *Federal Civil Servants Administrative Tribunal v. FDRE Customs Authority*, cited above at note 59.

63 Art. 9(1), Constitution, cited above at note 22.

64 *Ato Tariku Mekonnen v. Addis Ababa City Education Bureau*, 993 /CCI, 05, 15 December 2008, Unpublished.

City Education Office for organizing a strike and disrupting the teaching-learning process.[65] The applicant challenged the dismissal on the ground that it was made by the head of the Office unilaterally without instituting a formal disciplinary charge before a duly constituted disciplinary committee as per the Civil Service Proclamation.[66] He also complained that his right to be heard and to defend was not respected while the decision for dismissal was made. On such allegations, the applicant filled an appeal to the City Civil Servants Administrative Tribunal to request reversal of the decision to dismiss him. However, the Tribunal dismissed the appeal on the ground that its power is limited only to hearing appeal coming from decision of a disciplinary committee, and not from the decision of head of the Office. The applicant, dissatisfied with the decision of the Tribunal, lodged his complaint to various administrative institutions including the Ombudsman although he was unable to receive any redress.

The applicant, after exhausting all possible remedies, submitted a formal complaint to the CCI to challenge the decision on constitutional grounds. The applicant, in his complaint, referred to Article 37(1) of the Constitution and argued that the decision of the Tribunal to reject his appeal violated his constitutional right to make a complaint to a court or other institution with judicial power. The CCI after thorough investigation of the matter decided in favour of the applicant. In its recommendation, the CCI argued that the decision of the Tribunal to reject the appeal submitted by the applicant violates Article 37 (1) of the FDRE Constitution which grants a right for the applicant to institute a complaint to a court or other institution with judicial power.[67] The recommendation of the CCI was endorsed by the HoF, which has also given an instruction to the Addis Ababa City Administration Civil

65 The applicant was dismissed by a letter signed by the head of Yeka Sub-City Education Office, on 19 March 2004.

66 The City Government of Addis Ababa Civil Servant Proclamation, proclamation No. 6/2008. Article 71 of this proclamation requires the institution of formal complaint before the disciplinary committee (to be established as required by the Proclamation) when the offence committed by a civil servant is serious such as to entail dismissal from a public office.

67 *Ato Tariku Mekonnen v. Addis Ababa City Education Bureau*, 993 /CCI, 05, 15 December 2008, Unpublished.

Servants Administrative Tribunal to entertain the appeal of the applicant respecting the right to a fair hearing.[68]

In the above case, the applicant claimed that his right to be heard and to defend and adduce evidence in his favour had been violated by the unilateral action of the head of Yeka Sub-City Education Office. As per Addis Ababa City Administration Civil Servants Proclamation, first instance jurisdiction to entertain the matter is given to the Disciplinary Committee of the concerned office. In this case, the decision of the HoF instructing the Tribunal to entertain the matter directly may have an implication on the right of the applicant to be heard and to defend his case before the Disciplinary Committee. In addition, as the power of the Tribunal under the Civil Service Proclamation is to hear appeals from the decisions of the Disciplinary Committee, requiring the Tribunal to entertain the appeal directly from the decision of the head of Yeka Sub-City Education Office entails procedural irregularities. In this case, the safest approach to properly dispose the case would have been ruling the dismissal unconstitutional because the head of the Office had no legal power to directly dismiss the applicant before a proper investigation of the matter by the Disciplinary Committee.

4.3. The Right to Appeal

Another important component of the right of access to justice is the right to appeal against judgments of lower courts. Even if this is not expressly stated in Article 37 of the FDRE Constitution, it could be discerned from the rights of accused persons in criminal cases under Article 20 of the Constitution. The following cases illustrate the ways the constitutional adjudicator interprets the right to appeal.

In the case of *Melaku Fenta and Others,*[69] the Federal High Court referred the matter to the CCI regarding criminal charges against Melaku Fenta, former Director General of Ethiopian Revenue and Customs Authority, and

68 *Ato Tariku Mekonnen v. Addis Ababa City Education Bureau*, 018/08 /HoF, 2 October 2009, Unpublished.

69 HoF File No. 1066, House of Federation 4th Parliamentary term, 4th Year 1st Extraordinary session, 2nd January 2014, *Constitutional Decisions Journal,* Volume 2, March 2017.

others. The constitutional issue was whether the defendant, who was a Minister, should be tried by the Federal Supreme Court by virtue of Proclamation 25/96 Article 8(1) and the Revised Anti-Corruption Proclamation No. 434/2005 Article7(1). The Federal High Court wanted to know whether these provisions are in line with the constitutional right to appeal and equality of the defendant.

The CCI reiterated that Article 20(6) of the Constitution and international human rights instruments ratified by Ethiopia guarantee the defendant's right to appeal to a competent court against an order or a judgment of a trial court. It also underscored the constitutional importance of the right to appeal. Justifying the necessity of the right to appeal, it stated:

> "The reason why the decisions of courts with their first instance jurisdiction are not made final is unless there is a chance that legal or evidentiary error could be made right, it would affect fairness of the procedure and even other rights. Appeal system also helps to bring uniformity and predictability of judgments and hold judges accountable."[70]

In light of this, the CCI concluded that the fact that higher government officials are to be prosecuted before the Federal Supreme Court in its first instance jurisdiction violates their right to appeal and equality. It argued that Article 8(1) of Proclamation No. 25/96 and Article 7(1) of Proclamation No. 434/2005 contravened Articles 20(6), 25 and 9(1) of the Constitution, a recommendation subsequently approved by the HoF.

This case is one of the landmark cases in which the CCI/HoF quashed selected provisions of the laws enacted by the House of Peoples' Representatives. The right to appeal is one of the constitutional rights of accused persons. The CCI referred to international instruments like the ICCPR and ACHPR in order to strengthen the constitutional recognition in Ethiopia.

Constitutional adjudication plays a pivotal role in keeping the government within its constitutional limits and safeguard human rights from being violated by the lawmaker or the executive. In light of this, the CCI/HoF

70 Referral by the Federal High Court 15th Criminal Bench, 1066/06/CCI, 23 November 2006 E.C., Unpublished, p. 3.

could have taken a more progressive role in this case. First, the CCI/HoF failed to relate the right to appeal with the right of access to justice as recognized under Article 37. Even if the decision substantively refers to one aspect of access to justice, it fell short of making an explicit reference to it. Secondly, it could have interpreted the right to appeal as a fundamental right that should apply to both civil and criminal matters. In fact, the justifications provided in the decision also work for civil cases.

The Case of the *Wife and Heirs of Wasihun Mekonnen (10 persons)* [71] relates to a house registered in the name of Ato Wasihun located in Addis Ketema Sub-City that they claimed was nationalized illegally in violation of Proclamation No. 47/1974. They explained that they petitioned, as per Proclamation No. 110/1995, the Privatization Agency, which decided in their favour finding the nationalization to be illegal and ordering the return of the house to them. However, the Government Houses Agency appealed to the Privatization Board, which reversed the decision of the Privatization Agency without summoning the complainants. They subsequently petitioned to the Federal Supreme Court Cassation Bench claiming that their right to defend their case had been violated by the Privatization Board. However, the Cassation Bench rejected the case on the ground that the Board's decision is administrative and that it has no jurisdiction to entertain the case. Although they submitted a constitutional complaint to the CCI alleging a violation of their right to be heard, the CCI rejected their case. The complainants finally submitted an appeal to the HoF against the CCI's decision rejecting their case.

The applicants argued that as per Article 37 of the Constitution the right to bring a justiciable matter includes presenting cases not just before a court of law but also before quasi-judicial bodies with judicial powers. They argued that the Privatization Board is such a quasi-judicial body and hence the Federal Supreme Court Cassation Bench should have jurisdiction to review if there is fundamental error of law in the Board's decision.

The HoF argued that the Privatization Agency, even if it is structured under the executive branch, more or less followed procedures of regular courts in

71 *Successors of Ato Wasihun Mekonnen v. Government Housing Agency*, 43511 / Federal Supreme Court Cassation Bench, 23 October 2005/ Federal Supreme Court Cassation Bench Decisions, Vol. 14.

receiving complaints regarding nationalized houses. It allowed the Government Houses Agency to respond and present evidence, which made the Privatization Agency a quasi-judicial body. The HoF also stated that the Privatization Board is authorized by Proclamation No. 87/1994 Article 8(5) to hear and decide on appeals from decisions of the Privatization Agency. The HoF then raised the issue of where individuals aggrieved by the decision of the Board could go to seek remedy.

The HoF reiterated that Article 80 (3) of the Constitution empowers the Federal Supreme Court Cassation Bench to correct fundamental errors of law in final decisions of courts including quasi-judicial bodies such the Privatization Agency and its Board. It concluded that the refusal of the Federal Supreme Court Cassation Bench to look in to the case violated the right of access to justice of the applicants.

This decision of the HoF affirms the right to appeal as one aspect of access to justice. As discussed in the case of *Melaku Fenta,* the HoF quashed the law that granted first instance jurisdiction to the Federal Supreme Court on the ground that it violated the right to appeal of defendants. The HoF took for granted the right to appeal in civil cases without establishing that the constitutional recognition of the right in criminal cases is applicable *mutatis mutandis* to civil cases. The same approach was followed in the case of *the Wife and Heirs of Wasihun Mekonnen*, which is another landmark case in guaranteeing the right to appeal in civil litigations. In effect, many cases from the Privatization Agency and its Board were presented by aggrieved parties to the Federal Supreme Court Cassation Bench.

Consequentially, the decision protects the right to appeal of the applicants, but it fails to firmly establish the right of access to justice as including the right to appeal in civil cases. It could be discerned from this decision of the HoF that the aspects of the right to access to justice that are not expressly listed under Article 37 have also constitutional recognition by necessary implication.

In the case of *W/o Wude Tesfahun et al v. Ato Legesse Belay,*[72] the applicants, who were residents of Addis Ababa City, brought a suit against a person whom they alleged to have occupied their house illegally in Tigray Region Western Zone High Court. The Court entertained the case and decided in favour of the applicants ordering the respondent to leave the house. However, the Regional Supreme Court reversed the decision of the lower court. The applicants submitted a petition to appeal out of time to the Federal Supreme Court as they were unable to submit their appeal within the legally prescribed period. The Federal Supreme Court allowed their petition so that they could submit their appeal within 10 days. However, the applicants submitted their application mistakenly to the Federal Supreme Court Cassation Bench, instead of the appellate bench, which rejected the case. By the time they tried to submit the appeal to the Appellate Bench of the same court, the 10 days allowed had already expired. The applicants petitioned to the Appellate Bench that they mistakenly submitted it to the Cassation Bench mentioning their illiteracy as the reason for the delay. However, the Appellate Bench rejected their petition.

The applicants petitioned to the CCI that their right to appeal, to be heard and access to justice had been violated. The CCI emphasized that the registrar of the Court had a duty to check for the names of the courts as per Articles 229 and 222 of the Civil Procedure Code. Acknowledging citizens' duty to comply with procedural laws, it argued that failure of the registrar to discharge its duties should not be a ground for depriving rights of citizens. In the case at hand, the CCI argued that the registrar should have checked and corrected the errors.

In this case, the CCI/HoF invoked Article 20(6) of the Constitution in the context of civil suits arguing that the 10 days granted to the applicants by the Federal Supreme Court Appellate Bench lapsed due to the failure of the registrar of the court and prohibiting them from pursuing their case as a result of this violates their right to appeal. The CCI argued that as long as the applicants submitted their case in due time to a court, failure to submit to the right bench within a court should not deprive them of their right to

72 CCI File No. 1645/2008, Recommendations of the Council of Constitutional Inquiry, Volume 1 No. 1, Published by the Secretariat of Council of Constitutional Inquiry, September 2018.

appeal. It also insisted that the Cassation Bench should have referred the case to the Appellate Bench when it understood that the case should have been presented to the Appellate Bench. The HoF endorsed the recommendation of the CCI.[73]

In another case referred from the Federal High Court,[74] the CCI deemed Article 202/3/ of the Criminal Procedure Code (CPC), which prohibits appeals against decisions dismissing applications for setting aside, is not contrary to Article 20(6) of the Constitution granting the right to appeal. The case started in the Federal First Instance Court where a certain Ato Jemal Ibrahim was charged for committing a crime under customs law. The suspect, after being interrogated by the police, was released on bail. Although a charge was instituted, the whereabouts of the suspect could not be identified. After following the legal procedures for summoning, the court proceeded in absentia convicting the suspect. After a sentence was passed, the suspect was caught by police and sent to prison to serve the sentence.

The detainee petitioned the court to set aside the sentence and retry the case in his presence respecting his right to defend since he was not summoned properly and had no knowledge of the charges. After considering the petition for setting aside, the court dismissed his request arguing that he was summoned properly according to the legally prescribed procedures and he was hiding from justice. Aggrieved by this decision, the detainee appealed to the Federal High Court. The Federal High Court, uncertain of the constitutionality of Art 202/3/ prohibiting appealing in such scenario referred the matter to the CCI.

The CCI relied on Art. 20(6) of the Constitution to review the constitutionality of Article 202/3/ of the CPC. The Constitution states, "Every person has the right to appeal to a competent court against an order

73 But the CCI has taken different approaches in cases where there is also contributory negligence by the applicant in properly lodging a claim to court of proper jurisdiction. Unlike the current case, the CCI has also decided that the time spent by the court to verify its jurisdiction may not be considered as good cause to warrant appeal out of time. See the case of *Tigray Region Public Prosecutor v. Ato Gebresilassie Gebru*, 2542 /CCI, 24 November 2012, Unpublished.

74 The Federal High Court, 4347 /CCI, 21 September 2012, Unpublished.

or a judgment of the court which first heard the case".[75] The issue was whether the constitutional right of appeal related exclusively to decisions on merits or whether it also applied to a procedural matter of setting aside a sentence passed in absentia. The CCI reasoned that as long as the court has summoned the applicant following procedures, it is the duty of the applicant to be present during the hearing. It also reiterated that the appeal right is against decisions on merits and the lawmaker has the discretion to regulate procedures for setting aside a sentence passed in absentia. It further argued that allowing an appeal against such a decision has the potential of encouraging suspects to flee prosecution and delay the judicial process. Therefore, since the applicant in this case was given the opportunity to petition to set aside the sentence before an independent judiciary, the CCI argued that he had enjoyed his constitutional right of access to justice.

The CCI, in this case, tried to balance the right of the applicant to access justice and the power of the legislature to regulate the procedure of setting aside a court decision. The applicant was not denied his right to appeal on the merits; the application submitted to CCI is related only to constitutionality of the prohibition of appeal on the procedural issue of setting aside of a sentence passed in absentia and requesting a fresh trial. Although the applicant claimed he was not properly summoned, the court differed and found summon was made following the legal procedure and he wilfully absconded justice. Though it could be debatable as to whether the legislature has any power to regulate the court procedure in particular relating to the right to appeal, the CCI has tried to accommodate both the interests of the applicant and expediency in criminal proceedings.

4.4. The Right to Obtain a Judgment

The Constitution under Article 37 guarantees everyone's right not only to bring a justiciable matter to a court or other competent body with judicial power, but also to obtain a decision or judgment. The cases below highlight the manner of the CCI/HoF's interpretation of this aspect of the right of access to justice.

75 The FDRE Constitution, cited above at note 22, Art.20(6).

In the case of *Yayneabeba Adamu and others v. W/ro Meseret G/Medhen*[76], the litigation involved paternity where the respondent filed a suit in the Federal First Instance Court claiming she is the daughter of applicants' father, Mr. Adamu, in their absence. The Court heard evidence and decided that the respondent was the daughter of Mr. Adamu. The applicants petitioned the Court as per Article 358 of the Civil Procedure Code opposing the judgment passed in their absence but to no avail. The applicants appealed to the Federal High Court which accepted their application, ordered a DNA test, and adjourned the case. Meanwhile, a new judge came, stepped back, and rejected the appeal as un-appealable. The applicants made an unsuccessful application to the Federal Supreme Court Cassation Bench. They again requested the Federal First Instance Court for review of judgment claiming that the previous judgment was passed based on false witness testimony, and the DNA result showed their father and the respondent had no paternal relation. This was, however, rejected by the courts.

They petitioned to the CCI claiming that the procedural irregularity has violated their right to equality, right of access to justice, and right to property. The CCI confirmed that the Federal High Court reversed the process after it ordered a DNA test, awaiting result. While the new judge should have waited for the DNA result, the judge cancelled the order contrary to lawful procedure and rejected the appeal. This procedural irregularity, according to CCI, violated the applicants' right to equality before the law and the right to obtain a judgment from a court of law. In addition, the CCI mentioned violation of Article 12 of the Constitution, arguing that the government should be transparent which is lacking in this case, and Article 79, which provides that judges should not be ruled by anything other than the law. This case is partly about the right of access to justice and relates to the irregularity created due to the change of judge presiding over the case.

In another case,[77] the spouses got divorced before the Federal Fist Instance Court. In the division of common property, there was a 75 m^2 plot of land

76 *Yayneabeba Adamu and others v. W/ro Meseret G/Medhen*, 1507/2008/CCI, 18 August 2008, Unpublished.

77 *W/ro Adanech Lesanewerk v. Ato Shibru Asnake*, 1368/2007/CCI, 12 April 12 2008, Unpublished.

and a sum of money acquired as compensation for expropriation. It was easy to divide the money but not the parcel of land. The Court ordered the concerned government entity to divide, if possible, the plot into two. The Yeka Sub-city reported to the Court that the plot of land is indivisible. The Court then asked the litigants to agree; when they failed, it closed the case. This order was affirmed by the Federal Supreme Court Cassation Bench.

The CCI firmly argued that failure of the Court to pronounce a judgment or order disposing the case violates the right of access to justice of the litigants. It added the Court could have used its powers under the Civil Procedure Code to execute the judgment instead of completely relying on the agreement of the parties.

In both cases discussed above, the Courts violated the right of access to justice, particularly the right to obtain a judgment. In the case of *Yayneabeba Adamu,* the Court committed a procedural irregularity in dismissing the case contrary to its previous order for DNA test. While the judge should have taken the result of the test in to account and pronounced a judgment, it reversed as if no order was granted and no litigation occurred. Regardless of the content, the Court should have passed a judgment on the merits. This is an important precedent in elaborating the right to obtain a judgment as part of the right of access to justice. The same holds true to the case of *W/ro Adanech Lesanewerk v. Ato Shibru Asnake,* where the Court's failure to resolve the issue presented before it violated the right to obtain a judgment.

Conclusion

In Ethiopia, constitutional interpretation is a new phenomenon and it might take some time to mature. Nevertheless, the progress made in protecting fundamental rights especially the right of access to justice through constitutional interpretation is commendable. Access to justice is a fundamental human right that also serves for the protection of other rights. It is also among the constitutional rights that face frequent violations by the government. From the cases we have investigated, access to justice is precarious and the threats to the exercise of the right come in the forms of legislative acts, court decisions, and actions of the executive.

In this chapter, we have investigated responses by organs responsible for constitutional interpretation to stop and redress violations of the right of access to justice. We have also tried to investigate the contribution of the concerned organs in the jurisprudential development of access to justice. Considering the infancy of the institutions tasked with constitutional interpretation, we have come to understand that they have taken bold measures to define the scope of the right in light of the Constitution and international instruments ratified by Ethiopia.

However, there are also some issues that need urgent action in which both CCI and HoF have failed. Although constitutional interpretation is an endeavour for maintenance of rule of law and constitutionalism, we have taken notice that decisions of the CCI and HoF are sometimes inclined to consider the political implications of their decisions. Due to this fact, the decisions of the HoF are sometimes inconsistent and against the tenets of the Constitution. There are also cases whereby the CCI has opted not to take action by keeping the cases in limbo until some measure is taken by the legislature or the executive to rectify the problems they created. As far as there is no established communication channel to rectify constitutional violations through discussion with government organs, keeping the cases in the hands of the CCI and HoF in limbo would affect the legitimacy of the institutions.

Finally, we can say that constitutional interpretation in Ethiopia is a leap forward for the enjoyment of access to justice by defining and delimiting its scope. We also hope that the endeavours so far would help to develop the jurisprudence and better entrenchment of access to justice in Ethiopia.

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Enforcing Socio-economic Rights through Constitutional Adjudication in Ethiopia: Taking the Right to Housing as an Example

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Abstract

Constitutional adjudication has played a significant role in transforming the status of socio-economic rights into a justiciable right in many constitutional systems. Creative and progressive constitutional adjudicators, in many constitutional systems, have interpreted their Constitution to create a means to enforce the non-justiciable right to housing. General Comments issued by the UN Committee on ESCR (Economic, Social and Cultural Rights) also indicate that there are developments on how to treat socio-economic rights in general and the right to housing in particular. In Ethiopia, socio-economic rights are still considered non-justiciable rights. This chapter intends to indicate the role of the Council of Constitutional Inquiry (CCI) and House of the Federation (HoF) in transforming the status of socio-economic rights into justiciable rights - focusing on the right to housing. Despite the enormous problems related to housing, cases pertaining to housing are barely submitted to the CCI/HoF. Nevertheless, the CCI/HOF did not endeavour to frame the cases from the perspective of the right to housing. This should have been possible for them as constitutional adjudicators and there is no law which restricts them from framing a case beyond what has been requested by the petitioners. Recently, however, a case which specifically invoked a constitutional right to housing has been filed to the CCI.

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Introduction

In Ethiopia, there is a severe problem of housing ranging from problems related to access, to habitability, and to security of tenure. While there is a high housing demand across the country, it is particularly so in the major cities. A study on housing conditions in Ethiopia reveals a substantial imbalance between the demand for and supply of houses in many major cities. For instance, the demand in ratio in Addis Ababa is 361 per 1,000 people while it is 277 per 1,000, and 272.4 per 1,000 in Semera and Bahir Dar respectively.[1] The study also indicates that there is a high demand for housing in other major cities including Bishoftu, Adama, Dire Dawa, Shire-Endaselassie, Jimma, and Hosanna.[2]

In terms of habitability, the problem is rampant everywhere in the country. In the majority of areas, a large number of people live in substandard housing, and without adequate sanitation and basic services.[3] According to the criteria of UN Habitat, 80% of houses in Addis Ababa are identified as slums, of which 70 % is constituted by government owned rental housing.[4]

Forced eviction from illegally built houses is also a regular occurrence in Ethiopia. It has become a major problem leading many people to homelessness, humiliation, undignified life, and to so many other social, economic, physical, and mental problems. Absence of appropriate and adequate policy and legal measures intended at realizing the right to housing, delay in granting access to land, and discriminatory low-cost housing provision have also been identified as challenges pertaining to the right to housing in Ethiopia.[5]

1 EiABC, Housing in Ethiopia – An Overview, 2017, <https://mdl.donau-uni.ac.at/binucom/pluginfile.php/596/mod_page/content/15/Housing%20in%20Ethiopia.pdf>, last visited on 3 May 2020.

2 *Ibid.*

3 UN-HABITAT, Condominium Housing in Ethiopia: The Integrated Housing Development Program, 2011, <https://www.humanitarianlibrary.org/sites/default/files/2013/07/3104_alt.pdf> , last visited on 18 February 2020.

4 *Id.*, p. 5.

5 While there are some laws and a policy, they are not, however, deliberately enacted to ensure the realization of the right to housing. On the other hand, the low-cost condominium housing project is argued to be discriminatory favouring those who are

While this is the reality, regular courts in Ethiopia hold the view that the right to housing, as a socio-economic right, is not justiciable. Given that the realization of socio-economic rights requires mobilization of resources, courts consider themselves ill-suited to resolve housing related claims.[6] They furthermore hold the view that socio-economic rights are to be realized progressively and hence cannot be claimed immediately before the courts.[7]

Considerable research on the right to housing in Ethiopia covering issues related to the legal framework governing the right to housing, the provision of and access to housing, and housing tenure has been conducted. Nevertheless, none of these research works have explored the role of the CCI/HoF in realizing/enforcing socio-economic rights in general or the right to housing in particular.

This Chapter wants to explore the role the CCI and HoF have played or could play in transforming the status of the right to housing in Ethiopia. To this end, analysis of relevant cases and interviews with resource persons at the CCI/HoF were conducted. Experience of other relevant jurisdictions and the relevant General Comments of the Committee on the ESCR have also been explored.

The remaining part of the Chapter is divided into five sections. Section I deliberates on the meaning, content, and scope of the right to housing as defined by the General Comments of the Committee on ESCR. Section II briefly reviews the international understanding of and experience with the adjudication of the right to housing. As such, sections I and II provide the theoretical background to sections III and IV which discuss the experience in Ethiopia. A conclusion summarizes the research findings and formulates recommendations.

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economically well-off. Access to land to build one's house is also identified to be very difficult in Ethiopia, thereby impeding citizens' chance of building their house. Dejene Girma, The Realization of the Right to Housing in Ethiopia (LL.M Thesis, Faculty of Law, University of Pretoria, 2007), pp. 28 & 32-34.

6 Aremaye Assefa, The Right to Adequate Standard of Living with Specific Focus on the Right to Adequate Housing: The Institutional and Legal Framework in Ethiopia (LL.M Thesis, Addis Ababa University, 2011), pp. 41-42.

7 *Ibid.*

I. The Right to Housing: Meaning, Content, and Scope

The International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) acknowledges the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and to a continuous improvement of living conditions.[8] The right to housing is thus recognised as one of the elements of an adequate standard of living. The right to housing is essential for the fulfilment of other basic human rights of a person including the right to live with dignity, the right to family, the right to privacy, the right to freedom of movement, the right to assembly and association, the right to vote, the right to education, the right to work, the right to health, and the right to development.[9] Accordingly, the violation of the right to housing of a person will result in a violation of the individual's other basic rights. For instance, the prospect of getting a livelihood can be affected when a person is evicted forcibly from his home and hence forced to move to another place. Also, in the absence of proof of residency, it may not be possible for individuals to get registered for voting or to become beneficiaries of health and other basic services. The right to housing is particularly significant to protect the rights of children, the elderly, the disabled, and women.[10] Forced eviction exposes women and girls to sexual violence and the rest of the family to humiliation and degrading treatment.[11] Forced eviction may also force children to interrupt or drop out from school.

Notwithstanding the significance of the right to housing to the enjoyment of many other human rights, large numbers of people across the world are reported to live in inappropriate housing. Many people around the world

8 General Comment No. 4, on the right to adequate housing, (Art. 11 (1) of the Covenant), Sixth session (1991), Para.3.

9 The Human Rights and Equal Opportunity Commission, Housing as a human right, Sydney, September 1996, <https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf>, last visited on 3 May 2020.

10 *Ibid.*

11 Office of the United Nations High Commissioner for Human Rights, the Right to Adequate Housing, Fact Sheet No. 21/Rev.1, p. 9. <https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf> , last visited on 21 December 2019.

live in a situation that is dangerous to their life and wellbeing.[12] Millions of people still live in congested slums and makeshift homes or in situations where their right to live with dignity is not protected.[13] Millions of others are subjected to forced eviction or are exposed to eviction from their house every year.[14]

The right to adequate housing is not only entrenched in the ICESCR, but it is also recognized in many other international human rights instruments. It is, for instance, acknowledged under the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Declaration on Social Progress and Development, the Vancouver Declaration on Human Settlements, the Declaration on the Right to Development and the ILO Recommendation Concerning Workers.[15] More importantly, however, it is General Comment (GC) No.4 of the UN Committee on Economic, Social and Cultural Rights that has provided an elaborate meaning, content, and scope of the right to housing and the nature of states' obligations. The elaboration by GC No.4 is believed to have expanded the understanding and enforcement of housing rights around the world. The Committee on ESCR, in its GC, has emphasized that the right to housing should not be interpreted narrowly, in the sense of a right to have a shelter with four walls and a roof. The right to housing is intrinsically linked with other human rights. The right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and in other applicable international instruments. The Committee, accordingly, indicated that the right to housing should be understood as a right to live in security, peace, and dignity.[16] The

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 See, for example, Article 25(1) of the Universal Declaration of Human Rights, Article 5(e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women, Article 27(3) of the Convention on the Rights of the Child, Article 10 of the Declaration on Social Progress and Development, Section III (8) of the Vancouver Declaration on Human Settlements, 1976, Article 8(1) of the Declaration on the Right to Development and the ILO Recommendation Concerning Workers' Housing, 1961 (No. 115).

16 General Comment No.4, cited above at note 8, Para.7.

Committee also noted that the right to housing under Article11(1) should be read as "adequate housing" which, in other words, refers to adequate security, peace, and dignity.[17]

The Committee, even though it noted that the realization of the right to adequate housing is dependent on economic, cultural, ecological and other factors, identified seven components of the right to housing which, at minimum, should be applicable in any context. These include: "(1) Legal security of tenure, (2) Availability of service, materials, facilities and infrastructure, (3) Affordability, (4) Habitability, (5) Accessibility, (6) Location, and (7) Cultural adequacy."[18]

In realizing the right to housing, States have both specific and general obligations under international law.[19] The specific obligation emanates from ICESCR Art 2, which imposes a fundamental obligation on States Parties to

17 *Ibid.*

18 ***Legal security of tenure***: - According to the Committee's comment, a housing right should entitle everyone to a legal security of tenure irrespective of the type of tenure, i.e., whether a public or private rental accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements. States Parties to the Covenant must guarantee security of a person from a forced eviction, harassment, and other threats. States Parties must also take measures to protect the tenure security of those who have already become victims of forced eviction or other threats. ***Availability of service, materials, facilities and infrastructure***: - An adequate housing must provide access to basic services and facilities such as safe drinking water, energy necessary for cooking, lighting, and heating, facilities for health, security and sanitations, and emergency service. ***Affordability***: - States Parties must strive to make sure that housing related costs are affordable by establishing housing subsidies for sections of the society who cannot afford to pay the market price. Tenants must also be protected from unreasonable rent levels and rent raise. ***Habitability***: - Adequate housing also refers to liveability. Occupants are entitled to have an environment which is habitable in which occupants are protected from cold, heat, wind and damp. ***Accessibility***: - Adequate housing also includes accessibility. Disadvantaged sections of the society should be given some degree of priority to have access to housing. ***Location:*** - Adequate housing must consider access to employment, health care centres, schools, childcare centres and other facilities. ***Cultural adequacy:*** - adequate housing also refers to the way housing is built. Materials used to construct housing must enable the expression of cultural identity. Housing schemes and policies must not compromise cultural values and identities.

19 S. M. Atia Naznin, Researching the Right to Housing, 2018, <https://www.nyulawglobal.org/globalex/Housing_Rights.html#_edn7>, last visited on 21 December 2019.20 CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23), Para. 9.

realize the right to housing. Yet, the ICESCR, taking into account the economic implications of the enforcement of the right to housing, imposes on States a progressive realization of the right. The idea of progressive realization, however, led States Parties to the Covenant to a misconception of their obligation and allowed them to justify their failures to fulfil their obligations. Later, GC No.3 provided a clarification on the original intent of the Covenant concerning the obligation of the States.[20]

Accordingly, the Committee stated that the obligation of States to progressively realize the right to housing imposes an obligation to take immediate appropriate measures. The immediate appropriate measures may include an appropriate intervention in the form of policy, legislation, administrative or judicial remedies.[21] These interventions of the State must be capable of preventing forced eviction, ensure security of tenure, and must deal with discriminatory practices and address vulnerable groups of the society. In some cases, the right to housing requires the State to abstain from taking discriminatory and retrogressive measures which may deprive a person of the enjoyment of his/her right. The right to housing, however, does not impose on the State an obligation to build housing for the whole population of the country.[22] Neither does it entitle citizens, who do not have an accommodation, to immediately request housing from the State except in exceptional circumstances such as when they are in desperate need of housing resulting from a natural or man-made disaster or because they are vulnerable sections of the society.[23] Instead, it imposes on the States Parties an obligation to take immediate necessary measures as described above. Apart from the specific obligations resulting from the Covenant, States Parties also have a general duty (as for other human rights) to protect, respect and fulfil the human right of housing.[24]

At regional level, the African Charter on Human and Peoples Rights (ACHPR) lacks an explicit provision acknowledging the right to housing.

20 CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23), Para. 9.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

However, the African Commission on Human and Peoples' Rights later developed a doctrine of *implicitly guaranteed rights*, which enabled the Commission to read rights not expressly recognized by the Charter "into" it.[25] The Commission, based on this doctrine, inferred the right to housing from the right to enjoy the best attainable state of mental and physical health (Art18), the right to property (Art14) and the protection accorded to the family (Art18(1)).[26]

The duty of the State to progressively realize the right to housing is not expressly stated under the ACHPR and CEDAW. One may, therefore, argue that the right to housing imposes an immediate obligation on States Parties. Nevertheless, to the extent that the fulfilment of the right demands a resource, it is inevitable that the same will remain a progressively realizable right.[27] However, if the enforcement of the right does not require resources, it will impose an immediate obligation on States Parties.[28]

II. Adjudication of the Right to Housing: An Overview of the Understanding and the Experience in other Jurisdictions

Judicial adjudication of the right to housing is one of the necessary steps States Parties must take as part of their obligation to progressively realize the human right of housing.[29] The long standing assumption that socio-economic rights ought to be non-justiciable has, however, impeded – for long – the realization of these rights in general and the right to housing in particular. Noting this widespread misunderstanding, the Committee on ESCR in its General Comment No. 9 para. 9 noted that the assumption which always puts socio-economic and cultural rights beyond the reach of courts while the same is not true for civil and political rights is unfair and contrary to the principle that human rights are indivisible and

25 F. Viljoen, "Introduction to the African Commission and the Regional Human Rights System", in C. Heyns (ed), Human Rights Law in Africa: International Human Rights Law in Africa, V. 1 (2004), p. 410.

26 The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Communication No.155/96, African Commission on Human and Peoples' Rights, 2001, Para. 62.

27 Dejene, cited above at note 5, p. 17.

28 *Ibid.*

29 General Comment No. 3 cited above at note 20, Para. 9.

interdependent. The Committee has thus noted that it should be possible to take grievances on socio-economic rights to courts. It is also argued that GC No. 9 framed, for the first time, the issue of justiciability of ESC rights from the perspective of the right holder.[30] While human rights in general are supposed to be understood from the perspective of the right holder,[31] the assumption that socio-economic rights ought not to be adjudicated, however, does not emanate from the perspective of the rights holders.[32] The Committee asserted the justiciability of ESC rights based on the principle that "rights holders to any human right must have access to an effective remedy".[33]

The Committee in its GC No. 3 also listed, by way of example, provisions of the Covenant which it considered immediately applicable before the courts of law.[34] The Committee, in its GC No. 16, also indicated that the right of men and women to the equal enjoyment of socio-economic and cultural rights is a mandatory and immediate obligation of States Parties.[35] To this end, States Parties have a duty to ensure equal enjoyment of the right to housing as their immediate obligation.

Regional human rights systems have also shown a substantial progress in treating socio-economic rights as justiciable rights. Significant numbers of cases involving socio-economic rights have been adjudicated before the regional human rights systems including the African Commission on Human and Peoples' Rights, [36] the Inter-American Commission on Human

30 B. Porter, Justiciability of ESC Rights and The Right to Effective Remedies: Historic Challenges and New Opportunities, Beijing, 31 March 2008, p. 7, <http://www.socialrights.ca/documents/beijing%20paper.pdf>, last visited on 3 May 2020.

31 The principle that every human right must have an effective remedy is affirmed in Article 8 of the Universal Declaration of Human Rights.

32 *Ibid.*

33 *Id.*, p. 8.

34 The General Comment No. 3 mentioned the following Articles as immediately applicable: Art 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application. See *Id.*, Para 5.

35 The Committee on Economic, Social and Cultural Rights, General Comment No. 16, Para.16.

36 See for example, *Purohit and Moore v. Gambia*, Communication 241/200, Decided at 33rd Ordinary Session of the African Commission, 15-29 May 2003 (dealing with the right to health of mental health patients); *SERAC and CESR v. Nigeria,* African

Rights,[37] the Inter-American Court of Human Rights,[38] and the European Court of Human Rights.[39]

The way the African Commission on Human and Peoples' Rights, as discussed above, has adjudicated the right to housing – in the absence of any express recognition of the same under the Charter – is particularly significant to the matter at hand.

National jurisdictions have also shown momentous progress on the understanding that socio-economic rights are justiciable. It has become common to see the adjudication of socio-economic rights in domestic jurisdictions.[40] Specifically with respect to the right to housing, a significant number of countries have expressly acknowledged the right to housing in their national constitution. The constitutions of Belgium, Haiti, Armenia, Burkina Faso, Congo, Ecuador, Mali, Mexico, Spain, Uruguay, Russia, Paraguay, Venezuela, Viet Nam, Sao Tome and Principe, Seychelles, Maldives, Guyana, Equatorial Guinea, Nicaragua, and South Africa include provisions that explicitly acknowledge the right to housing and outline the

Commission on Human Rights, Case No. 155/96, Decision made at 30th Ordinary Session, Banjul, The Gambia, from 13th to 27th October 2001 (dealing with the right to health and the implied rights to food and housing).

37 See for example: Argentina: *Jehovah's Witnesses, Case* 2137, Inter-Am. C.H.R. 43, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1979) (Annual Report 1978) (dealing with the right to education); *Jorge Odir Miranda Cortez et al. v. El Salvador* Inter-American Commission on Human Rights, Case 12.249, Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000) (admissibility decision dealing with the economic, social and cultural standards enshrined in the OAS Charter).

38 See for example: *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua,* Inter-American Court of Human Rights Series C, No. 79, 31 August 2001 (involving the right to property); *Dilcia Yean and Violeta Bosica v. Dominican Republic*, 7 December 2005 (involving education rights and rights of the child).

39 See for example: *Europe v. France,* Complaint No. 13/2002, 7 November 2003 (dealing with the education rights of persons with autism); *FIDH v. France,* Complaint No. 14/2003, 8 September 2004 (involving, inter alia, the right to medical assistance of non-nationals) and most recently *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France,* Complaint No. 39/2006 (dealing with the right to adequate housing and failure to make sufficient progress in addressing homelessness).

40 Countries including Bangladesh, Colombia, Finland, Kenya, Hungary, Latvia, the Philippines, Switzerland, Venezuela, South Africa, Ireland, India, Argentina and the US have litigated socio-economic rights in their courts. See A. Nolan, B. Thiele, and M. Langford, Leading Cases on Economic, Social and Cultural Rights: Summaries – Working Paper, (2009).

corresponding responsibility of the State.[41] Claims related to the right to housing covering issues such as forced eviction, tenant protection, discrimination in the area of housing, and access to basic housing facilities have been adjudicated by the courts in these countries.[42] Adjudication of the right to housing has also become a reality in countries where the right to housing and the corresponding obligation of the State are not clearly established in the constitution. In states in which the right to housing is not acknowledged as a justiciable right in the constitution, progressive and creative judges have interpreted their constitution to create an indirect means to enforce the non-justiciable right to housing.[43]

India is a good example of a state where the right to housing has been enforced in the absence of an explicit constitutional acknowledgment of the same as a justiciable right. Even if the Constitution of India lacks an explicit provision establishing an enforceable right to housing, the Supreme Court has created a way to adjudicate the right to housing. In *Olga Tellis v. Bombay Municipal Corporation* (a case which involved a forcible eviction of slumdwellers by the municipality as part of its city development plan), the Court created an indirect means to adjudicate the violation of the non-justiciable housing provision of the Constitution of India (which is called the directive principle). The Court inferred the right to housing from the justiciable right to life.[44] The Court held that the violation of the directive principle of housing stated in the Constitution amounts to a violation of the justiciable fundamental right to life.[45] In finding a violation of the right to life in the action of the state evicting slumdwellers, who established their livelihood out of their improvised homes, the Court argued that:

> "An equally important facet of that right to life is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of

41 Atia Naznin, cited above at note 19.

42 *Ibid.*

43 M.C.R. Craven, "The Domestic Application of International Covenant on Economic, Social and Cultural Rights", Netherlands International Law Review, (1993), p. 389.

44 *Olga Tellis v. Bombay Municipal Corporation AIR* (1986) SC 180.

45 *Ibid.*

> abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness, but it would make life impossible to live."[46]

The Court also ruled that those slumdwellers, who are evicted and who have a documentation and an identity card, must be resettled and given an alternative accommodation and couldn't be evicted without due process and notice.[47]

In *Shantistar Builders v. Narayan Khimalal Totame*, the Supreme Court further strengthened its position in *Olga Tellis* by stating that:

> "The right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual…."[48]

In South Africa, even if the right to housing is explicitly entrenched under the Constitution, the extent of the right and the corresponding responsibility of the State have been clarified by the subsequent decisions of the Constitutional Court. The *Oliva Road* and *Blue Moonlight* are important cases that have laid the foundation for claims concerning the right to housing in South Africa.

The *Oliva Road* case is a case which concerns the decision of the City of Johannesburg to evict the 300 people who were living in crumbling buildings in the centre of the City.[49] Occupants filed a case against the decision first to the Higher Court and then appealed to the Constitutional Court. The Constitutional Court first gave an interlocutory decision

46 See *Olga Tellis v. Bombay Municipal Corporation AIR* (1986) SC 180.

47 *Ibid.* Also see C. Albisa, B. Scott, and K. Tissington, "Demolishing Housing Rights in the Name of Market Fundamentalism: The Dynamics of Displacement in the United States, India, and South Africa", in L. Minkler (ed.), The State of Economic and Social Human Rights, (2013), pp. 91-92.

48 B. G. Ramcharan (ed), Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials, (2005), p. 342.

49 *Occupiers of 51 Oliva Road, Vera Township and 197 main street, Johannesburg v. City of Johannesburg and Others* 2008(3) SA 208(cc).

ordering the parties (the City and the occupants) to "engage with each other meaningfully" to resolve the dispute in accordance with constitutional values. Accordingly, the disputants reached an agreement including on ground-breaking points. If the occupants left the place permanently, the City agreed to arrange for them a temporary accommodation as well as basic services pending a lasting answer to their housing problem.[50] Consequently, the Constitutional Court approved in its final decision the negotiated deals agreed by the disputants.[51] The Court also underlined, in its final decision, that the City had to anticipate the possibility of homelessness in its decision to evict the occupants.[52]

The *Blue Moonlight* case is about 86 poor people who were living in an uninhabited industrial building and who were forced by a private developer – who had bought the property – to leave the place.[53] The occupants refused to vacate until the City provided them an alternative accommodation, which they considered the City's constitutional obligation. In this case, the Constitutional Court reaffirmed its position in its previous decision that the State shall make sure that its action will not lead occupants to homelessness.[54] The Court ultimately ordered the occupants to vacate the place but only after the City provided them a temporary accommodation. The Court also commented on the Municipality's failure to plan and budget to alleviate the housing problem in the city.

In deciding this case, the Court prioritized the right to housing over the right to property of the private developer who bought the industrial building. The Court, in a way, ranked the housing need of the occupants, who otherwise would have become homeless, higher than the interest of the owner to take action on his property. In its decision, the Court stated that, "Where a property owner purchases land knowing it to be occupied (as in this case), an owner may have to be somewhat patient, and accept that the owner's right to occupation may be temporarily restricted if an eviction

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties, 39, (pty) Ltd and Another* 2012(2) SA, 104(cc).

54 *Ibid.*

would lead to homelessness."[55] The Court further noted that, "An owner's right to use and enjoy property at common law can be restricted in the process of justice and equity inquiry mandated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) of the Parliament."[56]

III. The Right to Housing under the FDRE Constitution

The FDRE Constitution is often praised for recognizing all generations of rights compared to its predecessors. Nevertheless, the Constitution has not treated socio-economic rights in the same way as it treats civil and political rights. Socio-economic rights are covered in the Constitution principally under Articles 41 to 44. Yet, only few socio-economic rights are acknowledged in these provisions.[57] Many of these rights, including the right to housing, are unrecognized under the FDRE Constitution.

The FDRE Constitution lacks an explicit provision establishing the human right to housing. Yet, Article 41(4) of the Constitution imposes on the State a duty to earmark an ever-increasing resource to public services – public services including provision of housing. Article 90(1) also states that, to the extent resources are available, government policies shall aim at providing all Ethiopians access to social services including housing. Furthermore, Article 41(3) guarantees citizens a right to enjoy equal access to publicly funded social services, which the State is obliged to provide under Articles 41(4) and 90(1).

As it is clear from the words of the provisions, none of these provisions explicitly confer the right to housing. It is obvious that Article 41(3) only protects equal access and non-discrimination in the provision of publicly funded social services. It needs to be noted, however, that this particular right is an immediately enforceable right. For instance, the State cannot discriminate when distributing government arranged/funded housing opportunities. Articles 41(4) and 90(1), on the other hand, are phrased as state obligations and not as individual rights. Therefore, unless one argues

55 *Ibid.*

56 *Id*, Para. 40.

57 The socio-economic rights mentioned under Articles 41 to 44 of the Constitution include the right to work, right to education, and the right to choose the means of one's livelihood.

that every obligation entails a corresponding right, these two provisions do not create an enforceable right to housing.

Even if the human right to housing is not expressly acknowledged in the Constitution, it can be inferred from other expressly recognized human rights. The jurisprudence of the African Commission on Human and Peoples' Rights, for instance, has shown that the right to housing is implied in the right to property, and the protection accorded to the family. The Indian Supreme Court decided that the right to housing can be inferred from the right to life and livelihood. The relevant General Comments of the Committee on ESCR indicated that the right to housing is central to the right to life, dignity and many other civil and political rights, which are immediately claimable.

Accordingly, the CCI/HoF can interpret the FDRE Constitution in such a way as to infer the right to housing from justiciable civil and political rights expressly protected under the Constitution. Article 13(2) of the Constitution also stipulates that the rights protected under Chapter Three of the Constitution need to be interpreted in line with the international instruments adopted by Ethiopia.

The CCI and HoF, as constitutional interpreters, are appropriate bodies to clarify ambiguities concerning the status of the right to housing and the corresponding obligations of the State. The uncertainties in this regard have left the government unchecked in its actions and inactions, particularly in relation to the realization of the human right to housing.

IV. Constitutional Adjudication of the Right to Housing

Given the absence of a clear constitutional recognition of the right to housing, the CCI/HoF can play a significant role in determining the justiciability of the former, its scope, and the specific obligation of the State. This section investigates how far the CCI and HoF have tried to play their role in the protection, promotion, and fulfilment of the right to housing. The authors have tried to investigate how the CCI/HoF have approached and resolved cases which involve the right to housing.

Few cases which, in one way or another, involve the right to housing have been submitted to and adjudicated by the CCI/HoF. While some of them

have been settled already, some others are still pending.[58] This section discusses and investigates how the constitutional interpretation bodies have approached and resolved these cases.

4.1. Access to Government Owned Houses

The Federal and Regional governments own and administer a significant number of houses in Addis Ababa and in other major cities. The government came to own the majority of these houses through nationalization by virtue of Proclamation No. 47/1975. The government has enacted rules and regulations governing the houses. For example, the Addis Ababa City Government Houses Agency has recently issued Directive No. 5/2011(E.C.) with a view to "manage the houses and determine the manners of transfer".[59]

As discussed above, the very nature of socio-economic rights demands the government to progressively implement them through allocating available resources. From this perspective, government houses can be one of the resources that the government can use to fulfil the right to housing of its citizens. In this regard, there is a case which was litigated before the Addis Ababa City Courts and then came to the attention of the CCI/HoF.

The Case of *Fatuma Hussein*[60]

The applicant in this case had lived in a government owned house for more than fifteen years with another person who had a formal rental agreement with the government. When the lessee died, the applicant remained in the house with her four kids. However, the Kolfe Sub-City Government House Administration Office ordered the applicant to leave the house. She refused and filed a possessory action against the Kolfe Sub-City House Administration Office before the Sub-City's Court. The Court decided that the applicant had no formal agreement with the respondent, and hence she did not fulfil the requirements of the applicable Directive to stay in the house. This decision was later confirmed by the Addis Ababa City Appellate

58 Interview with anonymous senior constitutional researcher at the CCI.

59 The Addis Ababa City Government Houses Agency Directive No. 5/2011(E.C.).

60 CCI File No. 1569/2008 (E.C.), the Case of *Fatuma Hussein v. Kolfe-Keranyo Sub-City Government House Administration Office,* Unpublished.

Court, and ultimately by the Appellate and Cassation Benches of the Federal Supreme Court.

Subsequently, the applicant submitted a constitutional complaint to the CCI claiming that her constitutional right had been violated by the decision of the lower courts as affirmed by the Supreme Court. She also petitioned for a temporary injunction order against the eviction order pending the final decision of the CCI. Accordingly, the CCI issued an injunction order so that the applicant could remain in the house until it rendered a final decision on whether her claim deserved a constitutional interpretation. In the meantime, despite the order of the CCI, the respondent forced the applicant to leave the house by transporting her home appliances to its office and by sealing the house so that no one could enter. As such, the respondent violated the CCI's order.[61] The officials who were involved in the act were summoned by the CCI and asked to explain why they had not respected the injunction order. They claimed that they already had a prior court decision that affirmed the applicant had no right to stay in the house. The CCI, then, continued to look into the substance of the case and concluded that the courts' decisions were in line with the pertinent Directive and hence no right of the applicant was violated.

The action of the state bodies, evicting a woman with four kids from a government owned house without providing her a temporary accommodation, is an apparent violation of the right to housing and of other interrelated human rights of the woman and her children (at least, considering the growing global jurisprudence and the relevant General Comments discussed above). As we have witnessed in the *Oliva Road* and *Blue Moonlight Cases* in South Africa, a state's eviction order leading to homelessness, let alone from a government owned house but also from a privately owned property, is unjustified. However, in the present case, the claims and arguments raised by the applicant and lower courts were focused only on the Directive and barely raised a constitutional right to housing.

61 The head of the Kolfe Sub-City Government House Administration Office was summoned by the CCI to respond to the violation of the temporary injunction and replied that the legal service of the Kolfe Sub-City advised him the CCI had no such mandate under the Constitution and hence there was no obligation to abide by the order. The CCI warned the head and excused him without any repercussion. Interview with Mr. Tekleweld Tilahun, Former Constitutional researcher in the Council of Constitutional Inquiry.

Neither did the CCI/HoF attempt to frame the case from the perspective of the right to housing. Even if the petitioner did not invoke a constitutional right to housing, it could have been possible for the CCI/HoF to broadly frame the case to include the right to housing as one issue. As constitutional adjudicators, the CCI and HoF are generally expected to adjudicate cases from the perspective of preserving the supremacy of the Constitution and hence, must not be bound by what is and what is not asked by petitioners. It should be possible for them to adopt broader views and analysis for the reason that their decisions set precedents. Besides, there is no specific provision in the relevant laws that require these bodies to limit themselves to what has been asked by the petitioners in the course of adjudicating a constitutional dispute. In fact, there were times when the CCI/HoF adjudicated a case framing the issue differently from what had initially been asked by the petitioner. For instance, in the case of *Hasay Doyo v. Ato Tensae Kutale and Others*[62], the CCI in its recommendation to the HoF considered the decision of the lower courts, which gave effect to a contract of sale of rural land, unconstitutional. The CCI issued this recommendation even though the issue of constitutionality of a sale of rural land was not previously raised in the arguments of the courts and the petitioner, who rather claimed the right not to be evicted from her rural land. The CCI, however, on its own motion, framed the case as a matter of a sale of rural land and therefore considered the decisions of the lower courts unconstitutional. In fact, many of the petitioners who file a complaint with the CCI fail to indicate the specific constitutional right which they claim is violated by the decision of a court or another state body.[63] Oftentimes they come with a general claim that their constitutional right has been violated. As a result, it is the CCI that usually frames the issue as it deems appropriate.[64]

The case of Fatuma Hussein is presented here to demonstrate that litigation involving eviction from government houses is devoid of arguments related

62 See *Hasay Doyo* v. *Ato Tensae Kutale and Others,* CCI File No. 805/2005 (E.C.), CCI Journal of Constitutional Interpretation, 2018. This recommendation of the CCI was accepted by the HoF in the 5th Parliamentary Term 1st Year 2nd Ordinary Session held on 12 March 2016.

63 One of the authors' own observations while working as a constitutional researcher in the Council of Constitutional Inquiry.

64 *Ibid.*

to the right to housing. We also assessed the rest of the cases from this perspective.

4.2. Referral by the Federal Supreme Court Cassation Bench (C/File No. 150818)

In the case between *Mr. Alemayehu Tesema and Addis Ababa City Housing Development and Administration Agency*, the Federal Supreme Court Cassation Bench (hereinafter the "Cassation Bench") made a rare (probably the first) referral to the CCI inquiring the constitutionality of Article 44 of the Addis Ababa City Government Directive No. 01/2008 (E.C.), "A Directive to Transfer and Administer Condominium Houses to Beneficiaries", which prohibits heirs who have attained the age of majority from inheriting a condominium house. The applicant's mother had subscribed to the 20/80 housing scheme and had deposited savings up until her death. Later, in a draw that took place after her death, her name was in the list of those who got a condominium house located in the Bole Arabsa site. The applicant appeared before the City Administration's Condominium House Development and Management Agency (hereinafter "the Agency") with a certificate of inheritance so that the house could be transferred to him. The Agency, however, rejected the request explaining that the Directive governing the transfer and administration of condominium houses does not permit to do so. Article 44 of this Directive denies heirs, who have attained majority age, a right to inherit the condominium house in case the beneficiary dies.

The applicant sued the Agency arguing that it denied his right by applying the specified provision of the Directive. The Agency responded that the Directive prohibits the applicant from inheriting the house as he has attained majority age. The Federal First Instance Court rejected the petitioner's claim arguing that the Directive is clear in prohibiting the applicant from inheriting the house. The case reached the Cassation Bench, which then referred it to the CCI\HoF for a constitutional interpretation of the concerned Directive.

The Cassation Bench emphasized, in its referral, the constitutional right to property, particularly Articles 40(1) and (2), vis-à-vis the Directive that vividly prohibits persons who attained the age of majority from inheriting

houses drawn for deceased persons. Hence, the referral did not mention issues related to the right to housing.

The CCI investigated the case by questioning the detailed content of the provision in question, the government's aim in building and transferring condominium houses apart from the ordinary right to property, the compatibility of such public purposes with individual rights, and finally the constitutionality of the Directive.[65] The CCI argued, in its decision, that citizens save their money in one of the schemes with the intention to own a house in accordance with the rules. To this end, it needs to be considered as another form of acquiring property, which deserves protection in accordance with Article 40(1) of the Constitution.

The decision restates, inter alia, the constitutional duty of the government to guarantee citizens equal opportunity to improve their economic condition and to promote equitable distribution of resources as recognized under Article 89 of the Constitution. Most importantly, it cites Article 90 of the Constitution which stipulates government's obligation to provide, to the extent its resources permit, social services including housing. The CCI concluded that these basic principles should guide the process of acquiring property through such government schemes. It emphasized that, provided that the transfer of the house achieves the purposes under Articles 89 and 90, the heir of the deceased should also benefit from such scheme.[66] Hence, the CCI decided that the Directive in question violated the right to property of a person and the heirs. This recommendation of the CCI was later adopted by the HoF.

The order requiring the government to take into account – in its legislative and policy measures – its obligation to try to create access to housing under Article 90(1) is particularly significant. For instance, the Addis Ababa condominium project was initially not designed by taking into account the obligation of the government under Article 90(1). In other words, it was not

65 CCI File No. 3383/10, Recommendation of the Council of Constitutional Inquiry, unpublished.

66 *Id*, p. 5. The opinion reads as follows: "As long as the deceased has fulfilled what is expected from her, the property created for her (the deceased) in accordance with Art 89(1)(2), and 90(1) of the Constitution as discussed above should be transferred to heirs, just like any Ethiopian with full-fledged right to property provided it [the transfer] fulfils the objectives of the provisions." (Translation by the authors).

framed from the purpose of realising access to housing of the residents.[67] As one can read from the preamble of the Condominium Proclamation No. 370/2003, the project wants to balance demand and supply of housing, it aims at city beautification and effective use of urban land, and it wants to create favourable conditions for private developers and cooperatives. Fulfilling the State's duty under Article 90(1) is, therefore, not among the objectives of the Condominium Project. The remark by the HoF requiring the government to take in to account its obligation included in this particular provision of the Constitution is therefore important in projects such as this one.

Nonetheless, the decision does not attempt to articulate the right to housing apart from mentioning that the rules and regulations enacted in relation to condominium houses should bear in mind the broad objectives of Chapter Ten of the Constitution. The referral by the Cassation Bench did not frame the case as a matter involving the right to housing either. It rather fully focused on the right to property. However, the CCI/HoF could have gone further to challenge the status quo regarding the right to housing in Ethiopia.

4.3. The Right to Housing in the Context of Forced Eviction

The *Legetafo-Legedadi* Case

This case[68] involves eviction of more than 800 families from their houses in the Oromia Regional State, Legetafo-Legedadi town in February 2019. The case captured the attention of media as the demolition occurred by giving settlers only a seven days' notice and was accompanied by bulldozers and special police force of the Region.

The constitutional complaint was submitted by 240 victims and challenged, among others, the constitutionality of specified provisions of the Proclamation to regulate Urban Land Lease No. 721/2011, and the Oromia Regional laws enacted following this Proclamation, which authorize administrative organs to take such measures. For instance, the petitioners

67 Dejene, cited above at note 5, p 33.

68 CCI File No. 4365/11. This case is still pending before the CCI. Even if this case is still pending, the authors decided to discuss it in this research because it is directly relevant.

challenged Article 26(4) of the Urban Land Lease Proclamation No. 721/2011, which reads as follows:

> "The appropriate body shall have the power, without the need to issue a clearance order pursuant to article 27 of the Proclamation and payment of compensation, **to clear an illegally occupied urban land by merely serving a written notice of seven working days** to the occupant in person or by affixing it to the property situated on the land."[69](emphasis added)

The petitioners claimed that the law authorizes the appropriate body, which in this case may include a local administrative entity, to make the eviction decision against occupants who are considered illegal as per the same law. What is more, Article 30 of the same law allows appeal against the decision of eviction by administrative bodies only to the appeal tribunal (established within the administrative structure). As such, judicial review of the decision of the tribunal or, indirectly, the decision of the administrative body, is not possible. A parallel provision under the Oromia Regional State Regulation No. 182/2008 and the Urban Land Management Agency Directive No. 05/2008 empowers local cabinets to forcefully evict informal settlers.

In their application to the CCI, the complainants claimed that these laws violated the right to housing by utterly disrespecting the fate of citizens dwelling in informal houses and shacks. The laws should have struck a balance between the government's power to control land squatting and the rights of citizens. For instance, the process should have been "humanized" by allowing courts to oversee the process of eviction by requiring prior approval from them or by imposing a duty on the government to prepare alternative shelters. The complaint also invoked a violation of the dignity of the victims in demolishing the houses while they are still living inside them.

Even if it is clear that the government has a constitutional obligation to fulfil socio-economic rights by allocating an ever-increasing resource to the extent its capacity allows, it fails to take in to account victims' rights by empowering itself with unchecked powers to demolish houses. The Urban Land Lease Proclamation completely ignores such constitutional obligation of the government by allowing it to evict settlers forcefully with only seven days' notice and without preparing alternative shelters. Instead of allocating resources to fulfil the right to housing of its citizens, the government even

69 Urban Lands Lease Holding Proclamation No. 721/2011, Art. 26(4).

takes away what citizens acquired through their capital. Of course, the houses were built without appropriate permission from the government. However, many of the residents had lived there for more than ten years and had subscribed to utilities like electricity and water. This should make neither the law nor the measures right as the housing rights are totally ignored. Decided either way, this case, which is still pending, will set precedents in many ways.

Conclusion

The right to housing, as an element of an adequate standard of living, is recognized under the ICESCR and in several other instruments to which Ethiopia is a party. The right to housing is considered to have a central role in fulfilling other basic human rights such as the right to life, the right to dignity, the right to family, the right to privacy, the right to freedom of movement, the right to assembly and association, the right to vote, the right to education, the right to work, the right to health, and the right to development.

In Ethiopia, problems related to access, affordability, habitability, security of tenure and equal provision of publicly funded low cost housing are enormous. On the other hand, while some socio-economic rights are addressed as justiciable rights under the FDRE Constitution, several others including the right to housing are stated as national policy objectives and principles. Accordingly, the meaning, content, scope, and justiciability of the right to housing are not clear in Ethiopia. The ordinary courts hold the view that the right to housing is a right without a claim and hence are not willing to engage in adjudicating cases involving the right to housing. As a result, the right to housing has hardly been adjudicated in Ethiopia. Human rights are, however, understood as interrelated and inseparable. The growing jurisprudence in several countries and the series of General Comments of the Committee on ESCR also dictate that the right to housing is implied in other human rights including the right to life, dignity, and several other civil and political rights. The African Commission on Human and Peoples' Rights also inferred the right to housing from the right to property and from the protection accorded to family.

The CCI/HoF (as constitutional interpreters), even if they could play a significant role in transforming the right to housing into a justiciable right,

they have, so far, shown self-restraint. Until now, three cases, which, we think, pertain to the right to housing have been filed to the CCI/HoF. However, except one of these (which is still pending), the other two cases were not initially framed as the right to housing cases. Neither did the CCI/HoF expand the cases beyond what was initially framed in order to elaborate the meaning, content, scope and nature of state obligations pertaining to the right to housing. The CCI/HoF, beyond resolving the cases at hand, could have taken these cases as an opportunity to address the immense housing problem in the country and review the appropriateness and adequacy of measures being taken by the government.

It seems that the CCI/HoF are not ready and conscious to see cases from the perspective of the right to housing. However, sooner or later, these bodies need to start to deliberately engage in adjudicating cases related to the human right of housing. Even if the Constitution lacks a clear provision establishing the right to housing, they need to understand the evolving understanding and jurisprudence on the right to housing at the global level. The CCI/HoF can, on the basis of Article13(2) of the Constitution, interpret the Constitution to infer the right to housing from other human rights protected in the Constitution, such as the right to life and the right to dignity.

In the meantime, the CCI/HoF, on the basis of Articles 41(3) and 25 of the Constitution, can, at least, enforce the right to equality of citizens in the provision of government funded housing services. It can also oversee the implementation of its decision requiring the government to take into account the policy principles under Article 90 of the Constitution in its housing development program. Yet, sooner or later, the CCI/HoF need to embark on the specific issue and resolve the debates on the status and justiciability of the right to housing in Ethiopia. We hope that the decision of the CCI/HoF in the *Legetafo-Legedadi case*, whether it is in favour of the state or of the petitioners, will set a precedent on the right to housing in Ethiopia. As the claim of the right to housing is explicitly stated in the petition, the CCI/HoF will not be able to refrain from addressing the issue in detail.

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CONSTITUTIONALISM, CONSTITUTIONAL ADJUDICATION AND HUMAN RIGHTS IN ETHIOPIA

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