



ETHIOPIAN HUMAN RIGHTS LAW SERIES

(VOLUME-XII)

Addis Ababa University - School of Law

Righting Human Rights through Legal Reform

Ethiopia's Contemporary Experience

EDITORS

Sisay A. Yeshanew

Abadir M. Ibrahim



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2020

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Ethiopian Human Rights Law Series is an annual thematic publication of the School of Law of Addis Ababa University in the field of human rights laws. It was established by the Academic Committee of the School of Law on December 2, 2016 to publish cross-cutting thematic researches on human rights law issues with a focus on Ethiopia and to support the graduate programs of the School thereby encouraging staff and student participation in research activities.

Each volume of *Ethiopian Human Rights Law Series* covers different themes in priority areas identified by committee of conveners and approved by the Academic Committee of the Law School. Submissions to this volume have been presented in a national conference organized by the School on December 5, 2020, attended by invited faculty members from law schools in Ethiopia and experts from different walks of life. Moreover, each submission has been blind peer-reviewed by experts in the field for substantive merit as per the Addis Ababa University School of Law Thematic Research Conference and Proceedings Rules of 2016.

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PREFACE

Since its launch in 2016 by the School of Law of Addis Ababa University, the Ethiopian Human Rights Law Series has been published in a number of volumes covering various human rights issues in the country and beyond. It has contributed to knowledge generation in the area and supported the graduate programs of the School by providing critical literature. Each volume of the Series covers a different theme identified by a Committee of Conveners and approved by the Academic Committee of the School of Law. The present volume takes the theme: “Righting Human Rights through Legal Reform: Ethiopia’s Contemporary Experience”.

Since the first initiative of “modernization” of its legal system in the 1950s, Ethiopia has adopted and revised several of its laws. The five most notable codes, namely, the 1957 Penal Code, the Civil Code, Commercial Code and Maritime Code of 1960, the 1961 Criminal Procedure Code and the Civil Procedure Code of 1965, remained unchanged for the most part. However, three constitutions and numerous other laws have been adopted over the years to cover additional areas or to amend or replace existing ones.

The 1990s and the first decade of the current century witnessed a seemingly paradoxical historical epoch in terms of legislative developments in the Ethiopian legal landscape. On the one hand, we have the human rights provisions of the FDRE Constitution that are highly praised for adopting international norms, and the Country’s ratification of fundamental international and regional human rights treaties. Commendable domestic pieces of legislation were also introduced on the various facets of human rights. On the other hand we have a good number of provisions in the Constitution itself with which a substantial part of the Country’s population is at variance. We have also witnessed restrictive and repressive laws, especially after the turn of the millennium, such as the now-repealed Charities and Society’s Proclamation, the previous Anti-Terrorism Law, Press Laws and the Special Criminal Procedure Law.

Needless to say, these pieces of legislation were utilized as instruments of repression and stifling descent, of violating human rights and hampering the path to democracy and good governance. These and several other attendant issues, among many others, turned out to kindle the spark that ignited the nation-wide call for socio-political reform in the last few years. Following the political transition in mid-2018, The Legal and Justice Affairs Advisory Council was established and tasked with working on law reform by prioritizing those pieces of legislation that constricted the political space. The Advisory Council and its

Secretariat mobilized an army of volunteer legal experts into Working Groups that were then entrusted with studying and proposing changes to several legislation, starting with those governing CSOs, Counter-terrorism, Media and Elections, but then expanding into such legislative areas as freedom of information, freedom of assembly and demonstration, national human rights institutions, prison administration, administrative procedure, criminal procedure and evidence.

The articles incorporated in this volume cover most of the above areas of legislative reform. The editors and authors, who are mainly drawn from experts that were involved in the legal reform work, engage in a stocktaking exercise to highlight the main issues for reform, options considered and choices made in the process and lessons learned from the perspectives of legislative development. The articles were peer reviewed by experts in the specific areas and the editors with a view to ensuring quality and consistency. The volume presents a dozen articles of varying coverage and rigor that carry and meet the humble objectives of recounting what was done in the legislative process and highlighting the extent to which the reforms promote human rights. Such studies and publications should be encouraged not only for the institutional memory they leave behind but also for their contribution to the overall development of the legal system. The community of academics and practitioners in the various areas covered will benefit a lot from reading this volume.

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Righting Human Rights through Legal Reform – the Ethiopian Experience from Past to Present

Sisay A. Yeshanew & Abadir M. Ibrahim***

Introduction

In mid-2018, the government of Ethiopia announced its decision to initiate a legal and justice sector reform process as part of the broader initiative to open up the political space. It established the Legal and Justice Affairs Advisory Council (LJAAC or Council) under the Federal Attorney General's Office (AGO). The members of the Council were drawn from the academia, legal practice, and civil society organizations. LJAAC then established Working Groups on various issues composed of volunteer legal scholars and practitioners. What started with thirteen initial members of the Council, who were appointed by the Attorney General, quickly grew into an institution that boasted two hundred and ten highly qualified (mostly legal) volunteers and fourteen thematic Working Groups supported by a small Secretariat.

In the initial phase of its establishment, the LJAAC set up its organizational structure and standardized working methods and procedures. The LJAAC's work on a legal subject typically starts with the staffing of Working Groups with subject area experts who conduct a set of 'diagnostic studies' to identify reform needs and, where necessary, proceed to drafting legislation that would meet that need. The work was initiated by prioritizing the reform of particularly notorious legislation such as those governing civil society organizations, counterterrorism, media and elections. The Council then expanded the substantive coverage of the reforms to include a number of other normative areas, including freedom of information, freedom of assembly and demonstration, national human rights institutions, prison administration, administrative procedure, criminal procedure and evidence.

At the time of writing, the LJAAC had completed quite a few diagnostic studies identifying legislative and non-legislative reform needs and had completed work on fifteen major pieces of legislation. Out of these, seven had been passed into law,¹ and eight are at different stages of the

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¹ These laws include – Organizations of Civil Societies Proclamation (No.1113/2019); Prevention and Suppression of Terrorism Crimes Proclamation (No.1176/2020); The Ethiopian Electoral, Political Parties Registration and Election's

law-making process.² While almost all legislative reform processes were initiated under LJAAC, institutions that directly report to Parliament later either took charge of the processes or took over the working groups.³ Draft laws have been subjected to substantive changes by Parliament, the Cabinet, or the executive or other government bodies to which they were submitted, and only one draft law was completely rejected by the government.⁴ Ongoing diagnostic studies have identified a number of additional areas that require legislative change.⁵ However, the LJAAC is likely to defer detailed work on these by permanent law reform bodies as it prioritizes legal advances that need to and can be achieved within the transitional context that led to its establishment.

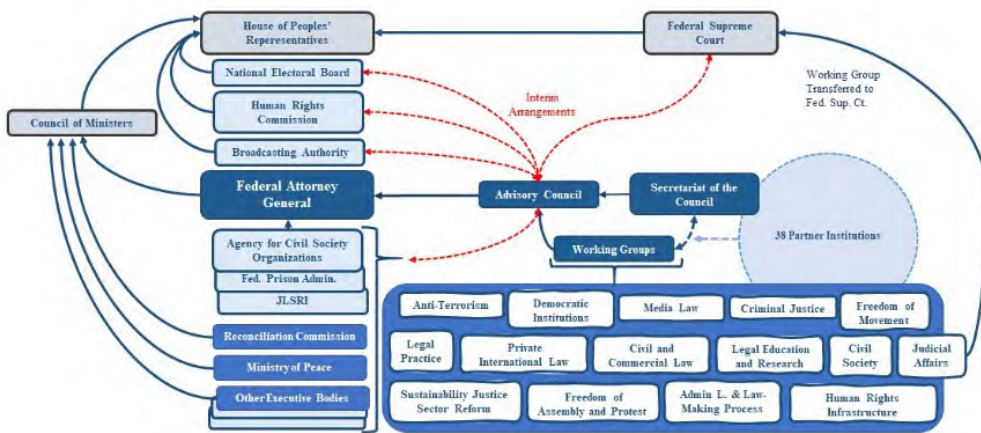


Figure 1 Institutional Structure of the LJAAC

Whereas the LJAAC borrows a great deal from previous law reform experiences, both within and outside Ethiopia, it has a number of features that made it quite unique. To begin with, the LJAAC was established as a transitional institution that was expected to last for only three years.

Code of Conduct Proclamation (No. 1162/2019); National Electoral Board of Ethiopia Establishment Proclamation (No. 1133/2019); Federal Prison Proclamation (No.1174/2019); Federal Administrative Procedure Proclamation (No.1183/2020); and Ethiopian Human Rights Commission Establishment Amendment Proclamation (No. 1224/2020).

² These include a Criminal Procedure and Evidence Code, a Commercial Code, and laws relating to the Reconciliation Commission, mass media, access to information, computer crimes, legal practice, and the freedom of assembly, demonstration and petition.

³ These include the Federal Supreme Court, the National Electoral Board, and the Ethiopian Human Rights Commission.

⁴ See Cord Brügmann's article in this volume for more on this draft law.

⁵ The areas include women's rights, children's rights, separation of the prosecutorial and other functions of the AGO, compensation of victims of human rights violations, the Institution of the Ombudsman, the freedom of movement, police reform, criminal law reform, private international law, banking, and insurance.

At the time of its establishment there had already been two permanent institutions specializing in law reform.⁶ However, these institutions lacked legitimacy within civil and political society, especially within the legal community, as they were seen as both ineffective and too closely associated with power brokers that had just lost control over the government. The LJAAC was established with a view to putting in place a more neutral and competent professional institutional arrangement to facilitate the envisaged legal and democratic reforms.⁷

And finally, the fact that the LJAAC was both established as an independent institution and that it was allowed to exercise this independence also constitutes one of the things that set it apart at least from an Ethiopian law reform context. With its legal and functional independence that the LJAAC had human rights, democracy, and the rule of law at the forefront of its mandate had a new significance. Although every institution, law reform related or otherwise, established under the 1995 FDRE Constitution had a comparatively progressive mandate, the LJAAC represents arguably the first time such independence has been exercised. Whereas Ethiopia's political system remains in transition, this volume investigates some of the many work products that may very well turn out to be Ethiopia's experiment with the rule of law.

1. Concept, Theory and Practice of Law Reform

The meaning of law reform, including in the context of the LJAAC, is one of those things that everyone knows what they are until a serious attempt is made at defining them or their different iterations or variants. In the case of law reform – or justice sector reform, rule of law reform, judicial reform etc. – the lack of understanding may not just be situational, but one caused by the nature of the thing in itself. The lack of clarity is such a major issue that many serious commentators on the subject have raised doubts whether legal reform has grown as an independent field of study.⁸ Whereas many academic sub-fields connected with law reform such as comparative legal studies and legal diffusion or transplantation have come to age, law reform seems to be subsisting in borrowed spaces within other fields despite its prominence in practical fields related to governance reform.

It is then not surprising that, although law reform may be as old as law itself, a systematic approach to law reform which sees law reform as an end in itself is not that old. One finds early

⁶ These include the Justice and Legal System Research Institute and the AGO's Legal Research, Drafting and Dissemination Directorate of the AGO.

⁷ See Abadir M. Ibrahim, 'Critical Analysis of "Revolutionary Democracy" Discourse and its Role in Ethiopia's Experiment in (non)Democracy' (2018) 21(1) International Journal of Ethiopian Studies.

⁸ Julio Faundez, *The Rule of Law Enterprise: Promoting a Dialogue between Practitioners and Academics*, (2005) 12:4 Democratization 567, 569-72; Linn Hammergren, *Envisioning Reform: Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America* (Penn. State Univ. Press 2007) 2-22; Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Working Papers No. 34 (Carnegie Endowment for International Peace 2003).

attempts at systematization in the early 20th century when legal innovation, experimentation and inter-borrowing was on the rise.⁹ At the time, the simultaneous rise of globalization and the Keynesian administrative state was accompanied by the rise of specialization and institutionalization of law reform bodies including ministries of justice, law commissions, agencies, and institutes.¹⁰ Comparative law and sociological jurisprudence, which came to maturity around the same time, provide an interesting insight into early attempts at systematization of the knowledge about legal reform that followed the rise of law reform itself.¹¹

Legal reform, and the study of law reform, get another boost with the law and development movement of the 1960s which correlated with the end of colonialism and the ramping up of the cold war. Although this second wave finds its conceptual roots in the first wave, it was unique enough that the epistemic continuity between the two is questionable. Although it overlapped in that it dealt with reforming laws, this wave was defined more by its attempt to radically transform not just the laws but entire societies of the Global South and incorporate them into the global economic order in a way that both assumes and reinforces the ascendancy of the West.¹² However, this movement together with its broader philosophical underpinning of modernization theory, lost its prominence immediately afterwards.¹³ In addition to failing to bring about effective legal and justice system transformation, let alone the economic growth that was supposed to be its ultimate outcome, its determinist assumptions that hold Western

⁹ Norman S. Marsh, 'Law Reform Commissions Compared: A Review Article' (198) 38(1) ICLQ 185, 187.

¹⁰ Generally, Darius Whelan, 'The Comparative Method and Law Reform' (LL.M. Dissertation, National University of Ireland Faculty of Law 1988).

¹¹ For ex. see Hessel E. Yntema, 'Legal Science and Reform' (1934) 34(2) Columbia Law Review 207 (containing an attempt at systematization of experiences in law reform. For a brief discussion of Roscoe Pound's contributions on the topic see E. V. Walter, 'Legal Ecology of Roscoe Pound' (1950) 4(2) U. Miami L. Rev. 178 ; For further examples of the use of comparative law in legal reform see Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 (1) Oxford Journal of Legal Studies 101.

¹² For a broader discussion of how global power relationships have affected these legal diffusion processes particularly from the point of view of Edward Seid's theoretical perspective (i.e. Orientalism) see Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Harv. Univ. Press 2013). For a discussion of the role of international law within the same topic see Jean Allain, 'Orientalism and International Law: The Middle East as the Underclass of the International Legal Order' (2004) 17(2) Leiden J. Int'l L. 391.

¹³ Generally, David Trubek & Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 4 Wis. L. Rev. 1062; John Henry Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement' (1977) 25(3) Am. J. Comp. L. 457; Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken & Johannes Feest (eds.), *Adapting Legal Cultures* (Hart Pub. 2001); Livingston Armytage, *Reforming Justice : A Journey to Fairness in Asia* (Cambridge Univ. Press 2012); Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J. Eur. & Comp. L. 111, 115; Hammergren, *Envisioning Reform : conceptual and practical Obstacles to Improving Judicial Performance in Latin America* (n 8); Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and The Contest to Transform Latin American States* (Univ. of Chicago Press 2002); Thomas Carothers, 'The Rule of Law Revival' (1988) 77 Foreign Aff. 95, 95-96; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 Mod. L. Rev. 11, 12.

civilization, and hence Western law, at the pinnacle of an evolutionary process of the human condition are universally disdained as an ethnocentric expression of imperialism.¹⁴

Although the law and development movement is now seen to be thoroughly repudiated,¹⁵ the type of legal reform it espoused did not cease.¹⁶ In fact, a new wave of interest in the practice and study of the second type law reform came in the 1980s and 1990s following the “third wave” of democratization in South America, Eastern Europe, Africa and Asia¹⁷ and continues in what has been described as legal globalization.¹⁸ Despite the continuity, however, the new law reform initiatives not only dissociate from the law and economics movement but they also come at a different time and with different actors in a new context of interaction and power relations. Therefore, it is not easy to associate this wave with the justifications or the critiques of the law and economics movement. The nexus, however, requires critical examination both globally and in the Ethiopian context.

The literature on the latest wave, which is also what the current work of the LJAAC mostly relies on, is quite voluminous. However, it is also quite problematic. On the one hand, the “waves” of legal reform initiatives happened with what turned out to be developmental philosophies that have been characterized by temporal and geographical factors. The post-colonial legal diffusion projects and the neoliberal law reform initiatives of the 1980s gave way to more recent networks that aim at enhancing knowledge and understanding about the role of law in socio-economic development and governance.¹⁹ On the other hand, as pointed out earlier, the literature on law reform has barely grown into an independent academic field and is consequently rather impressionistic and at best praxical. As a result, it may be prone to the risks of confirmation bias and does not have sufficient methodological and empirical support to allow theoretical abstraction.²⁰ This situation is not helped by the fact that legal reform literature on Western

¹⁴ Ibid; Mauro Bussani, ‘Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric through Comparative Law’ (2019) 67 (4) Am. J. Comp. L. 701.

¹⁵ Yntema (n 11), Walter (n 11), Hill (n 11), Trubek and Galanter (n 13) and Merryman (n 13).

¹⁶ Neither did more organic reforms initiated within the West that came with the first wave of reforms and scholarship within the West.

¹⁷ Carothers, ‘The Rule of Law Revival’ (n 13) 95, 100-101.

¹⁸ Michael J. Shapiro, ‘The Globalization of Law’ (1993) 1(1) Ind. J. Global Legal Stud. 37 (describing the globalization of private commercial law through contracts, the globalization of the bureaucratic state and the concentration of public/private power, and how it can lead to the globalization of public “protective law” countering the abuses of power).

¹⁹ See, for example, the Law and Development Institute that was established in 2009 (<https://www.lawanddevelopment.net/>) and the Law and Development Research Network that was launched in 2017 (<https://lawdev.org/>).

²⁰ Generally, see the work referenced in (n 8) and (n 13). Also see, Linn Hammergren, *Political Will, Constituency Building, and Public Support in Rule of Law Programs* (USAID PN-ACD-023, 1998); Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (1999) 176; Bryant G. Garth, ‘Building Strong and Independent Judiciaries through the New Law and Development: Behind The Paradox of Consensus Programs and Perpetually Disappointing Results’ (2002) 52(2) DePaul L. Rev. 383; Jedidiah Kroncke, ‘Law and Development as Anti-comparative Law’ (2012)

efforts to reform Western law is not that developed either and is concentrated on informed reflections of subject area specialists or summaries and digests of law reform bodies.²¹

2. Law Reform in Ethiopia

If the development of the field of law reform is unimpressive, its Ethiopian counterpart does not fare any better. The literature, and especially the earlier material,²² that focuses on the initiative to “modernize” its legal system in the 1950s and 1960s through the law and development movement is mostly descriptive²³ or only incidentally contributes to the topic while dealing with specific normative topics.²⁴ Attempts at higher levels of abstraction, while available, are mostly a collection of preliminary reflections and are at any rate extremely sparse. Sedler, for example, in his 1967 publication writes in support of the application of modernization theory in Ethiopia as an effort of an undeveloped or underdeveloped (to which he also indirectly signifies as “primitive law”) legal system to emulate developed ones.²⁵ Although transplantation would eventually hold sway, an earlier attempt to advocate for the codification and use local legal systems was made by Schiller.²⁶

While the earlier contributions were rather descriptive, Beckstrom²⁷ and Singer²⁸ initiated theoretically and empirically informed analysis a little over a decade after the major codes were passed. These authors reviewed the transplantation process and concluded, for the most part,

45 Vand. J. Transnat'l L. 477; Stephen Holmes, 'Can Foreign Aid Promote the Rule of Law?' (1999) 8 E. Eur. Const. Rev., 68 and Armytage, (n 13).

²¹ For ex. see Whelan (n 10), p. 67-70 (containing a review of the literature). Although this study is dated a preliminary review of the literature on the subject does not suggest a significant change in the type of literature on the subject.

²² Note that we are mostly focusing on the English material and have not reviewed the non-English literature.

²³ For ex. see J. Vanderlinden, 'Civil Law and Common Law Influences on the Developing Law of Ethiopia' (1966) 16 Buff. L. Rev. 250; Jayanth K. Krishnan, 'Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957-1977' (2012) Ame. J. of Leg. Hist. 261.

²⁴ A good example of this is G. Krzeczunowicz, 'A New Legislative Approach to Customary Law: The 'Repeals' Provision of the Ethiopian Civil Code of 1960' (1963) 1 Journal of Ethiopian Studies 57, which has interesting discussions and the author's insights on reform-specific issues but the mainstay of the piece is about how the Civil Code repealed customary law avoided a “*tabula rasa* repeal of the legal past.”. We will not attempt to catalogue the studies that fall in this category but invite future researchers to review the literature.

²⁵ Robert Allen Sedler, 'The Development of Legal Systems: The Ethiopian Experience' (1967) 53 Iowa L. Rev. 562. Similar positions are also taken by Vanderlinden (n 23); and René David, 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' (1963) 37 Tulane Law Review 187.

²⁶ Kaius Tuori, 'Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law' (2010) 62 Journal of Legal Pluralism and Unofficial Law 43.

²⁷ John H. Beckstrom, 'Handicaps of Legal-Social Engineering in a Developing Nation' (1974) 22 Ame. J. of Comparative L. 697. This publication is based on a set of empirical studies conducted by Beckstrom and other researchers which are described in John H. Beckstrom, Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia' (1973) 21(3) Ame. J. of Comp. L.

²⁸ Norman J Singer, 'Modernization of Law in Ethiopia: A Study in Process and Personal Values' (1970) 11 Harvard International Law Journal 73. Note that Singer's work is informed by a different set of studies conducted in the rural parts of Southern Ethiopia.

that the imported laws have not taken root. However, remaining firmly within the law and economics paradigm, saw the failure only as a bump in the road and recommend how to ensure the success of the codification project. Juxtaposed to Beckstrom and Singer stands Brietzke who, not only disputes efficacy of the transplantation project but, provides an in-depth evaluation along the lines of critiques of modernization theory.²⁹

The decades that followed the events these publications cover saw what, to carry over the “wave” metaphor, was nothing short of tsunamis of social engineering including through law reform and transplantation. The socialist revolution and subsequent national campaigns saw one of the most significant historical events in Ethiopia to which one can attribute the end of monarchical rule, the inauguration of a republican experiment, the dismantling the feudal system, and the disestablishment of religion. The Derg is often remembered for the violence that animated its tenure, but it has also championed structural changes in areas such as the nationalization of industry, urban housing and most importantly rural farmlands, which were accompanied by law reforms.

If the “modernization” of the legal system in 1950s and 1960s and the “socialist legal reforms” of the 1970s qualify as two major stages of legislative development in Ethiopia, the third phase comes in the 1990s with the introduction of a number of legal shifts, including in human rights, federalism and identity-based state structure, multi-party system and economic liberalization. From a country that was ruled without a constitution for much of the 17 years tenure of the Derg, Ethiopia became a country of constitutions at the federal as well as regional levels. In addition to the plethora of laws that had to be promulgated to implement the precepts of the new constitutional dispensation, the 1990s saw a new flux of legal transplantation, especially in the economic field. This period was also significant for the constitutional recognition of customary and religious legal systems, including as part of the constitution’s system of Peoples’ rights. This is not to say that the trajectory of legislative development in this period was all positive, as it was also dotted with some notable politically motivated laws, such as the amendment to the law establishing the Federal Ethics and Corruption Commission that was then used to disallow bail to a member of a faction of the ruling party.³⁰

The relative political opening of the 1990s, partly supported by legislative frameworks, was put to a test by the general election that was held in 2005, by far the most competitive in the history of the country. A post-election political crisis led to rolling back on a number of constitutional promises and narrowing down of the political space, including through legal reforms. This phase of legislative developments saw the introduction of new laws, such as those governing elections,

²⁹ Paul Brietzke, ‘Law, Development and the Ethiopian Revolution’ (Ph.D. Dissertation, University of London 1979).

³⁰ See Awol Allo and Beza Tesfaye, “Spectacles of Illegality: Mapping Ethiopia’s Show Trials” (LSE Research Online, December 2015), pp 13-14.

civil society organizations, counter-terrorism and the media. These laws were widely criticized for their restrictive elements from the perspectives of human rights and democracy and for their usage to silence political dissent in practice. With the political transition that occurred in 2018, the new government made it one of its priority agenda to open up the political space, among others, by reforming restrictive laws. This led to the establishment of the LJAAC, which broadened the scope of the legislative reform mandate. The present volume mainly focusses on the legislative reforms or developments in the above-mentioned last two phases of legislative developments in Ethiopia. Taking a leaf from the concept of “righting wrongs”,³¹ the volume sets out to demonstrate attempts at correcting the anomalies in the human rights protection regimes in selected legislative areas through legislative reforms.

Despite the significance of the above changes to law reform, much of the scholarship on these events was normative or historical and only incidentally contributed to law reform scholarship. A review of the vast treasure-trove of information and comparative legal analysis contained in dissertations and published work is not attempted here. However, it is important to note that much of this literature merely incidentally contributes to the study of law reform as an end in itself.³² A noteworthy exception is Tsehai Wada's mercifully short and extremely insightful article on the current status of transplanted laws vis-à-vis customary legal systems.³³ While much of the work constituting the “law and practice” scholarship of Ethiopia can be seen as the chronological and conceptual extension of the Beckstrom³⁴ and Singer³⁵ studies, Tsehai Wada's article can be seen as a long overdue reassessment following the legal “modernization” era.³⁶

Tsehai Wada's contribution can be treated as a starting point for contemporary theoretical and practical discussions of law reform although it, unfortunately, neither drives at the law reform implications of the work nor enters into a conversation with the earlier works such as that of Beckstrom or Brietzke.³⁷ Tsehai Wada in effect strikes a balance between Beckstrom and Brietzke

³¹ Gayatri Chakravorty Spivak, “Righting Wrongs” (2004) 103 (2/3) *South Atlantic Quarterly*, pp. 523-581

³² While there are hundreds of published and unpublished studies that could be mentioned here, Muradu Abdo's work on reforms on Ethiopia's landholding system is one example that is worthy of note. In this body of work Muradu Abdo describes the processes through which land tenure laws diffuse from North Ethiopia to the South and East and then from Western countries to Ethiopia following local and global power relations. See Muradu Srur, ‘Rural Commons and the Ethiopian State’ (2013) *Law, Social Justice and Global Development* 1; Muradu Abdo Srur, ‘*State Policy and Law in Relation to Land Alienation in Ethiopia*’ (PhD Dissertation, University of Warwick 2014).

³³ Tsehai Wada Wourji, ‘Coexistence between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects’ (2012) (5) *Afr. J. of Leg. Stud.* 269.

³⁴ Beckstrom, ‘Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia’ (1973) (n 27) esp. see n. 27-29 and accompanying text.

³⁵ Singer, (n 28).

³⁶ Ibid. Beckstrom (1974) (n 27).

³⁷ Note that most Ethiopian law students get a taste of these debates in law school. A good example or sample of what this discussion looks like is contained in Muradu Abdo, Gebreyesus Abegaz, *Customary Law, Teaching Material*. Addis Ababa: Justice and Legal System Research Institute (2009).

from a practical point of view. He paints a picture of contemporary Ethiopia in which customary, religious, and “modern” legal structures and norms co-exist though uneasily. In addition, these normative systems also do not survive in their earlier “pure” forms and are, to some extent, entangled both in practice and law. Tsehai Wada also situates the current Ethiopian agent of reform who, unlike those in the 1950s and 1960s, may find herself a third-generation urbanite who, much like the legal system, is a product of the social engineering efforts of the 1960’s – neither fully traditional nor fully Westernized, but fully Ethiopian and fully modern.³⁸

In what is by far the most comprehensive reexamination of the transplantation project, Hailegabriel G. Feyissa places the laws transplanted in the 1960s at the center of the ideological struggles over the past, present and future of the Ethiopian political project.³⁹ Hailegabriel takes the discussion farther left afield of the contemporary legal discourse while achieving levels of abstraction which sets his work far apart from the state of the art in the literature. While Hailegabriel’s rather disruptive contribution is a welcome addition to a field that seems to be oblivious to power dynamics behind transplantation efforts, his work is also wanting in that the practical implications of his contributions are not borne out. Two additional publications worth noting take the form of edited volumes which, although failing to establish intertextuality with either Tsehai Wada or the earlier literature, take up and expand upon some of the themes connected with transplantation-oriented law reform.⁴⁰

Besides these studies which were singled out for their contribution to the field in a more direct way, the Ethiopian literature provides much empirical and analytical basis for the study of law reform at present and in the future. This situation was captured four decades ago by Brietzke⁴¹ who observed that “Ethiopian[lawyer]s are necessarily comparativists, since much of the legal system is not theirs”. While it is questionable if the second prong of Brietzke’s statement still holds, at least in the context of the increasingly large urban population which knows nothing but the formal legal system, it is indeed true that much of Ethiopian legal literature is – as a result – permeated with the comparative legal method. This makes a large part of the Ethiopian legal literature a rich resource for the study of law reform making for an open field for law students –

³⁸ While there is much in the Ethiopian social science literature surrounding this subject-position we do not venture that literature. For an interesting discussion that brings together the debates within the social sciences and law reform see Hailegabriel G. Feyissa, ‘Non-European Imperialism and Europeanisation of Law: Complexities of Legal Codification in Imperial Ethiopia’ (2020) (1)Third World Approaches to Int’l L. Rev. Issue 152.

³⁹ Hailegabriel G. Feyissa, ‘The Ethiopian Civil Code Project: Reading a ‘Landmark’ Legal Transfer Case Differently’ (Ph.D. Dissertation, University of Melbourne Law School Nov. 2017)

⁴⁰ Susanne Epple & Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions* (Verlag, Bielefeld 2020); Elias N. Stebek & Muradu Abdo (eds.), *Law and Development, and Legal Pluralism in Ethiopia* (JLSRI 2013).

⁴¹ Brietzke (n 29) 100.

a rich pasture for researchers and academics. The present volume sets out to add to the relevant literature by taking stock of the legal reforms that happened in the post-2018 period.

3. The Volume

This volume hopes to add to the growing literature on law reform in Ethiopia by capturing a historic moment in the legal history of Ethiopia. With a focus on legislation relating to human rights and democracy, the current volume of the Ethiopian Human Rights Law Series aims to examine and take stock of the problems identified, the options considered, the changes introduced and the lessons learned in the most recent legal reform processes in Ethiopia. In particular, the volume focuses on the reform processes relating to, but not limited to, laws governing civil society organizations (CSOs), counterterrorism, media, freedom of information, elections, democratic institutions, criminal and administrative justice, and freedom of assembly and demonstration.

The areas of legal reform covered by this volume may be roughly categorized into three. In the first category are those relating to fundamental rights such as the right to freedom of expression and freedom of assembly and demonstration. Legislation on the regulation of the media and the suppression of hate speech fall under the same category. The second category includes laws governing the administration of justice in criminal matters, namely, those relating to counterterrorism and presumption of innocence, and access to justice in administrative procedures. An article on legal practice and the independence of the lawyer profession in Ethiopia will be presented under this cluster. In the third category are legislative reforms on democratic institutions, including the electoral management body, the national human rights commission and civil society organizations. Substantive issues in the application of electoral rights, freedom of association and other human rights will be discussed under the respective articles in this category.

In one of the first batch of articles, Mesenbet Assefa and Solomon Goshu delve into the topic of the freedom of expression and the media, which they maintain is vital for the attainment of a democratic society in transitional Ethiopia. The authors begin with an exposition of the reasons why legislative reform was needed in this field and how and why Ethiopia attained notoriety for violating the freedom of expression through the existing legal infrastructure. The authors then go into a detailed normative analysis of the changes that were written into the new draft media law which brings together different aspects of the existing Freedom of Expression and Access to Information Proclamation and the Broadcast Service Proclamation of Ethiopia.

Toby Mendel picks up from the same current legal infrastructure as Mesenbet Assefa and Solomon Goshu which has been reviled as repressive – i.e., the Freedom of Expression and

Access to Information Proclamation. Mendel's article, however, posits that the substantive aspects of this law were not all too bad as far as the right to access to information was concerned. Thus, pointing out that the major challenge with this law was the lack of proper implementation, the author then proceeds to point out the major flaws in the law and how these flaws were addressed in the new draft. After critically reviewing the current LJAAC draft Access to Information Proclamation, Mendel ends with a caution that it is once again whether the new law is going to be implemented that will determine if the reform effort has been successful or not.

In an article that examines a new legislative development, rather than a reform of an existing one, Yohannes Eneyew examines the Hate Speech and Disinformation Prevention and Suppression Proclamation of 2020 from doctrinal, comparative law and empirical perspectives. He argues that the vagueness in the definition of "hate speech" makes the law susceptible for abuse by officials at different levels and could be used to stifle the freedom of expression in the absence of mechanisms of judicial review. Yohannes further questions the compatibility of the proclamation with international human rights standards and with the criminal law requirement of legality that is sanctioned under Ethiopian law. At a more practical level, the author finds the law to be incompatible with the overall socio-political architecture and existing social fissures.

Abdi Jibril and Kalkidan Negash take on yet another fundamental right in an article that discusses reform initiatives on the freedom of assembly and petition. After setting out the conceptual and normative framework for the right, they examine the gaps and limitations of the Proclamation to Provide for Peaceful Demonstration and Public Political Meetings (No. 3/1991) as well as problems encountered in the implementation thereof. They then present solutions proposed in a new draft law with a view to remedying the issues. The proposals not only include changes in the provisions on scope of application of the law, notification procedures and institutional mandate, but also the expansion of the law to include provisions on the right to petition. The notification system adopted under the draft notably exempts indoor assemblies from notification. Other changes include the extension of the period of notice to 7 days, the designation of the police for directly receiving notice and facilitating the conduct of public assemblies and the requirement that courts resolve disputes relating to the exercise of the right within 72 hours.

In the second group of articles, Amerti Solomon takes on the difficult task of assessing the changes introduced in the antiterrorism Proclamation of Ethiopia. She begins with an introduction of the context within which the 2009 Anti-terrorism Proclamation was passed and implemented. She then walks the reader through the problems identified in the 2009 law, the options considered in addressing them and the ones adopted in the 2019 Prevention and Suppression of Terrorism Crimes Proclamation. Amerti Solomon highlights the normative changes made in relation to the definition of terrorist acts and encouragement to commit

terrorism, punishments for inchoate crimes, procedural issues in bail and remand and admissibility of evidence, and evaluates these changes from the point of view of international human rights standards. She shows how the new law sharpens the definition of acts of terrorism, differentiates punishments for different levels of involvement, leaves the issue of remand and bail to be handled under the ordinary Criminal Procedure Code, and removes legal grounds that render hearsay evidence admissible.

Abadir M. Ibrahim and Adi Dekebo Dale continue the discussion on the 2009 and 2019 counterterrorism legislation but this time focusing on certain aspects of the definition of terrorism. Although focusing on parts of a very specific provisions within these laws, this article dwells upon the broader topic of the lack of standardized of normative and analytical frameworks in Ethiopia, which the authors argue has led to the proliferation of what they describe as the “vague-and-overbroad formulation”. The authors argue that wide use of this formulation is evidence of the lack of a nuanced jurisprudence on the topic and propose an alternative formulation. In addition to suggesting that what their article captures is only the tip of the iceberg, they recommend that a concerted effort needs to be made to standardize analytical frameworks used in constitutional interpretation.

Focusing on an aspect of criminal justice, Simeneh Kiros Assefa takes on the protection of the principle of presumption of innocence in the Draft Criminal Procedure and Evidence Code. He underscores the objective of criminal justice administration to balance truth and justice and the need to treat a person suspected or accused of a crime with dignity and respect. The article then investigates how the presumption of innocence that is postulated in the Draft Code is encapsulated in the provisions relating to the right to liberty and the burden and standard of proof. It demonstrates how the Draft Code makes arrest a last resort judicially supervised state action based on the needs of investigation, puts investigation under the supervision of the public prosecutor, gives courts discretion to decide on bail rather than provide *a priori* denial by law, and requires the public prosecutor to prove all the elements constituting the alleged crime beyond reasonable doubt with evidence, including those admitted during police interrogation.

An article by Abduletif Kedir and Minilik Assefa take the discussion on administration of justice to the administrative law realm by dealing with the issue of access to justice in administrative action under the newly adopted Federal Administrative Procedure Proclamation (No. 1183/2020). Against the backdrop of what they find to be a confusion of the judiciary regarding the adjudication of constitutional rights, the authors demonstrate how the judicial review of certain administrative actions could provide protection against and remedies for violations of human rights by federal administrative agencies. By describing the scope, fundamental principles and implications of the system of judicial review under the new Proclamation, and the carefully crafted grounds of review and possible remedies, they argue that the law affords a

mechanism of redress for rights violations through individual complains and advocacy through strategic litigations.

Cord Brüggmann takes on a hereto little explored topic in Ethiopian legal literature by delving into the regulation of legal practice and the importance of the independence of the lawyer profession to ensuring access to justice and the broader public interest. With an eye on international best practices and standards, this article discusses three bodies of law that are relevant to the topic in Ethiopia. It begins with a discussion of the current legal and normative infrastructure followed by a needs assessment for reform. The author then discusses how the draft law prepared by the LJAAC's Legal and Related Services Working Group attempted to meet these needs by, in part, adopting a system of co-regulation that combined government supervision and self-administration through a mandatory bar. He then discusses the draft law of the AGO as of December 2019 and makes recommendations that will bring it into compliance with international best practices and human rights and rule of law standards.

In the last category of article relating to democratic institutions, Getachew Assefa and Sisay Alemahu start by addressing the legal reform relating to the establishment, composition, structure and autonomy of the National Electoral Board of Ethiopia. They recount the options considered in revising the laws and the choices made based on the standards of independence and impartiality and comparative experiences. The authors further discuss the main changes introduced in the revised electoral legislation in terms of the conduct of elections, political party regulation, electoral code of conduct and dispute resolution mechanisms. In addition to clarifying the normative, institutional and procedural requirements relating to local elections, constituency mapping and referendum, the article highlights the changes made with a view to easing the exercise of the right to vote and to be elected and removing actual and potential barriers to the conduct of free and fair elections. It also describes some of the contested proposals relating to election security and the entry requirements for political parties and the participation of civil servants in elections.

Meskerem Gesset's article presents the reform on the law that establishes the Ethiopian Human Rights Commission. It discusses the reform options and choices relating to the mandate, independence, autonomy and effectiveness of the Commission through the prism of the Paris Principles, which define the competences and responsibilities, the composition and guarantees of independence and the methods of operation of national human rights institutions. The author notes that notable amendments were made to introduce an open and participatory process for the appointment of members of the Commission, to strengthen the powers and functions of the commissioners, and to improve the budgetary and staff autonomy of the institution. She also highlights limitations of the legal reform process, for example in terms of participation of stakeholders, as well as some areas for further consideration.

Dunia Tegegn takes on the interesting topic of the regulation of civil society organizations (CSO) and examines Ethiopia's new CSO Proclamation based on accepted international standards on freedom of association. She identifies the promises and changes that the law presents for human rights and democratization in Ethiopia. Her introduction looks at the right to freedom of association and the historical significance of previous legislation on the current regime of CSOs. Dunia compares the current legislation with its predecessor, points out the normative changes made by the new legislation, and evaluates the changes in depth from the vantage point of criteria recognized or implied by the international human rights standards. She takes her readers through the shortcomings she identifies while assessing the legislation from the point of view of international best practices and makes recommendations on how to rectify these shortcomings.

Finally, the last contribution by Abadir M. Ibrahim, Rediet Baye and Hawi Kefale, is a cross-disciplinary collaboration between two lawyers and an artist and illustrator who use comic art to tell the (hi)story of justice system reform in Ethiopia. While the authors' attempt to break the mold of the written law journal genre is conspicuous, what may not be immediately apparent is that the piece also fuses the interview method, literature review, the argumentative style and storytelling. The article is based on the history of, and tells the story of, the real-life experiences of three of the more experienced members of the LJAAC from which it derives certain conclusions about how legal reform has been and ought to be approached. Although this article is inspired by "popular culture and law reform" work, mostly from South America, the authors point out that they are not the first to introduce the genre to Ethiopia. They insist that loosely overlapping work is already available in the iconography of the Ethiopian Orthodox Church which often ventures into legal topics.

Reflections on Ethiopia's Media Law Reform

Mesenbet Assefa* & Solomon Goshu**

Abstract

Freedom of expression and the media is lifeblood of democracy and the bedrock of any democratic society. The vitality of freedom of expression and the media to democratic public discourse is particularly significant in transitional democracies such as Ethiopia as it pacifies tension in society and reduces the risks of violence. Despite the unparalleled significance of freedom of expression and the media, however, Ethiopia's legal framework on the media had some significant challenges that crippled the political space and created a chilling effect on free expression. This has led to extensive criticism by rights groups and international observers. Over the past two years, however, there have been some significant legal and political developments that paved the way for the media law reform in Ethiopia. The major part of reforming the media law in Ethiopia included amending the hitherto applicable Freedom of Mass Media and Access to Information Proclamation and the Broadcasting Service Proclamation. The purpose of this article is two-fold. At the normative level, it will discuss the key areas of the legal reform envisaged under the new Media Proclamation. Secondly, it will also highlight the process and different phases that the law reform process passed through as a way of reflection.

Introduction

Freedom of expression and the media is one of the most significant pillars of any democratic society. Often described as the fourth estate of government, the media plays a unique role in fostering robust public discourse and serving as a watchdog of government abuse of power.¹ The significance of freedom of expression and the media is particularly important in fledgling democracies like Ethiopia. It helps to reduce the risks of violence by consolidating their democratic trajectory and providing appropriate avenues to present political grievances. Moreover, the contribution of freedom of expression and the media to development cannot be

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¹ See in this regard Vincent Blasi, The Checking Value in First Amendment Theory (1977) 2 *American Bar Foundation Journal* 521.

overemphasized. It helps to address deep rooted structural development and governance challenges such as corruption and nepotism. Nobel Laureate Amartaya Sen's astute observation that no country in the world that truly respects the freedom of the media has ever experienced famine is a genuine reflection of the invaluable place of media freedom in a democracy.² Similarly, Richard Baron Parker has further noted that if one closely looks at socio-economic developments of states over the past two centuries, the rise and fall of nations has been defined by the degree of protection afforded to freedom of expression in their societies. He argues that the three essential "social technologies" of democracy, the free market and scientific inquiry cannot thrive without the freedom of expression and the media.³ This multi-faceted significance of freedom of expression has often a multiplier effect which is vital to "the good working of the entire human rights system".⁴

It should also be noted that the protection of freedom of expression is not just an individual right but a public good that has significant collective interest. In fact, this collectivist aspect of the importance of freedom of expression has structural resonance with non-liberal constitutional discourses such as Ethiopia that also give equal focus to collectivist understanding of rights. Eric Heinze in his book "[h]ate speech and [d]emocratic citizenship" astutely observes that because of its function to democratic public discourse, free speech should not just be considered 'as individual right but also, an essential attribute of democratic citizenship'.⁵ This broader resonance with the normative structure of non-liberal polities and constitutional discourses like Ethiopia strengthens the arguments for improved protection of freedom of expression and the media not less.

As vital as freedom of expression and the media is to democratic public discourse, it is also often one of the most violated rights. Silencing dissenting voices is the hallmark of authoritarian governments. This is particularly evident in fledgling democracies that find it difficult to consolidate democratic principles and uphold the principles of freedom of expression and the media. Ethiopia is no exception to this. The country's repressive political history demonstrates that the ability of individuals to express dissent and participate in the political process was significantly curtailed. In particular, the *Derg* regime under the leadership of Mengistu Hailemariam established a communist military dictatorship that completely shuttered dissenting

² Amartaya Sen, Food and Freedom (1989) 17 *World Development* 769.

³ Richard B. Parker, Free Speech and the Social Technologies of Democracy, Scientific Inquiry and the Free Market, in Deirdre Golash (ed) *Freedom of Expression in a Diverse World* (Springer, 2010) 3. See also in this regard, Mesenbet Assefa, Freedom of Expression Defines the Rise and Fall of Nations, Addis Standard,

⁴ Micahel O'Flaherty, Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34 (2012) 12 *Human Rights Law Review* 627.

⁵ Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016) 4.

voices through a sophisticated machinery of censorship known as *Sansur* (censorship) and eliminated its political opponents.⁶

When the new constitutional order, the Federal Democratic Republic of Ethiopia (FDRE) was established in 1995, it introduced sweeping reforms including the adoption of a progressive constitution that protected important safeguards on human rights and fundamental freedoms. In particular, one of the foremost reform areas that the constitution envisaged was the protection of freedom of expression and the media. Article 29, which is the most extensively articulated provisions in the constitution, provides a wide range of protections to freedom of expression and the media.⁷

The constitution includes important safeguards including the ban on censorship that came as a backdrop to the infamous sophisticated censorship (*sansur-ሳንሱር*) platform that was the hallmark of the brutal military dictatorship of the *Derg* regime.⁸ It emphasizes the special position of media in ensuring the vitality of the democratic process and reiterates that special measure should be taken to ensure its operational independence and its ability to entertain diverse opinions.⁹ The constitution also provides that state media should have the obligation to entertain diverse views in order to ensure that it is not used as a political propaganda for the ruling party.¹⁰ Although the constitution provides for limitations on the exercise of the right to freedom of expression, it narrows down the limitations to a set of strictly defined grounds subject to the requirements of necessity and proportionality in a democratic society.¹¹

The optimism for a more open political dispensation paved the way for a greater exercise of freedom of expression and the media in the few years that followed after the political transition. Many newspapers and magazines that covered political, social and economic issues sprang in the early 1990s. However, this began to change with drastic legal and policy measures that significantly restricted the fundamental right of individuals to freedom of expression. The subsequent decades until very recently witnessed a return of repressive tactics on freedom of expression and the media through regulatory, administrative and political measures that crippled the ability of the media to function as independent watchdog institution.

⁶ For a good understanding of the history of censorship in Ethiopia read, Endalegeta Kebede, 'Sanction' (2015) (አንዳለፈታ ከቢድ: ማዕቀብ (2007 ሳ/ም)).

⁷ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazette* No. 1 (21 August 1995) Art 29.

⁸ Meseret Chekol Reta, *The Quest for Press Freedom in Ethiopia: One Hundred Years of History of the Media in Ethiopia* (University Press America, 2013).

⁹ See Article 29 of the FDRE Constitution.

¹⁰ *Ibid.*

¹¹ *Ibid.*

However, the coming in to power of Prime Minister Abiy Ahmed in 2018 heralded a new chapter for media freedom in Ethiopia as the government opened up the political space and made significant reforms including the release of political prisoners, allowing exiled political groups and journalists to comeback and participate in the political process, allowing greater freedom for the media to operate and most importantly reforming the existing laws that were considered as bottlenecks for democratic transition.¹² The purpose of this article is also to discuss the major factors that precipitated the media law reform initiative, the process of the drafting process, the major reform areas envisaged under the new media law and the challenges faced in reforming the media law.

1. Factors that Precipitated the Media Law Reform

There were two major factors for the deterioration and eventual serious restrictions that were put in place on freedom of expression and the media in Ethiopia. First the media did not have any prior experience and the required ethical and legal understanding on what the proper boundaries of political speech is in public discourse. In fact, in some sections of society, there was the understanding that freedom of expression and the media is absolute. This is of course an erroneous understanding of the notion of the right to freedom of expression and the media. Even in more liberal societies like the United States, speech limitations can be applied consistent with the First Amendment protection of the freedom of speech. These include incitement, true threats, defamation, fighting words, ethnic epithets and a host of other forms of speech.¹³

The second and more important factor was the authoritarian political stance of the hitherto governing party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF).¹⁴ Although the constitution provides a robust system of the protection of human rights and basic freedoms, the soft constitutionalism that was entrenched within the party system under the ideology of revolutionary democracy and democratic centralism had significantly undermined the protection of fundamental freedoms and human rights including freedom of the media.¹⁵ In other words, the soft constitutional practices of the state manifested in the informal structures of the party system significantly undermined formal constitutional practices, rule of law, and respect for fundamental human rights including freedom of expression and the media.¹⁶ Moreover, the

¹² United States Institute of Peace, A Year of change in Ethiopia (2019) <https://www.usip.org/publications/2019/04/year-change-ethiopia> (accessed 20 July 2020).

¹³ See Robert Post, *Recuperating First Amendment Doctrine* (1995) 47 *Stanford Law Review*.

¹⁴ The EPRDF was disbanded in 2019 after the new Prime Minister Abiy Ahmed took over power and founded a new governing party, the Prosperity Party.

¹⁵ See in this regard Jean-Nicolas Bach JN, *Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia* (2011) 5 *Journal of Eastern African Studies* 642.

¹⁶ On the importance of soft constitutionalism See, Li-Ann Thio, *Soft Constitutional Law in Non-Liberal Asian Constitutional Democracies* (2010) 8 *International Journal of Constitutional Law* 766.

hitherto applicable laws including the Mass Media and Access to Information Proclamation, the Broadcast Service Proclamation as well other laws which have relevance to the media such as the criminal code and the Anti-Terrorism Proclamation had significant legal constraints that crippled the development of independent media and suffocated the space for free expression in the country.

Prior to April 2018, the state of freedom of expression and the media in Ethiopia was one of the lowest in the world. Ethiopia ranked 150 out of 180 countries in Reporters without Borders world rankings in 2018.¹⁷ The government has been criticized for taking legislative, administrative and political measures to weaken independent media in the country. The media's watchdog role has diminished through structural, economic and legal challenges. Truly independent media in Ethiopia has been rare and it is either stifled or driven by political agendas. State officials used to harass, arrest and prosecute journalists and bloggers perceived as critical of the government.¹⁸ As a result, the media landscape is mainly characterized by undue government interference, partisan reporting, politically affiliated ownership and lack of professionalism.¹⁹

The new government under the leadership of Prime Minister Abiy has acknowledged these critical problems and expressed its commitment to media freedom and this is integral part of the government's undertaking to open up the political space and ensure respect for human and democratic rights. Soon after assuming office, Prime Minister Abiy's government promised to review repressive laws including the anti-terrorism law, the media and the law on civil society that were considered to have restrained constitutionally guaranteed rights. Consequently, a Media Law Working Group (MLWG) was established under the auspices of the Legal and Justice Affairs Advisory Council (LJAAC) of Ethiopia chaired by Professor Tilahun Teshome, a prominent scholar and legal expert in Ethiopia.

As a result of these initiatives by the new administration, Ethiopia is witnessing a surge in the number of private print and electronic media outlets including scores of print and broadcast media established by journalists and bloggers. A number of exiled media institutions have also returned back to Ethiopia. At the national level, there are currently 13 public and 26 commercial television stations as well as 10 public and 15 commercial radio stations. Furthermore, 54 community radio and television stations are operational. There are also 48 print media currently operating in the country. It is expected that the media law reform will significantly boost the

¹⁷ Reporters without Borders, <https://rsf.org/en/ranking/2018#> (Accessed 15 July 2020).

¹⁸ See Amnesty International, 'Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia' (2011)

¹⁹ For a more detailed discussion on the contemporary challenges on freedom of expression and the media in Ethiopia, see Mesenbet Assefa, Freedom of Expression and the Media Landscape in Ethiopia, Contemporary Challenges (2016) 5 Journal of Media Law and Ethics 69, Gedion Timethewos, Freedom of Expression in Ethiopia: the Jurisprudential Dearth (2010) 4 *Mizan Law Review* 201.

number and diversity of both print and electronic media and thereby contribute to the better protection and exercise of the freedom of opinion and expression in Ethiopia.

The hitherto applicable legislative barriers among others include very restrictive provisions in the Criminal Code, the Anti-Terrorism Law, the Access to Information and Freedom of Expression Proclamation and the Broadcast Service Proclamation. These legislations provided a wide range of criminal restriction on incitement, dissemination of false information, defamation, spreading hate speech, crippling fines and a host of other wide-ranging restrictions on freedom of expression and the media. These broad and vague restrictions on freedom of expression were one of the major reasons for a number of prosecutions of journalists and politicians before the political change that took place in 2018. While there are still many complex legal, institutional, political and economic factors that continue to constrain the space for free expression and the media in Ethiopia, the legislative reforms currently envisaged promise to offer a significant normative basis to improve the space for freedom of expression and the media.

Although the Freedom of the Mass Media and Access to Information Proclamation includes some positive aspects, such as bans on censorship, pretrial detention of journalists, and ensuring the right of access to information, the law also provides for draconian legal provisions that have a chilling effect on freedom of expression. The media law allows prosecutions for defamatory or false accusations on constitutionally mandated legislative, executive or judicial authorities. The law also denies the normal protections made available to freedom of expression by making defamation cases subject to complaints made by individual victims.²⁰ Moreover, while the criminal law is limited to cases where defamatory statements were made with intent to injure an individual, the media law extends this to include —false accusations drastically affecting the protection afforded to political speech. In a similar vein, the criminal law also includes archaic understandings on defamation that do not meet international standards as well as legal developments in other democratic societies. Current developments in international and comparative law in other countries show the increasing decriminalization of defamation laws. At any rate, imprisonment is never an appropriate penalty for defamation.²¹ With regard to the regulation of media, there are also restrictions which are incompatible with a democratic society. The Broadcasting Service Proclamation prohibited foreigners from owning a media and provides additional restrictions on cross-ownership which have significantly affected the growth of the media industry.

In the following sections of the article, the study will highlight the major reform areas envisaged under the new media law and the specific legal reforms envisaged, the process that led to different

²⁰ The Criminal Code provides that defamation cases should be lodged upon complaint, indicating clearly that there is a high bar for protecting freedom of expression.

²¹ Human Rights Committee General Comment No. 34 para 47.

phases of the consultation process among various stakeholders, and the challenges faced in the process of drafting the new media law.

2. The Revised Media Law: The Reform Process

In June 2018, the government established the LJAAC under the auspices of the Federal Attorney General's Office. The mandate of the Council is to support the Office of the Attorney General in the justice and legal reform process and provide and make appropriate legislative and institutional changes as may be required. The Advisory Council is composed of 13 prominent legal professionals, chaired by Professor Tilahun Teshome. The Council was established to undertake the legal reform process for three years with a possible extension period. It started its work by establishing technical working groups composed of prominent legal professionals, academics, lawyers, and researchers. It also established a Secretariat with technical staff that support the drafting process and provide technical inputs to the working groups and the Council.²²

In 2019, David Kaye, the former UN Special Rapporteur on the Right to Freedom of Opinion and Expression, lauded the Government of Ethiopia for 'introducing a public participatory process of legislative drafting and advice that should be a model for democratic processes worldwide'.²³

The Media Law Working Group was one of the first working groups established by the Council in August 2018. It was tasked with analysing the shortcomings associated with laws governing the media and to make research-based recommendations for reform as well as drafting a new media law. The working group is comprised of professionals with special expertise in the areas related with the media law. It includes academic, researchers on media law, journalists, practicing lawyers, members of the civil society and a gender specialist. While it is true that media law working group was conscious of the need to include gender perspectives and make sure that women are represented in the process, it only had one active female member participating in the drafting process. This is not a unique issue to the media law working group as the Advisory Council itself had very few female members that participated in the overall law reform process.

Although it is true that different legislations directly or/and indirectly deal with the right to freedom of expression and media in Ethiopia; the working group prioritised and worked on the Freedom of the Mass Media and Access to Information Proclamation No. 590/2008 and the

²² It should be noted that the LJAAC had a functional independence and the reform process was not any way influenced by interest groups. But the coordination and support was provided by the Attorney General Office.

²³ David Kaye, End of mission statement after his visit to Ethiopia (2-9 December 2019) available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E>

Broadcasting Service Proclamation No. 533/2007. Priority was given to these legislations as they had direct impact on freedom of expression and the media.²⁴

The working group started its work by conducting a diagnostic study. The study evaluated the contents and implementation challenges related with laws regulating the media and identified major gaps under these legislations. It was developed through a detailed analysis of the national and international legal framework on freedom of expression and the media, conducting interviews with media practitioners and by referring published works and reports. The diagnostic study helped to identify the key problems associated with the media law and the specific problematic provisions that need to be revised under the new media law. The diagnostic report was submitted to the Advisory Council and approved before commencing public deliberations on the report. Subsequently, the outcome of the study was discussed with relevant stakeholders in the media sector and representatives of various sections of the society which created the occasion to get feedback and inputs. After the study was further developed and finalized by incorporating inputs from these consultations, the process of the drafting the new media law commenced by the working group on media law.

In the process of preparing the draft, amendments and changes were made by considering the studies on the current laws and the findings of the diagnostic report. Important inputs were also taken from international and regional human rights instruments and the best practices of some selected countries. In this context, the experiences of South Africa, Ghana, Kenya, Botswana, and Nigeria were considered from Africa. Moreover, the experiences of Australia, Canada, Sweden, and United Kingdom were also considered in drawing important lessons with regard to media regulation. The drafting team also referred the United Nations model laws and regulation manuals on broadcasting law. In drawing comparative experience of the aforementioned countries, the drafting team also considered the relative progress of media freedom in these countries and the fact that they have some of the most progressive laws on media regulation in the world.

The new proclamation was further developed by soliciting inputs from the consecutive consultations with media practitioners and other stakeholders. In particular, consultations were held with Addis Ababa based and regional media professionals, legal professionals, owners of

²⁴ These laws were prioritized because of their direct and huge impact on freedom of expression and the media sector. Nevertheless, there was a huge debate on whether to reform the provisions in the Revised Criminal Code. While there were many provisions that were identified in the Revised Criminal Code that were clearly incompatible with the basic principles of freedom of expression. However, the issue created a difficult problem as revising an already revised criminal code as it takes time and unnecessary administrative issues. Because of this the better approach was to focus on these specific proclamations and address the specific issues that were problematic for freedom of expression and the media. In the end as most of these issues overlap it was better to focus on the thematic issues and undertake the reform process accordingly.

media outlets and managers, political parties, and civil society organizations. Consultation forums were also organized in Hawassa and Dire Dawa with relevant stakeholders. Close consultations were conducted with the new leadership of the Broadcasting Authority and managers of media institutions. Furthermore, two well experienced and knowledgeable international consultants contracted by the support of partner institutions provided their written comments on the draft. The copy of the draft was also posted online through the Office of the Attorney General and the Advisory Council to gather input from citizens. The final draft was a reflection of all these inputs from various stakeholders and the general public.

3. Key Areas of Legal Reform Envisaged Under the New Media Proclamation

3.1. Decriminalization of Defamation

Broad proscriptions of defamation laws have been the most commonly used forms of silencing political dissent by authoritarian governments.²⁵ The broad proscription and criminalization of defamation laws have a chilling effect on political speech and the expressive liberties of individuals. The risk of imprisonment for defamation laws significantly affects the media and freedom of expression. The core political ideals of freedom of expression, which is informed by democratic self-government, will be highly compromised when the law allows for the criminalization of defamation. This is because criticism of government and public officials that run government can only be held publicly accountability not just during elections but also through a democratic constitutional process of a vibrant media. The uninhibited ability of individuals to criticize public officials and the affairs government cannot function, if there are draconian criminal defamation laws.

In this regard, the Human Rights Committee has reiterated that criminal sanctions in the context of defamation should be avoided, and in any event, imprisonment is incompatible with the right to freedom of expression.²⁶ In particular, when defamation suits involve political speech made in the context of public interest in a democratic society, the presumption that this 'high-value speech' should have the highest considerations is an established doctrine in many comparative jurisdictions.²⁷ In *Lohi Issa Konate v Burkina Faso*, a recent landmark decision of the African Court on Human Rights which was concerned with the defamation of a public official, the Court reversed the conviction of a journalist for defamation ruling that '[t]he Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate....'²⁸ In another landmark decision on

²⁵ See Dent and Kenyon, 'Defamation Law's Chilling Effect' (2004) 9 Media & Arts Law Review 89.

²⁶ Human Rights Committee General Comment No. 34 para 47.

²⁷ *Ibid.*

²⁸ *Lohi Issa Konatei v Burkina Faso*, App. No. 004/2014, (ACtHR, 5 December 2014) para 155.

freedom of expression, the Constitutional Court of Zimbabwe, abolished criminal defamation as a form of criminal sanction for speech-related offences. In arguing the incompatibility of criminal defamation with the right to freedom of expression, the Court underscored the unique importance of freedom of political speech as lifeblood for democratic self-governance.²⁹

Moreover, in cases where there are civil defamation laws, comparative experiences show that states have applied defamation laws narrowly. In the seminal First Amendment case of *New York Times v Sullivan*, which governs current First Amendment doctrine on defamation, the US Supreme Court established that defamation can only be applied when there is “reckless disregard for the truth”.³⁰ In other words, a speaker will be protected even if he speaks false information but has made his best effort to attain the truth. As noted above, similar legal developments can also be seen in more recent decisions of the African Court on Human and Peoples’ Rights.

The above international and comparative experiences clearly show that any constitutional democratic order that aspires to create vibrant media and climate of free expression needs to adopt narrower limits of defamation laws. In Ethiopia the hitherto applicable law imposes a criminal defamation. The Revised Criminal Code in Article 613 provides for a broad definition of defamation which unreasonably requires for establishing the truth of the defamatory statements. The Freedom of the Mass Media and Access to Information Proclamation which was introduced in 2008 has also come up with draconic provisions which have the effect of drastically limiting legitimate political speech. One of the difficult aspects of the law relates to the broad prohibitions on defamation and false accusations.³¹ In particular, it allows prosecutions for defamatory or false accusations on constitutionally mandated legislative, executive or judicial authorities.³² The law deprives the normal protections available by the Criminal Code to freedom of expression by making defamation cases to be subject to prosecution without the requirements of the victim’s complaint as well as imposing huge sums of compensatory moral damages.³³ Moreover, while the criminal law limits to cases where defamatory statements were made with intent to injure an individual, the Media Proclamation extends this to ‘false accusations’ further limiting the protection afforded to political speech.³⁴

²⁹ *Nevanji Madanhire and Nqaba Matshazi v Attorney General* (Constitutional Court of Zimbabwe, 12 June 2014) holding that ‘[c]rucially, freedom of expression is constitutionally enshrined and encouraged, as the lifeblood of democracy. The freedom to wield fists and firearms enjoys no similar status in our supreme law’ at 10.

³⁰ *New York Times v Sullivan*, 376 U.S. 254, 84 S.Ct. 710.

³¹ Mass Media Proclamation Art 43 (7).

³² *Ibid.*

³³ One notes that the Revised Criminal Code of the Federal Democratic Republic of Ethiopia provides that defamation cases should be subject to complaints made by victims of the defamatory statement (See in this regard Revised Criminal Code Art 613).

³⁴ Mass Media Proclamation Art 43 (7).

The new Media Proclamation has provided for the decriminalization of defamation. This will have far reaching significance for the progress of media freedom in the country. The new proclamation in Art 84 provides that defamation shall only entail civil liability and shall not entail criminal responsibility. The inclusion of this article was made because of the emerging consensus on the subject drawn from comparative experience of other countries and considering the significant limitations that broad criminal law restrictions could have on political speech. Art 84 includes various forms of protections including defence of truth, statements made in good faith, statements made for public interest, and privileged speech such as those made during parliamentary debates.

The proposed decriminalization of defamation and reforms envisaged in the new media proclamation provide a strong normative basis to ensure the adequate protection of freedom of expression and the media. Given the backdrop of serious implications of the criminalisation of defamation and its chilling effect on political speech, the decriminalization of defamation and other related changes that the new media law envisages are one of the most progressive aspects of the media law reform process.

3.2. Prior Restraint and Censorship

In most western democracies, censorship is considered as incompatible with the basic principles of an open and democratic society. Most states only impose criminal or civil sanctions for any speech related offences.³⁵ In some other states including Ethiopia however, the media law allows for prior restraint in exceptional circumstances that threatens the national security or public order of the state.³⁶ Some argue that the fragile nature of these polities and fear of ethnic strife and conflict requires prior restraint of publications in exceptional circumstances.

Others, however, argue that any contemplation of the notion of prior restraint even in narrow circumstances is dangerous as it provides government to control unfavourable publications and it may amount to indirect censorship. This is all the more troublesome given Ethiopia's dark political history of censorship. During the *Derg* regime, the media was under a complete control of the political space and unmatched censorship platform called *Sansur* whereby any publication has to pass through a rigorous scrutiny of its contents under a specific governmental department.³⁷

The members of the working group and the Advisory Council were somehow divided on this issue. A final decision was made to include a provision allowing for a limited and narrow

³⁵ Toby Mendel, Study on International Standards Relating to Incitement to Genocide and Hatred (2006) 22; See also, Kent Greenawalt, Speech and Crime (1980) 5 American Bar Foundation Research Journal 731.

³⁶ See Art 42 Proclamation to Provide for Freedom of the Media and Access to Information 590/2008

³⁷ See Meseret (n.8).

application of prior restraint with some modification from the hitherto applicable proclamation. The current Freedom of the Mass Media and Access to Information Proclamation in Article 42 provides:

where The Federal or Regional public prosecutor, as the case may be, has sufficient reason to believe that a periodical or a book which is about to be disseminated contains illegal matter which would, if disseminated, lead to a clear and present grave danger to the national security which could not otherwise be averted through a subsequent imposition of sanctions, may issue an order to impound the periodical.

What is troublesome in this particular article is not the fact that the law allows for impounding and prior restraint but also the fact that in some circumstances, the law allows for impounding to be made without a court warrant.³⁸ During the drafting process of the Media Proclamation the members of the Advisory Council took note of the difficulty of imposing such procedure to media freedom. However, a decision was made to keep the previous provision allowing prior restraint intact.

The major legal problem in this regard is how one establishes the legal standard – whether there is serious or grave danger to national security and in what circumstances prior restraint could be allowed. In this regard, it should be noted that the legal test for allowing prior restraint, which often is not clearly articulated in the context of Ethiopia is the notion of clear and present danger.³⁹ The legal test was first established in the 1919 US Supreme Court case of *Abrahams v United States*.⁴⁰ But this standard has long been modified in *Brandenburg v Ohio*, which governs current First Amendment doctrine. In *Brandunber v Ohio*, the US Supreme Court modified the standard by noting that:

the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁴¹

This standard further narrowed down restrictions on freedom of expression from the clear and present danger to “imminent lawless action”. Although it is not clear what the specific standards of this doctrine are, scholars have expounded and articulated the broader normative boundaries

³⁸ See Article 42 (3) of the Mass Media and Access to Information proclamation.

³⁹ The language in Art 42 clearly includes the notion of clear and present danger; see Article 42(2) which reads “...a periodical or a book which is about to be disseminated contains illegal matter which would, if disseminated, lead to a clear and present grave danger to the national security which could not otherwise be averted through a subsequent imposition...” clearly endorse the clear and present danger doctrine.

⁴⁰ *Abrams v United States*, 250 U.S. 616, 630 (1919).

⁴¹ *Brandenburg v Ohio*, 395 U.S. 444, para 447.

of such doctrine. Drawing from privacy law, Thomas Healy argues that the likelihood of the commission of lawless action in general should demonstrate the existence of 'probable cause' in the commission of lawless action. Healy argues that the requirement of probable cause requires that criminal advocacy should demonstrate the existence of 'substantial chance' or 'fair probability' that the speech will lead to the commission of the criminal act.⁴² It is interesting to note that a similar conclusion was reached by the Appeals Court of the UK in assessing the notion of likelihood and imminence in the case of *R v Faraz*. The Court held that '...the requirement that it was "likely" that a publication would encourage acts of terrorism meant that it must be "probable" that the publication would have that effect'.⁴³

Similarly, with regard to the question of imminence, the *Brandenburg* test does not also provide a definitive standard on the temporal nexus that should exist between incitement and the commission of a lawless action. Healy argues the temporal nexus between the inciting speech and the commission of the lawless action should be in a matter of days.⁴⁴ Nevertheless, providing a fixed time such as requiring that the inciting speech should have the potential to cause harm within matter of days deprives contextual analysis of particular speech acts confronted by courts. In this regard *R v Faraz* provides a more flexible normative standard in determining the temporal requirement of imminence in incitement. In *R v Faraz* the UK Court of Appeals held that 'what was required was an encouragement to commit such an act within a reasonable time' within the particular context of the purported inciting speech.⁴⁵

These normative articulations while not precise are helpful to look into in assessing the standard of imminence including in the context of decision on prior restraint. In the Ethiopian case, while the letter of the law provides for the notion of clear and present danger, often the literature and the legal debate does not clearly seem to discern the legal and conceptual difference between these two legal concepts. Despite this, courts can be guided by the above factors and the comparative experiences as discussed above before deciding measures on impounding and applying the rule of prior restraint. This discussion is also equally important in applying rules related with legal limitations of freedom of expression in the context of incitement law in general.

3.3. Improving Registration and Licensing Requirements

Registration and licensing restrictions have been the epitome of censorship since early developments of the press. Libertarians such as John Milton were particularly concerned with how licensing restrictions can curtail free press and the ability to criticize government policy. In

⁴² Thomas Healy, *Brandenburg in a Time of Terror* (2009) 84 *Notre Dame Law Review* 60.

⁴³ *R v Faraz* (2012) EWCA Crim 2820 (21 December 2012), para 49.

⁴⁴ Healy (n 1044); Healy rues that 'criminal advocacy can be prohibited only if it is directed to, and is likely to, produce unlawful conduct within several days'; see at 7.

⁴⁵ *R v Faraz*, para 49.

his essay, *Areopagetica*, Milton strongly argued against the then existing licensing laws of England.⁴⁶ He noted that books should be considered as souls that live on after the writer has died and compared the licensing scheme similar to the book burning during the inquisition, where he argued 'to kill a book kills reason and immortality'.⁴⁷

In the context of Ethiopia registration and licensing schemes were also used to suppress independent media. Freedom House and many other organizations have repeatedly noted that licensing restrictions are one of the bottlenecks that continue to cripple the independence of the press in Ethiopia.⁴⁸

This scepticism against licensing laws since early periods of the enlightenment shows how licensing schemes can significantly constrain the ability of the press to operate independently without undue restraint from government. There are also other technical issues that demand why licensing of the press does not make sense. In the case of broadcast, the very nature of the technology employed as well as the limited nature of the air wave and the demand to harmonize the use of frequencies requires adherence to basic international guidelines on broadcast licensing procedures in order to operate. Moreover, the force and influence of broadcasting is much bigger and its risks of misuse are also more devastating than the press. These factors have prompted many states to only require registration of the press and do not require licensing.

Most states that follow constitutional democratic principles do not impose registration and licensing requirements on print media outlets. In many countries, a distinct media registration regime is not required as publishers of newspapers and magazines get their business license just like other businesses from a body regulating trade. To the contrary in some countries like Ethiopia, licensing registration requirements create significant administrative barriers and discriminatory practices that constrain the development of an independent press. Proclamation 590/2008 states that anyone who desires to publish a periodical shall register such periodical and get certificate of registration from the Ministry of Information. The main concerns with regard to registration of the media relates to the broad discretion held by the government. The Proclamation puts registration in the hands of a Ministry of information or the equivalent at the regional level. In contrast, in the United Kingdom and India, registration is overseen by a body that is not part of the political apparatus of government to ensure that the system is not susceptible to political interference. In practice, the grounds for refusing to register or for cancelling registration in the Proclamation had been used by the regulatory bodies to filter contents and to limit press freedom. The certificate of registration is also subject to renewal once

⁴⁶ John Milton, *Areopagetica* (1644).

⁴⁷ *Ibid.*

⁴⁸ Freedom House, [<http://www.freedomhouse.org/report/freedom-net/2012/ethiopia>] (accessed on 4 December 2020).

every three years. Arbitrary denials of renewals and instances in which applications for renewal of newspapers and other media have been rejected have occurred many times.

The Media Law Working Group adopted the approach that made only the requirement of registration without the requirement of licensing. Considering the important role of registration of print and online media outlets in preventing duplication of names, recording shareholders and the identity of owners, and compiling information on dissemination of media outlets, registration is maintained under the new media proclamation. Moreover, as opposed to the executive organ of the government, it was proposed that the registration be conducted by the independent media regulatory body to ward off improper pressures and interferences from the government. In addition, the criteria and conditions required for registration by federal and regional organs conducting registration are clearly provided in detail under the new media proclamation. Furthermore, amendments are made on the right to appeal on these decisions; and anyone aggrieved by the decision can appeal to the administrative organ and then to the court of law. Additional protection is provided by enacting that a periodical shall wait for response and can start publication and distribution after 30 days, if a certificate of registration has not been issued to the applicant although the Authority has received the application that meets all the required conditions.

It should, however, be emphasized that the fact that licensing should not be a mandatory requirement for the press does not mean that it is not regulated by law. The full force of the law including the media law, the criminal law, and the civil code applies for any unlawful publication of the press. The exclusion of the licensing requirement will reduce the burden of the press for government manipulation and creating unnecessary administrative hurdles for the press to operate freely and independently. Moreover, the advent of online platforms such as blogs, commentaries and other social media platforms makes the requirement of licensing obsolete and incompatible with the evolving technological change.

With regard to broadcast media, there were issues raised on whether or not the licensing processes under Proclamation 533/2007 are fair, and transparent, particularly in the sense of ensuring a level playing field for applicants. Issues that were addressed included the question of whether clear criteria for making and assessing competing license applications are published in advance, whether the process ensures fair treatment among applicants and the like. The diagnostic study states that many stakeholders repeatedly complained that the process was discriminatory as a result of lack of clarity in the basic licensing criteria and license conditions in the law.

The new media law provides for detailed information on the criteria to award license for broadcast media, information that should be included in the application, categories of broadcasting service licenses, and the terms and conditions of licensure. The criteria for issuance

of license include the applicant's financial capacity and means, reliability and adequacy to run the service and business record (if any), expected technical quality of the proposed service and the capability of equipment and technologies listed in the applicant's project proposal to render the service (i.e., having regard to developments in broadcasting technology), and organizational capacity, experience, and expertise of the applicant. These criteria are provided to enable the license holder to provide the services with better responsibility and capacity as the operation and management of a broadcasting media, the establishment of a transmission station and studio, production and purchase of programs and administration of media professionals require higher initial resources.

The means of the broadcasting service transmission and the categories of public service broadcasting license, special public service broadcasting license, commercial broadcasting service license, and community broadcasting service license are also listed in the new media law. When it finds it necessary, the Authority may grant special commercial or community broadcasting service license upon the approval of the Board to an applicant who applies for a broadcasting service whose program focuses on special issues which are not covered or given enough attention by existing broadcasting services. This was intended to encourage diversity of views in the provision of broadcast services. To ensure that the licensing processes are fair and transparent, the new media law included the public hearing and input gathering mechanism in the process of assessing competing license applications and decision-making. In particular, when broadcasting service license that uses radio spectrum is available, the Authority should invite applicants by a notice published on the Authority's website, in appropriate widely circulated newspapers or through other media. Any potential applicant who responds to the advertisement should be given identical and sufficient information, and sufficient time to prepare their applications to ensure that all applicants are treated fairly. This is helpful to prevent unfair, unjust, and corrupt practices such as preferential treatment of one applicant by the Authority and to ensure its credibility.

3.4. Easing Media Ownership Rules

In the new proclamation, the media ownership rules are amended to ensure that the rules are promoting plurality of ideas and providing opportunity for different sections of society to access the media and diverse information and points of views. One of the contentious issues that was debated during the adoption of the new media law was with regard to the right of foreigners to own media in Ethiopia. The hitherto applicable broadcast law excludes all foreigners from owning media houses in Ethiopia.⁴⁹ The major rationale for this exclusion seems to emanate from the general understanding of the concept of democratic citizenship and the idea that only citizens should be able to have a voice in the domestic political process. While this idea gets support in the

⁴⁹ See Art 23(2) Broadcast Service Proclamation 533/2007; See also Art 7(5) Freedom of the Media and Access to Information Proclamation 590/2008.

regulation of media in many states, comparative experiences show that some level of limited ownership is allowed for the ownership of media by foreigners.

Allowing some limited level of media ownership of foreigners was proposed for two principal reasons. First it should be noted that the media sector is an industry that needs significant financial investment. The fledgling media sector in Ethiopia cannot be improved unless the Ethiopian diaspora and some foreigners invest in the sector. Moreover, the media sector is by its nature diverse and has not only political content, but also is keen in working on the entertainment sector including music, cinema and other forms of artistic productions. Second, there already are a number of media outlets owned by the Ethiopian diaspora that focus on Ethiopia. Instead of banning all these media outlets, it will be better to allow them to operate with some level of limitation on their ownership through appropriate state regulation.

Because of the above factors and the existing experience in other comparative jurisdictions, the new media proclamation allows foreigners to have up to 25% of the ownership of media outlets in Ethiopia. This middle ground will help to balance both the interest of the state not to be susceptible to monopoly of media by foreign actors and the required demand for improving the media industry's growth. Comparative experience also shows that similar kinds of media regulations exist in other countries. In South Africa, foreigners are allowed to have up to 20% of the media ownership. While in other countries such as Democratic Republic of Congo, the media law allows foreigners to have up to 40% of the media ownership.⁵⁰

The new media law also includes safeguard clauses to ensure the prevention of undue media dominance or concentration by media groups in monopolistic situations that may be harmful to diversity of sources and views. In the context of prevention of media monopoly, as observed from the experiences of other countries, ownership rules may be enacted on ownership shares (customer, market, and influence) or numerical limitations on the number of television stations, radio stations, magazines, newspapers and online media that one person or entity is allowed to control. The new media law mixes numerical limitations and effective control-based ownership limits on shares to promote the development of the media and protect the monopoly of media.

Under the Broadcasting Service Proclamation 533/2007, an organization applying for a television broadcasting service license while already having a license for television broadcasting service or more than one license for radio broadcasting service; or, an organization applying for a radio broadcasting service license while having a license for radio broadcasting service in the same license area or two licenses in different license areas may not be issued with broadcasting service licenses. The new media law lifts this limitation as it already provides that anybody that is conferred with a legal personality in accordance with Ethiopian law may establish one television,

⁵⁰ Justin Limptlaw, *Media Law Handbook for Southern Africa* (2013) 430.

one radio, one newspaper, one magazine and one online media. Notwithstanding this, the organization or its shareholders may directly or indirectly control less than the effective control threshold from the capital or shares of other media.

Another contentious issue with regard to media ownership was on whether the existing ban on ownership of media by religious entities and political parties should continue. The Broadcasting Service Proclamation prohibits political and religious organizations from owning broadcast stations.⁵¹ However, political party affiliated and religious broadcasting services are flourishing using the opportunities created through advanced technologies. As a means of seeking to protect political impartiality and balance in broadcasting, many countries prohibit political bodies from holding broadcast licenses. The new media law maintained this prohibition. On the other hand, there is some question about whether an outright ban contravenes the human right to freedom of religious expression. The new media law tried to accommodate the right of religious entities and political parties to use non licensed forms of transmissions to reach out to their audience. Accordingly, in the new media law, religious organizations are still prohibited from owning broadcasting licenses using radio spectrum while they are allowed to operate using other means of transmissions such as satellite broadcasting.

Another important issue that the drafters focused on in relation to ownership rules of the current media law regime is the issue of cross-ownership and control. Media regulations of many countries provide certain regulatory safeguards in order to avoid monopoly of media. It is common practice to use the effective control test to measure shares of ownership. However, the provisions on effective control under the current laws lack clarity and mix market shares with ownership percentage, and it had a negative influence on the development of the media sector. The new media law prefers to follow percentage of shares than market shares to measure effective control as rules based on simple percentages are relatively easy to apply and less likely to be open to abuse. On the other hand, markets are extremely complex and such rules may fail to have the desired impact. It also requires detailed monitoring to apply on an on-going basis. In the current law, any person owning more than 15% of a particular media is presumed to exercise effective control. Considering the experiences of other countries and the development of share companies in the country, the new media law raises it to more than 25%.

Under the new media law, the Authority is given a discretionary power to change the rules on ownership restrictions and the percentage of effective control every three years after evaluating the state of the media, the capital and financial situation of the media sector, ownership status and its impact on market concentration and monopoly of ideas. This was preferred as it is more effective to give the Authority the freedom to respond to the fast-changing nature of the media

⁵¹ Art 23(4) & (5) Broadcasting Service Proclamation.

sector and the economy through directives rather than exhaustively enacting ownership rules in the proclamation.

In countries that have good experience in media regulation, the independent media regulatory organs enact media ownership rules that balance the interests of the media with the wider public interest. Under the new media law, media outlets are required to be transparent about their ownership structures. They have notification obligation on ownership conditions to the Authority, and they are required to get the permission and approval on ownership changes or transfers via sale and merger. The Authority may prevent any combination over a certain size where this would be contrary to the public interest or have negative consequences for competition.

4. Improving Regulatory Oversight and Self-Regulation

Another major issue that was identified in the course of drafting the new media law is the re-establishment of the media regulatory organ - the Broadcasting Authority and ensuring that it is independent and impartial. Comparative experiences and international standards clearly show that a body which undertakes media regulation should be independent from executive organ of government.

A series of consultations with stakeholders indicated a number of problems on the independence of the Broadcasting Authority. Various stakeholders reflected that the Broadcasting Service Proclamation and different regulations have not sufficiently provided for the independence and impartiality of the Authority as there are gaps in the appointment process of its leadership including the Board. In particular, the independence of the Authority was questioned as a result of the lack of open and transparent appointment process of Board members; the appointment process not ensuring the participation of relevant stakeholders in sufficient manner; and the lack of protection to Board members from improper interference and pressure on their work.

The new media law made changes to the composition, appointment process, and powers and functions of the regulatory body. In line with the new powers and functions in regulating print, broadcasting, and online media, the Broadcasting Authority is renamed as the Media Authority. This is also in conformity with the names of regulatory bodies in other jurisdictions. One way of ensuring its independence is to ensure that members are not selected by the executive and that its accountability mechanism is not dependent on the executive organ. After the dissolution of the Ministry of Information, the Broadcasting Authority is accountable to the Prime Minister. In the new media law, the re-established Ethiopian Media Authority (EMA) is accountable to the House of Peoples' Representative.

The new media law provides for the EMA board to be composed of 9 individuals. Board members are selected based on their expertise and experience in the media sector and they cannot be members or employees of a political party and are expected to be of a high moral character. The Board members are appointed by the House of Peoples' Representatives, upon recommendation by the Prime Minister. The new media law also provides that recruitment of candidates and appointment of members of the Board will be conducted in an open and transparent manner. Among the Board members, two of them shall be drawn from civil society organizations, two from the media sector and two from other institutions that have relevance to the media sector; the other three shall be drawn from relevant government organs. The selection process ensures balance in membership in addition to ensuring that the decision-making body stands for the public interest.

The new media law also provides prohibitions on individuals with strong political connections from being appointed as a Board member. To protect Board members and the leadership of the Authority from political interference, a person nominated to be selected as a Board member as well as Director General or Deputy Director of the Authority will be free from any political party membership. The Director General of the Authority is appointed by the House upon recommendation by the Board. Conditions are also placed on members to ensure their independence from commercial influence. The Board and the Directors must also be free of any potential personal conflict of interest with the media sector they are regulating.

Under the Broadcasting Service Proclamation, the tenure of the Board members is not well addressed. The new media law sets the term of office of Board members to four years. Only five of the members of the Board can be re-appointed for additional term. Board members will be appointed on staggered terms, to ensure there is continuity amongst the membership and to keep institutional memory by maintaining the experienced members to work with new members. The new media law also clearly provides for factors which may lead to termination of term of office of the Board members and thereby provide protection by ensuring that they will not be relieved of their responsibility without sufficient and convincing reasons as stated in the law.

The Broadcasting Service Proclamation No. 533/2007 was highly criticized for stipulating excessively broad powers and functions to the Authority which made it open for abuse of power. The enactment of regulations enumerating additional powers and functions to the Authority further complicates the issue. The new media law includes most of the powers and functions given to the Authority by different laws. For instance, the function of the Authority to provide necessary support, upon request, to reporters or news agents, coming from foreign countries to Ethiopia or resident foreign media correspondents is maintained. This was the function of the Government Communication Affairs Office which was transferred to the Authority. The objectives of the Authority under Proclamation 533/2007 were inclined towards controlling the media. In the new media Proclamation, the objectives are changed to creating enabling

environment and building the capacity of the media in addition to the clearly and narrowly expressed regulatory functions. In particular, it will provide proper support to strengthen media self-regulation.

The other major change in the new media proclamation is the inclusion of online media to the scope of the regulation. In the new media law, “online media” is defined by reference to an editorial process. The key idea here is that a central editor is responsible for the selection and arrangement of content. In other words, the content is not simply produced and disseminated by one individual but this is done through a process controlled by the media service provider. This would clearly exclude “ordinary” social media activities, such as tweeting and posting messages on Facebook, but it would also exclude activities which look a bit more like media activities, such as blogging, even of a regular nature, since this is not subject to editorial control.

5. Other Envisaged Regulatory Changes

Part Four of the new media proclamation contains provisions on the rights and obligations of media and content related obligations. Some new provisions have been added and the previous provisions have been expanded in detail that clearly provide better legal protections for the media and outline the specific responsibilities of the media. In particular, provisions which provide protections from undue interferences, intimidations, harassments, and other actions that threaten the editorial independence of the media and the wellbeing of journalists have been included in the new media law. In the following sections, the paper will briefly highlight the various protection regimes and the obligations and responsibilities of the media in the new media proclamation.

5.1. Protection of Journalistic Sources

One of the key pillars of a good media law regulatory regime is to provide for protection of journalistic sources. The ability of journalists to access information, often which is vital to critical press is their ability to protect their sources from potential reprisals. While some protection was provided by the previous media law, there were a wide range of restrictions to this rule that deprive confidentiality of sources and compel journalists to disclose their sources. The new media proclamation provides that journalists may not be forced to reveal a source that provided information on confidential basis. It sets more stringent conditions in which this right may be waived. It also provides that disclosure may only be required when it is critical information necessary for prosecution or defence of a serious crime or for preventing clear and imminent danger to the national security; and there is no alternative means of obtaining the information needed to prosecute or defend the case or avert the imminent danger. Moreover, the new media law added a safeguard indicating that such order can only be made by a decision of a court of law.

These additional safeguards are important to strengthen the protection of journalistic sources which is indispensable to the watch dog function of critical media.

5.2. Right of Reply

In most media regulations right of reply ensures that an aggrieved party has a right to respond to an alleged defamatory statement or something that does not truly represent the character and behaviour of a person or an institution. The new media law stipulates that when the media disseminate false and inaccurate information in their reports and programs, they are obliged to respect the right to publish reply or to demand correction. This provides an opportunity to the complainant and the media outlet to resolve the issue on their own before the formal charge is brought to a court of law. It also provides that the right of reply should not be used to negate an accurate reporting ascertainable with facts by providing false responses. Amendments are also made in regards to the time given to exercise of the right to reply and correction in normal times and during election periods to provide better and timely opportunity to exercise the right.

5.3. The Appointment of the Editor-in-Chief

Under the new media law, periodicals and online media are obliged to appoint an editor-in-chief. The editor-in-chief of a periodical and an online media has a mandate to supervise and determine content of the periodical and ensure nothing is printed against his will, and he will have a full legal responsibility for the content of the publication. To avoid conflict of interest between editors and owners and protect the 'interference' of owners in editorial decisions, the new media law provides that owners or shareholders with effective control of a media organization shall not be appointed as editors-in-chief. However, to encourage the ownership of professionals, the new media law allows the appointment of interested journalists who own less than 25% of the shares as editor-in-chief.

5.4. Ensuring Diversity of Information

Under the new media proclamation, obligations of public service, commercial and community broadcasting licensees are enacted in detail. Similarly, obligations of content aggregators and content reader websites are also provided in detail. Considering the tendency of public service broadcasting licensees operating as government media in practice, the new media law clearly states that they are obliged to reflect the country's linguistic, ethnic, cultural, religious, gender, regional and political diversity; serve vulnerable groups and all political parties fairly in line with the public interest. The new media law also incorporates a new provision on the obligations of public service, commercial and community broadcasting licensees as well as national, regional and local transmissions to include minimum quotas for domestic content and quotas for

productions made by independent producers. This is aimed at limiting the effects of globalization on local culture, and to enable the media discharge their responsibility in raising the society's awareness on local affairs.

5.5. Content Obligations

The new media proclamation includes many provisions on content obligations. Provisions which state in general terms that programs or news should be balanced and impartial in reflecting diverse viewpoints to serve the public at large; and the obligations of broadcasters to make reasonable effort to ensure the content and source of their program or news is accurate; and their obligation to disseminate programs and reports which respects the law and do not violate the rights of others are included in the new media law. Additional clauses that provide these obligations in detail are also included. Any broadcasting service licensee who provides programs that may harm minors morally, psychologically or physically, with contents relating to violence, sexual portrayal and bad language shall only be transmitted from 10:00 PM in the evenings up to 5:00 AM in the morning; or render information to parents or tutors before transmission by notifying in advance the age level of program listener or viewer so that the parent or tutor take relevant caution.⁵² It also requires broadcasting service licensees that host religious programs should ensure that due respect is given to all religious beliefs and protect the basic human right to religious freedom. Moreover, the new media law prohibits religious program which incite religious hatred, undermine any religion or belief of others and provoke religious intolerance.⁵³

In order to ensure that the media operates with a sense of responsibility, the new media law provides that the Authority should issue detailed code of conduct that directs programs to be disseminated through broadcasting service. In other countries with well-functioning media self-regulation mechanisms, the media has its own code of conduct. While this may be feasible in the long run, the current media landscape does not seem to have such self-regulatory capacity. However, the new media law provides that while the Authority prepares the code of conduct it shall ensure that the self-regulation structure of the media is given an opportunity to provide comments on detailed code of conduct and participate in its implementation. It also provides that the Authority may allow the self-regulation structures of the media to enforce their code of conduct before appealing to the Board on certain issues after conducting an evaluation to check the effectiveness and strength of the operations of the media self-regulation bodies and their implementation of code of conduct.

⁵² Art 69, draft Media Proclamation

⁵³ Art 70, draft Media Proclamation

5.6. Election Coverage and Party Election Broadcasts

The new media proclamation provides that broadcasting service licensees shall ensure that political parties or private candidates registered in accordance with relevant laws get free airtime to political parties or private candidates to publicize their objectives and programs to the public during elections. The Authority in accordance with relevant laws and in collaboration with the National Electoral Board of Ethiopia should allot specific amounts of free airtime to each party according to a transparent and an equitable pre-determined formula. This provision works only during election periods and campaigns. However, other provisions are included in the new media law to ensure that political parties get fair coverage and share their ideas and views on different issues in all circumstances without waiting election periods.

In addition, in relation to social responsibilities of the media, broadcasting service licensees are obliged to transmit, free of charge, any emergency statement given by the federal or regional state government due to occurrence of an incident that endangers the peace and security of the public; and a natural disaster or an epidemic that threatens public health. Moreover, while broadcasting service licensees are required to keep the record of any transmitted program; periodicals are obliged to deposit gratuitous copies of every volume at the appropriate organ. To encourage the development of internal capacity to resolve complaints, the new media law also stipulates that the broadcasting licensees are obliged to put in place and implement a compliant handling mechanism to address concerns and complaints by their audience.

6. Administrative Measures

Part five of the new media proclamation deals with the administrative measures of the Authority. As indicated in the diagnostic study, the types of administrative violations are not properly listed under the current law. The measures provided are excessive and are not proportionate to the breaches and were enforced by the regulatory body in a manner that erodes the independence of the media. For instance, under Proclamation 533/2007 breach of programming may lead to revocation of a license and confiscation of the property of a person using it for broadcasting.

The new media law provides for a system of graduated sanctions in case of a breach of the rules. The most common sanction, in keeping with the primary goal of the system, which is to set standards rather than to punish, is a warning. For more serious breaches, the broadcaster may be required to carry a statement by the regulator to the effect that it has acted in breach of the rules. For even more serious breaches, normally in the form of persistent offending, fines may be imposed and, in the very most serious cases, where other remedies have failed to stop the breach, the license may be suspended or even revoked. Provisions are included in the new media law to ensure that administrative measures: are taken in a fair and transparent manner; respect the due

process principles of justice; and are proportional and appropriately tailored to the seriousness and repetitiveness of the breach.

The new media law provides that the Authority may deploy, step by step and as may be appropriate, administrative measures against a broadcasting service provider the contravenes the provisions of the new media law and regulations or directives issued in accordance with the Proclamation. Accordingly, four types of administrative measures are provided: issuing a written warning; imposing administrative fine up to Birr 200,000; suspending or terminating the program; and suspending or revoking the license. With the aim of establishing a transparent and accountable system of decision-making on penalties, acts that which may lead to the imposition of penalties are clearly listed and maximum amount of the penalties are provided.

The fines provided for under the current media laws are relatively heavy compared to the overall financial health of the media sector and threatened the survival of the media institutions. Under the new media law, the fine should be determined taking into account various factors such as: the seriousness of the breach, the licensee's record of breaches, any financial benefit the licensee might have gained as a result of the broadcast (e.g., advertising revenue), and the overall financial state of the broadcaster. It also states that fines should be proportionate to the offence, and the Authority should not seek to levy fines of such magnitude that it seriously endangers the broadcaster's viability.

To protect the right to defend of the media, the new media law states that when complaint is made against the media which may result in administrative sanction, the licensee shall be given an opportunity to comment in writing and in person. As these administrative measures may harm the consumers of the services in addition to the licensee, the new media law includes provisions which ensure that these measures are taken by respecting due process and by considering the comments of the licensees and inputs from the public hearing.

Moreover, the new media law provides for access to administrative justice and complaint handling mechanisms. It states any person who is aggrieved by the order given by the Authority, may submit his/her grievance to the Board. It is also provided that any party who is aggrieved by the decision given by the Board may submit his/her petition to the Federal High Court. The Federal High Court has a power to review a question of fact and law on petition on the decision of the Authority. Considering the serious harm to the media due to the exaggerated delays in the process of access to justice, the new media law provides that both the Board and the court shall decide on the petition and appeal within 30 working days to ensure accelerated justice.

Conclusion

Freedom of expression and the media is a life blood of democracy which ensures the vitality of democratic public discourse. In fledgling democracies like Ethiopia this is particularly useful to nurture democratic culture and consolidate the country's democratic trajectory by accommodating diverse political views. In this regard freedom of expression and the media has a unique nexus with democratic self-government. Since the political change that took place in 2018 under the leadership of Prime Minister of Abiy Ahmed, Ethiopia has made bold political reforms that provides a significant opportunity to entrench democratic principles and practices. In this regard the new media law offers a tremendous opportunity for creating a vibrant media environment that supports this important political transition in the country.

The new media law was approved by the Council of Ministers on December 11, 2020. It has made significant changes to the hitherto applicable media law. It envisages various regulatory reforms including the decriminalization of defamation, narrowing down the rules on prior restraint, providing clear and narrower restrictions on speech related crimes, reforming the regulatory body to be more independent; removing the requirements of licensing for the press; proving more appropriate and commensurate penalties for breach of media law regulations and many other bold reforms as discussed above. These reforms will have huge contribution in improving the regulatory regime on freedom of expression and the media and there by contributing in the democratic transition that the country is currently going through. Media regulation is, however, one aspect of the pillars of building a vibrant media environment in Ethiopia. The media should also develop its own ethical and self-regulatory frameworks in order to nurture responsible media operation.

Access to Information Legislation in Ethiopia: Transitioning from Strong to Trusted

Toby Mendel*

Abstract

Ethiopia first passed an access to information or freedom of information law in 2008 in the form of the Freedom of the Mass Media and Access to Information Proclamation. Although the provisions of the Proclamation relating to the mass media were quite repressive, the access to information provisions were not. Indeed, the Proclamation earned Ethiopia a score of 111 points out of a possible 150 for its overall legal framework for access to information on the RTI Rating, a score which puts Ethiopia in a very respectable 23rd position from among the 128 countries currently assessed. However, in part due to the repressive media provisions and in part due to an almost complete failure by the government to put in place the systems for actually providing information in practice, the law never gained any traction and has essentially remained a dead letter.

When media law reforms were included among the overall package of reforms in Ethiopia in 2018, access to information was among the leading priorities for reform. The Media Law Working Group (MLWG), established under the Justice Affairs Advisory Council (LJAAC), thus made it a priority to reform this legislation. A number of consultations were held to garner input into new draft legislation and various versions of the Draft Freedom of Information Proclamation were prepared. An RTI Rating assessment of the draft from August 2019 showed that it actually scored slightly below the existing Proclamation, earning 107 points, but a second RTI assessment of the February 2020 version of the draft have improved to 116 points. This paper is based on the latest version, a working draft, of the draft Freedom of Information Proclamation available at the time of writing. This draft contains some important improvements over the current Proclamation, most notably in terms of establishing an independent and dedicated oversight body. But there is still room for further improvement. In addition to briefly outlining right to information legislation developments in Ethiopia, this paper will discuss the main strengths and weaknesses of the 2008 Proclamation and both the general features and some of the finer details of the current draft of the legislation.

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Introduction

The right to access information held by public authorities (the right to information or access to information) has now been unequivocally recognised as a human right under international law.¹ Even before that recognition had become widespread, the right to information had been recognised by leading inter-governmental development agencies, such as the United Nations Development Programme and the World Bank, as a key element of sustainable development. That recognition now finds formal status in Sustainable Development Goal (SDG) Target 16.10, which calls on States to, “ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”.² During the period of the COVID-19 pandemic, the importance of access to information has become even more widely recognised, including as a means to save lives.³

Ethiopia has an interesting history in the area of legal guarantees for the right to information. This starts with the Ethiopian Constitution,⁴ which has an odd guarantee of the right to information, in Article 29(3)(b). Article 29 addresses the Right of Thought, Opinion and Expression, but Article 29(3) focuses on freedom of the press. Article 29(3)(b) states, specifically:

Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:

...

(b) Access to information of public interest.

There are two main issues with this. First, access to information is not, under international law and most national constitutions, a matter only for the media. Rather, it is a right which belongs to everyone. Second, this guarantee only applies to information “of public interest” whereas, under international law, the right applies to all information (subject to exceptions to protect overriding interests). The problem with subjecting this right to a “public interest” test is that what is of interest is largely in the eye of the beholder, so to speak. In many cases, people want information for commercial purposes, because it will enhance their business operations. Although that could

¹ See, for example, Toby Mendel, ‘Global Recognition of the Right to Information as a Human Right’ in J. S. Mann (ed.), *Comparative RTI Laws in the SAARC Nations* (Centre for Transparency and Accountability in Governance 2017).

² See *Transforming our World: the 2030 Agenda for Sustainable Development*, (<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>). This is supported by Indicator 16.10.2, which looks at the: “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information”.

³ See Toby Mendel and Laura Notess, ‘The Right to Information in Times of Crisis: Access to Information – Saving Lives, Building Trust, Bringing Hope!’ (UNESCO, 2020), https://en.unesco.org/sites/default/files/unesco_ati_iduai2020_english_sep_24.pdf.

⁴ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta 1st Year No. 1, Aug. 1995, Addis Ababa.

be seen as a private interest, it is also a public interest inasmuch as it is valuable to grow the economy. For practical purposes, if someone makes a request for information, they can be assumed to be interested in it and that is enough according to international law.

Ethiopia's current law on access to information, the Freedom of the Mass Media and Access to Information Proclamation, was adopted in 2008 (2008 Proclamation).⁵ This Proclamation is a dual-purpose media law and right to information law. But it was renowned primarily for its repressive media law provisions, used frequently and effectively against media outlets and journalists to undermine their freedom and to prevent them from engaging in fair criticism of government.

Due to the notoriety of the media law part of the 2008 Proclamation, the fact that it also included a fully developed regime governing the right to information was rarely talked about. Not only was its right to information regime fully developed, it was also remarkably strong. As assessed by the RTI Rating, the leading global tool for assessing the strength of legal frameworks for the right to information,⁶ Ethiopia earns a score of 111 points out of a possible 150 for its overall legal framework for access to information, based mainly on the Proclamation, a score which puts Ethiopia in a very respectable 24th position from among the 128 countries currently assessed on the RTI Rating.

Despite this impressive score, the Proclamation was never recognised as an important tool for accessing information. That was in part due to the repressive media provisions it contained but also in part due to an almost complete failure by the government to put in place the systems for actually disclosing information in practice. This could be seen as part of a wider failure of the government at that time, the Ethiopian People's Revolutionary Democratic Front (EPRDF), to respect freedom of expression generally, and the right to access information more specifically. As a result, the law never gained any traction with the public and has essentially remained a dead letter.

That looks set to change now. A broad package of legal reforms was announced by the Government of Ethiopia in 2018, under the leadership of the Justice Affairs Advisory Council (LJAAC), established by the Attorney General's Office. Media law reforms were included among

⁵ Proclamation No. 590/2008, Federal Negarit Gazette, 14th Year No. 64., 4 Dec. 2008, Addis Ababa.

⁶ Available at (<http://www.rti-rating.org>). The RTI Rating, launched in September 2011, is run by the Centre for Law and Democracy (CLD) (<http://www.law-democracy.org>) and Access Info Europe (<http://www.access-info.org>). It is based on international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee, and by regional mechanisms, such as the African Commission on Human and Peoples' Rights. The Rating assesses all of the national right to information laws globally (currently 128), and is continuously updated as new laws are adopted or existing laws are amended. It is relied upon regularly by leading international authorities, as well as national decision-makers and advocates, to evaluate national right to information systems.

the priority areas for reform, including reform of the 2008 Proclamation, both through adopting a new proclamation on the right to information and another separate one on media regulation.

This paper starts out by providing a brief overview of right to information legislation developments in Ethiopia. This is followed by a general discussion of the main strengths and weaknesses of the 2008 Proclamation, along with some pointers as to what will be necessary to make it work in practice (i.e. unlike the current law) and, in turn, a discussion of both the general features and some of the finer details of the current draft of the legislation.

1. Brief History of Progress on the Right to Information

The LJAAC created a Media Law Working Group (MLWG) as a way of moving forward in terms of media law reform, one of its identified priorities. The MLWG is comprised of a number of independent experts working on a volunteer basis to assess laws affecting the media and to propose reforms as relevant. The MLWG identified three laws as particularly important for initial attention, namely the right to information, regulation of the media and cybercrimes. The first two would serve to replace the 2008 Proclamation which, as noted above, encompassed both of these quite different regulatory frameworks.

In terms of the right to information, a Working Draft Freedom of Information Proclamation was shared on 13 August 2019 with a number of experts for their comments.⁷ An expert seminar, Providing Expert Inputs to Ethiopia's Media Law Reform, was hosted in Addis Ababa from 15-17 August 2019 at which three draft laws – a Media Proclamation, a Freedom of Information Proclamation and a Computer Crime Proclamation – were discussed on successive days.

Working as an independent expert consultant,⁸ I prepared written comments on each of the three drafts. As part of my assessment of access to information, I conducted an informal RTI Rating assessment of the new Working Draft Freedom of Information Proclamation⁹ and it scored 107 points out of a possible total of 150, actually slightly below the (still current) 2008 Proclamation, which earns 111 points.

Revisions to the draft continued and, again as an independent expert,¹⁰ I prepared a second set of detailed written comments on the draft as it was in February 2020,¹¹ albeit without conducting

⁷ On file with the author.

⁸ I had been hired, at that time, by International Media Support, a media freedom and support organisation based in Denmark.

⁹ There is a rigorous procedure for approving assessments before they are posted on the RTI Rating which involves, among other things, review by a local legal expert whenever possible. This informal assessment, on the other hand, was just done by myself, without any external review.

¹⁰ This time on behalf of the World Bank.

¹¹ Draft on file with the author.

another RTI Rating assessment. For purposes of preparing this paper, I was provided with the latest version of the draft Freedom of Information Proclamation (current draft).¹² I conducted a second informal RTI Rating assessment of the current draft, this time generating a score of 116 points out of a possible 150, which would place the draft in an impressive 16th position from among the 128 national right to information laws currently assessed on the RTI Rating. The various results from the successive RTI Rating assessments of the 2008 Proclamation and then the two new draft right to information laws in Ethiopia is shown in Table 1.

Table 1: RTI Rating Scores of Successive Versions of the Ethiopian Freedom of Information Proclamation

| Section | Max | 2008 | Percent | 2019 | Percent | 2020 | Percent |
|------------------------------|-----|------|---------|------|---------|------|---------|
| 1. Right of Access | 6 | 4 | 67% | 4 | 67% | 4 | 67% |
| 2. Scope | 30 | 25 | 83% | 25 | 83% | 26 | 87% |
| 3. Requesting Procedures | 30 | 19 | 63% | 16 | 53% | 22 | 73% |
| 4. Exceptions and Refusals | 30 | 18 | 60% | 20 | 67% | 24 | 80% |
| 5. Appeals | 30 | 25 | 83% | 21 | 70% | 22 | 73% |
| 6. Sanctions and Protections | 8 | 6 | 75% | 7 | 88% | 6 | 75% |
| 7. Promotional Measures | 16 | 14 | 88% | 14 | 88% | 12 | 75% |
| Total score | 150 | 111 | 74% | 107 | 71% | 116 | 77% |

2. Strengths and Weaknesses of the 2008 Proclamation

It is important to recognise the strengths and weaknesses of the 2008 Proclamation in the area of the right to information for a few reasons. First, it would not only be a mistake to reinvent the wheel, as it were, if that law already has something right, but this could also lead to less protective rules being adopted, which would actually undermine this right. Second, while the public attitude towards that Proclamation, informed mainly by its media provisions, but also the failure of the government to make any effort to implement it, is not inappropriate, it is also important to set the historical record straight, at least inasmuch as this relates to the formal legal rules on the right to information in that Proclamation. Third, it is worth devoting some attention to trying to understand why, despite being a strong legal framework, implementation of the 2008

¹² Draft on file with the author. It should be noted that this was very much a working draft, for example, with cross-references between different articles not having been updated and other tidying up being needed (such as repetition in several places, sometimes inconsistent provisions and even somewhat rough translation at places). I take no responsibility for errors in this paper based on flaws, whether due to translation or a need for further refinement, in the draft upon which it is based.

Proclamation was almost entirely lacking. In particular, it is worth considering whether some adjustments need to be made to the legal framework for access to information to prevent this from happening again.

One of the features of the RTI Rating is that it breaks the scoring down into 61 very discrete indicators, most with a score range of 0-2, and all covering very precise features which should be reflected in a strong right to information law. For example, different indicators ask about whether the law covers all information and different types of public authorities, others look at what information you need to provide to lodge a request and how long the public authority has to respond, and so on. Another useful feature, however, is that the indicators are grouped into seven categories, such as Right of Access (the primary guarantees for the right), Scope (how broadly the law applies, to information, to requesters and to public authorities), Requesting Procedures (the procedures for lodging and processing requests) and so on. Looking at the scores by category tells you how well a law does in each of these separate areas.

Based on this, very generally we can see that the strongest area in the 2008 Proclamation is Promotional Measures, or the provisions in the law that provide support for implementation. This is followed by Scope, defined above, and Appeals, or the means available to contest adverse decisions on requests by public authorities. Normally, these are all quite important categories for successful implementation of a right to information law because they set out the main institutional structures for implementation.

However, Ethiopia's strong score in some of these categories may be a bit misleading. This is because, in the 2008 Proclamation, the oversight and promotional roles were allocated to the Ombudsman. These roles were added to the general mandate of the Ombudsman, which is to consider any form of "maladministration" committed by government.¹³ This earned Ethiopia a strong score in the area of Appeals, due to the independence and impressive complaints and oversight powers of the Ombudsman, as well as under Promotional Measures, given the broad mandate of the Ombudsman, including to raise public awareness, train officials and report on progress in implementing the law.

However, the experience of many countries demonstrates that allocating information oversight and promotion roles to a pre-existing body which already has a broad mandate, for example to address maladministration or human rights abuse, is rarely effective. The focus of such bodies is normally elsewhere (i.e. on their main areas of work) and, at least unless they are allocated additional funding for the information role and appoint staff with dedicated responsibilities for looking after it, it is likely to fail to be given serious attention. There are some counterexamples or

¹³ For example, the Proclamation to Provide for the Establishment of the Institution of the Ombudsman, Art. 22(1) gives anyone claiming to have "suffered from maladministration" the right to lodge a complaint with the Ombudsman. Proclamation No. 211/2000, Federal Negarit Gazette, Year 6, No. 41, 4 July 2000, Addis Ababa.

at least emerging counterexamples. For example, section 20(3) of the Kenyan Access to Information Act, 2016 calls on the (general ombudsman) oversight body, the Commission on Administrative Justice, to “designate one of the Commissioners as ‘Access to Information Commissioner’ with specific responsibility of performing the functions assigned to the Commission under this Act”.¹⁴ Stipulating a specific lead on access to information within a pre-existing body with more general responsibilities may avoid some of the problems other countries have experienced in this area.

However, this was not done in the case of Ethiopia. In addition, although it has started to address this more recently, the Ombudsman does not seem to have focused much at all on the right to information in the early years of the 2008 Proclamation, contributing to its essentially stillborn status.

Another very important institutional system for the right to information is the appointment of individuals, often referred to as information officers, at every public authority with dedicated responsibilities for ensuring that the public authority meets its right to information obligations, including by responding properly to requests for information. The 2008 Proclamation did provide for such appointments, although here, again, the approach was flawed. Article 2(18) of that Proclamation defined a “Public Relation Officer” as “a public relation officer or any other officer” with responsibilities regarding the right to information, which were then further defined in the law.

In practice, it seems that where public authorities bothered to implement this at all, and it is unclear how many did, most almost automatically allocated this role to the person or unit who was already responsible for public relations, i.e. the PR officer. This is another approach which the experience of other countries has taught us to avoid, once again for reasons which become fairly obvious if one considers the matter carefully. The main role of the public relations officer is to communicate with the public on behalf of the public authority and, in particular, to paint a positive picture of the work of the authority. This is fundamentally inconsistent with the role of an information officer, which is to provide information to the public, based on the law and its regime of exceptions, regardless of whether this presents the authority in a positive or negative or indeed neutral light. In other words, public relations officers focus on highlighting positive results and glossing over, spinning or even obscuring negative results, while information officers should be entirely blind as to the issue of positivity or negativity, focusing only on the exceptions as spelt out in the law (which should not be designed to protect the reputation or image of public authorities).

¹⁴ Act No. 31 of 2016, 7 September 2016, Nairobi.

Another problem with public relations officers is that they are primarily used to dealing with the media (i.e. journalists). As a result, giving them the information officer role reinforces the idea that the right to information law is for the media whereas, in fact, it is for everyone. If ordinary citizens see the right to information law as primarily being a media right, they are unlikely to make use of it themselves, thus cutting off a key ingredient of successful implementation of such laws, namely robust public demand for information. Demand is important since public authorities can hardly be expected to make a major effort to implement a law that no one seems to be interested in. This problem was exacerbated in Ethiopia due to the dual-purpose nature of the law as both a right to information and a media law, as well as the nature of the constitutional guarantee for this right, which also focuses on the media.

Ethiopia does less well in some of the other categories on the RTI Rating, specifically Requesting Procedures and Exceptions and Refusals, earning 63% and 60% respectively on them. Given the low rate of requests from the beginning in the country, it is unclear whether procedural weaknesses were ever part of the problem or citizens just never got around to making requests in the first place, but awkward procedures certainly represent a significant deterrent for requesters. And, inasmuch as the regime of exceptions defines the dividing line between what is accessible and what is not, it is clearly of the greatest importance. The key weaknesses in this area in the 2008 Proclamation are exceptions which are overbroad or not legitimate on their face, the lack of a harm test for some exceptions (i.e. so that it is where information merely relates to a protected interest – such as national security – that it becomes exempt, rather than only where the disclosure of the information would pose a risk of harm to that interest) and an excessively long overall period of secrecy – namely of 25 years – which even then only applies to some of the exceptions.

Despite these weaknesses and underlying explanations of why Ethiopia's relatively strong scores may not reflect a robust institutional structure for the right to information, the 2008 Proclamation does contain a number of positive features. It is beyond the scope of this paper to describe these in great detail but some noteworthy features include:

- The very broad application of the law to everyone (including legal entities), all information held in recorded form and most public authorities, including all three branches of government.
- A fairly robust system for providing assistance to requesters who need it, including by having the information officer reduce an oral request to writing in appropriate cases.
- The fact that the law overrides other laws to the extent of any inconsistency.
- The broad power of the Ombudsman both to order appropriate remedies for the requester and to order public authorities "to take such other action as is appropriate" to ensure that it respects the law.

- Broad protections for good faith disclosures both pursuant to the law and to expose wrongdoing (whistleblowers).
- Public awareness measures, including annual reporting on implementation of the law, to be undertaken by both the Ombudsman and individual public authorities.

3. General Comments on the Current Draft

As an initial point, it should be noted that the current draft goes some way to redress the structural weaknesses noted above vis-à-vis the 2008 Proclamation. Most importantly, it provides for the establishment of a dedicated, independent oversight body, the Commission for Freedom of Information. This is a major improvement which, if put into place properly, including by officials respecting the independence of the Commission and it being provided with sufficient funding to do its work, could by itself have a very significant impact on the right to information in Ethiopia.

The current draft includes detailed and apparently robust protections for the independence of this body.¹⁵ This includes an elaborate system for appointments with an independent committee making nominations, itself comprising representatives from a number of independent sectors and institutions, rules on the engagement of the public in the selection process and ultimate appointment by a vote of the federal House of Representatives. It also includes rules against individuals with strong political connections from being appointed, requirements of expertise on the part of members, fixed terms of office (of five years, subject to renewal but only once), and an again fairly elaborate procedure for removal of members on limited grounds, which needs to be initiated within the Commission itself and requires another vote of the House of Representatives.

Another important strength in the current draft is the broad mandate of the Commission. Overall, it is possible to divide the roles of these sorts of bodies into two areas, oversight (mainly deciding on complaints about failures by public authorities to respect the provisions of the law) and promotion. Virtually all such bodies have an oversight role, while practice is varied in terms of whether, and to what extent, these bodies also play a promotional role. To some extent the latter is more a function of funding (on which see below) than of the formal mandate. But it is important to have a broad mandate which can then be levered to obtain funding which is commensurate with it.

The current draft assigns a wide range of functions to the Commission. In terms of complaints, it not only decides them but its decisions are, in line with better and increasingly dominant practice

¹⁵ I say apparently because it requires very deep knowledge of the local political and social environment, which I do not have, to assess, in advance, whether or not these sorts of protections will work in practice.

in this area, legally binding.¹⁶ Beyond this, the roles of the Commission include, among others, generally monitoring implementation of the law, including proactive disclosure, making recommendations for the development or reform of the system, raising public awareness, providing training to information officers, and formulating laws or policies as relevant to advance the right to information.¹⁷ If adequate funding is provided to the Commission, armed with this broad mandate it could do an enormous amount to promote the right to information in Ethiopia.

Creating a new institution of this sort does, of course, cost money, which needs to be paid from the public purse. However, having an effective right to information system also saves money, both directly and indirectly, in a number of ways. These include exposing corruption, making better development decisions and engaging the wider public in the development process, thereby improving outcomes. While the cost-benefit analysis may not work out for very small countries, it is certainly worthwhile for a country as large as Ethiopia to create a dedicated right to information oversight institution.

At the same time, there are ways in which the oversight system could be further improved. According to Article 21(1) of the current draft, the Commission's budget will come from government allocations and project grants. Assuming the former will be the primary source of funding, especially for core activities, this approach lacks sufficient protection against government influence over the Commission, whether directly (i.e. through threatening to reduce funding unless the Commission complies with government wishes) or indirectly (i.e. by simply reducing the funding, thereby undermining the ability of the Commission to do its job properly, including in terms of overseeing the activities of public authorities). Better practice in this area is for parliament to approve the budget for the Commission, which can help insulate the process from political interference. Depending on the way financial arrangements work in Ethiopia, there may be a number of other ways of protecting the financial independence of the Commission.

Although, as noted above, the decisions of the Commission are binding, in some other respects the current draft is rather unclear as to its powers. Part of the problem here is that the draft provides very generally that the "powers, rights and duties related to freedom of information given to the Ombudsman" by the 2008 Proclamation are transferred to the Commission. It is not clear, from this formulation, to what extent powers found in the 2000 Ombudsman Proclamation, are also carried over. In addition, it is not clear how courts will deal with cases where the new proclamation refers to a power or duty in a general or vague or weak way and where the 2008 Proclamation also refers to it, albeit more robustly.

¹⁶ In accordance with Art. 36 (4), the decisions of the Commission shall be executed "in the same manner as a court's decision".

¹⁷ See Art. 8.

This has very practical implications. For example, Article 36(1)(a) of the current draft gives the Commission the power to order the production of information, while Article 33(1) of the 2008 Proclamation has arguably stronger language, indicating that “the Ombudsman may examine any record held by a public body”, albeit with some claw backs. The rule on reporting is even more clear. Article 32(2)(a) of the 2008 Proclamation calls on the Ombudsman to “prepare an annual report to the council of peoples representatives”. The current draft is silent on this issue. Presumably this obligation will continue to apply to the new Commission. But the very fact that this is not absolutely clear demonstrates that it is undoubtedly better practice to include all of the powers, rights and duties of the Commission in its own primary legislation.

A potentially more controversial issue is whether the Commission can order public authorities to undertake remedial measures to address structural problems they are facing in terms of implementing the law. As noted above, the Ombudsman currently has the power to order authorities “to take such other action as is appropriate” to ensure that they respect the law, which is what is needed. Potentially this power also carries over to the Commission. However, given that this involves issuing a binding order against a specific public authority, it is far more likely to be contested. It is not at all clear that a general rule on transfer of powers would suffice to carry over such a specific and remedial power such as this.

The current draft also addresses the issue of public relations officers by introducing new language – specifically the term “information officer” – and adding in a specific article on the appointment and role of these officers, namely Article 29. This provides, among other things, that these officers shall “possess the minimum qualifications and training relative to the responsibilities they are to shoulder”, “serve on a fulltime basis” and “be protected from pressures and reprisals by institutional hierarchies or chains-of-command”. In addition, Article 30(8) requires other officials to cooperate with the information officer. This is an impressive package of rules governing this very important position. Once again, if these rules are respected, that should do a lot to empower information officers to ensure compliance by the public authorities they work for with the right to information law.

The current draft scores its highest percentage on the RTI Rating in the category of Scope, due to its broad coverage. However, the draft also reflects some confusion when it comes to the issue of private bodies.¹⁸ Better practice laws assimilate certain private bodies to public authorities, normally by defining the latter so as to include the former. In particular, it is better practice to treat private bodies which undertake public functions or which operate with public funding as though they were public authorities, at least to the extent of that funding or those functions. For

¹⁸ This costs it only one point on the RTI Rating but it is important to clarify this issue to avoid confusion when the law is being applied.

example, section 2(7) of the Nigerian Freedom of Information Act, 2011,¹⁹ defines public authorities as follows:

Public institutions are all authorities whether executive, legislative or judicial agencies, ministries, and extra-ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, and also, *private companies utilizing public funds, providing public services or performing public functions*. [emphasis added]

South Africa also partially follows this approach. However, South Africa cut important new ground in this area by also including all private bodies under the right to information law, but only where the information being requested from them was required for the exercise or protection of a right. This is set out directly in the Constitution of South Africa,²⁰ in section 32(1), as follows:

- (1) Everyone has the right of access to-
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.

This rule is given practical effect through section 50(1) of the South African Promotion of Access to Information Act, 2000.²¹

The current draft of the Ethiopian right to information law mixes up these two concepts of the coverage of private bodies, leading to inconsistent and unclear rules in this area. This is even reflected in the definitions, with Article 2(1) defining a “private body” as:

[A]ny private entity that performs public function and has substantial financial ties with any level or branch of the government including bodies which are obliged by authorized bodies to provide access to information or document which is necessary for the exercise or protection of any right.

Article 24(1) then provides for access to information held by a private body where this is “required for the exercise or protection of any rights”. As a result, the definition of private bodies is limited from the beginning and then the scope of access to information from them is also subject to conditions. Only one of these should apply at the same time.

¹⁹ 28 May 2011 (<https://www.cbn.gov.ng/FOI/Freedom%20Of%20Information%20Act.pdf>).

²⁰ Constitution of the Republic of South Africa, Act 108 of 1996.

²¹ Act No. 2 of 2000, 3 February 2000 (<https://www.justice.gov.za/legislation/acts/2000-002.pdf>).

In practice, few countries have followed the South African approach and it has proven to be difficult to apply even in South Africa. A better approach for Ethiopia, therefore, may be to stick with the more traditional approach, and simply assimilate private bodies which undertake public functions or which operate with public funding to public authorities (and impose the same obligations on them).

Although the current draft does adequately in terms of Requesting Procedures, this is one of its worst performing categories, despite the fact that this is generally an area where it is relatively easier to earn points. Mostly, the weak score is based on minor shortcomings in the draft rather than more serious problems. All of the indicators in this category are out of two points, and the draft only scores zero points on one, Indicator 22, on time limits for responding to requests. Under this Indicator, two points are earned for time limits of ten working days or less, one point for twenty working days or less and no points for longer time limits. Article 31(1) requires requests to be responded to “as expeditiously as possible”, earning two points on Indicator 21 (about responding as soon as possible), but then goes on to set the default maximum initial time limit at 30 working days, thereby earning no points on Indicator 22. A point is also lost on Indicator 23, covering extensions to the time limit, because the grounds for this are too broad – including cases where the public authority is “congested” by similar requests – although the extension is capped at 20 working days, which is appropriate. The appropriate response, when an office is getting a lot of requests for the same information, is to release that information proactively.

In terms of exceptions, the current draft does very well, earning 24 out of 30 points or 80% on the RTI Rating, its strongest category other than Scope. This is also unusual, since laws tend to do less well in this category. A strong point here is the fact that the law overrides other laws to the extent of any inconsistency. Importantly, the ability of the heads of public authorities to issue secrecy certificates for information relating to national security or international relations, which make it impossible for either the Commission or courts to review whether the information really is sensitive, found in earlier drafts, has now been removed. There is also a strong and comprehensive public interest override, in line with better practice, so that even where the disclosure of information would pose a risk of harm to a protected interest, it shall still be released where this is in the overall public interest (for example because the information exposes corruption or human rights abuse). At the same time, there are still four exceptions which are worded in an overbroad manner, and several of the specific types of information listed under national security are not harm-tested. The overall time limit for exceptions has been maintained at 25 years, which is unduly long. There is provision for ministers to extend this by another ten years for information deemed to be sensitive on national security or international relations grounds. This is legitimate, given that such information does, very occasionally, remain sensitive beyond the initial period. But this facility also voids any need for such a long (25-year) initial overall time limit.

4. Specific Comments on the Current Draft

There are a number of small ways in which the current draft could be further improved. The more important of these are described in this part of the paper. These issues are less important than the ones discussed above, but still not unimportant if Ethiopia wishes to have a truly leading right to information law, as well as to improve further its position on the RTI Rating.

The Preamble and Article 5 of the current draft set out certain objectives for the law. These include, among others, many of the wider benefits that the right to information brings to society, such as government accountability, greater public participation in decision-making, reducing corruption and generally promoting good governance. It is useful to include another provision calling on those tasked with interpreting the law to do so in the manner that best gives effect to these benefits. This can provide invaluable guidance to information officers, the oversight body and the courts when trying to decide, for example, exactly what exceptions mean or whether the public interest override is engaged. The current draft lacks any such reference to using the benefits of the right to information as a basis for interpretation.

Article 2(9) defines a public authority as any body which is established under a constitution or law and “which forms part of any level or branch of the federal or regional state”. This may simply be a translation issue but it would be preferable to replace “which” in the quoted part above with “or”, so that the definition would cover any body which was established by law and also any body which was part of any level or branch of government. It is possible to have bodies which form part of government but which are not established by law; these would not be included by the current formulation.

Article 48(2) provides that a request may be rejected for being too general or imprecise, “even though the Public Relations Officer has provided him with assistance to this end”. While this largely serves the purpose, it would be better to set out a positive requirement for information officers to assist requesters to frame their requests clearly where this was needed. This could be important, for example, to avoid a situation where a requester declined to lodge a request in the first place because he or she felt it was not sufficiently clear.

Article 30(3)(e) provides for requesters to be given a receipt upon lodging a request, but fails to set out any time limit for this. In contrast, Article 30(2) requires the information officer to provide a receipt within five days where he or she reduces an oral request to writing. The same time limit should apply to receipts for all requests.

The current draft has rather complex and even contradictory rules on fees. Article 34(3) limits fees to the cost of “researching, collecting and duplicating the record” but Article 34(7)(b) provides that no fee may be charged for “time spent by an information holder searching for the

information”. Better practice is to allow for fees to be charged only for reproduction (i.e. photocopying) and sending (i.e. posting) information, and not to charge for time spent by officials, given that this is a human right.

Article 23(1), the primary one setting out the right to make requests for information, provides that requesters have the right to “seek, obtain, re-use, and communicate” the information they obtain. This is useful but it does not constitute a proper system for empowering open re-use of information. This normally requires public authorities to attach a somewhat detailed reuse licence to the records they disclose, setting out the conditions of reuse, such as that credit must be given and that reuse may include translation, alteration and commercial uses. It would be useful either to add a more developed system for reuse into the right to information law or to develop a separate (more detailed) regime for this.

A couple of issues relating to Promotional Measures in the current draft are either not entirely clear or do not represent best practice. According to Article 25(1)(a), public authorities are required to maintain their records in “an orderly and easily accessible manner”. Furthermore, according to Article 25(2), the Commission shall “issue and from time to time update a Code of Practice relating to the custody, management and disposal of records”. Better practice in this area is to make it clear that public authorities are required to comply with any code issued by the Commission and to require the Commission to provide them with the necessary training to be able to do so.

Articles 8(8) and (9) empower the Commission to provide training to information officers, but also make it clear that participation in such training is based on consent. That is appropriate but the law should also impose a direct obligation on public authorities to ensure that their staff are appropriately trained on the right to information. They do not have to get that training from the Commission, but they do need to get it somewhere.

Conclusion

Many observers would probably be surprised to hear that Ethiopia actually has a fairly long and proud history in terms of legal guarantees regarding the right to information. This includes the 2008 Proclamation which currently puts Ethiopia in 24th position from among the 128 countries currently assessed on the RTI Rating or in the top 20%. That is a very respectable position indeed. However, the right to information regime established by the 2008 Proclamation was never realised in practice, leaving most Ethiopians with the impression that they do not even have a right to information law. That is unfortunate given the importance of the right to information both as a human right, under international law and also the Ethiopian Constitution, and for sustainable development.

This is set to change now, with ongoing efforts to develop strong right to information legislation for the country. If decision-makers start from the position of the 2008 Proclamation, both improving its provisions and learning from the weaknesses contained within it, Ethiopia should end up with very strong at least legal guarantees for this right.

One of the Achilles Heels of the 2008 Proclamation was its failure to create a dedicated oversight body for the right to information, instead allocating that role to the Ombudsman. Successive drafts of the new legislation propose to create a new Commission on Freedom of Information. Importantly, the current draft both provides for robust protections for the independence of this body and gives it a broad and powerful mandate. If that is maintained, and adequate funding is ultimately allocated to the Commission, that will do a lot to support realisation of the right to information in Ethiopia.

There are a number of other ways in which the current draft would provide for a strong right to information system. These include good provisions on information officers, a tight regime of exceptions and a broad scope. At the same time, there are also a number of ways in which the current draft could be improved, both structurally and in its details, as outlined above.

The right to information is an important right in many ways. These include its role in underpinning democracy and the realisation of other human rights, in fostering public participation, including in development efforts, leading to strong ownership which is very important to sustainable development, in promoting government accountability and in curbing corruption. Ethiopia would be well served by adopting a strong right to information law, followed by serious efforts to implement that law in the manner in which it was intended. Let us hope that both of these results come to pass.

Defining ‘Hate Speech’ under the Hate Speech Suppression Proclamation in Ethiopia: A Sisyphean Exercise?

Yohannes Eneyew Ayalew*

Abstract

In February 2020, the Ethiopian parliament passed a law, the Hate Speech and Disinformation Prevention and Suppression Proclamation, aimed at countering hate speech and defines ‘hate speech’ as any speech that deliberately promotes hatred, discrimination or attack against a person or group—based on protected status. However, this definition is still vague since it fails to define the term ‘hatred’, which is one of the major ingredients of hate speech. The article examines how this vagueness might in practice enable law enforcement officials to act arbitrarily in investigating and indicting for hate speech. This impinges on the principle of legality requirement as recognized under Ethiopian laws and international human rights law. There are deep social fissures in contemporary Ethiopian society in addition to the absence of shared historical memory and disagreements regarding the narratives on state building. All these are becoming a debacle for the hate speech legislative intervention. As such, defining hate speech without working on national reconciliation, and dialogue would be a meaningless legislative exercise. The article argues that in Ethiopia—where judicial review is not clearly provided for in the Constitution and courts are invariably oblivious to international human rights standards—passing a law that defines hate speech in this way would shackle freedom of expression and chill journalistic activities. The article suggests that defining hate speech remains to be an elusive exercise since any definition of hate speech should use specific examples and contexts and interrogates the definition of ‘hate speech’ under the law and its compatibility with the country’s legal reform measures.

Introduction

Ethiopia has been undertaking a massive legal reform initiative since April 2018. As part of this initiative, the Legal and Justice Affairs Advisory Council (LJAAC) has been established.¹

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¹ Abadir M. Ibrahim and Abduletif Kedir Idris, ‘The Silent Fighters: The Volunteers behind Ethiopia’s Democratic Reforms,’ *Addis Standard* (Addis Ababa, 27 February 2020) <<http://addisstandard.com/profile-the-silent-fighters-the-volunteers-behind-ethiopias-democratic-reforms/>> accessed 21 April 2020.

The Council seeks to reform draconian laws —such as the Anti-Terrorism Proclamation, the Charities and Societies Proclamation and the Mass Media Proclamation — but it expanded to other areas of law that could contribute to national democratisation and human rights promotion.²

In the midst of these reforms, the Ethiopian parliament passed a Proclamation aimed at countering hate speech in February 2020.³ This law defines the term ‘hate speech’ as ‘any speech that deliberately promotes hatred, discrimination or attack against a person or a discernible group of identity, based on ethnicity, religion, race, gender or disability.’⁴ However, this definition is vague and susceptible to subjectivity because the law fails to define the term ‘hatred’, which is one of the major ingredients of hate speech. The over-broad formulation of the definition of hate speech under the Proclamation is deeply concerning. Unlike other draft pieces of legislation which were processed through the Advisory Council, this proclamation was developed outside that process. The UN Special Rapporteur on freedom of expression cautioned that the Proclamation ‘goes far beyond the command of article 20(2) and the limitations’ required by article 19(3) of the International Convention on Civil and Political Rights (ICCPR).⁵ Preventing hate speech is a complex endeavour, which requires a thorough understanding of the local context, proficiency in local languages, and knowledge of social and cultural traditions.⁶ Similarly, Human Rights Watch advised that Ethiopian lawmakers should have significantly revised the draft law on hate speech because it could significantly fetter the freedom of expression.⁷

Besides concerns related to the definition of hate speech, the law proscribes ‘disseminating’⁸ hate speech, a nebulous term unknown in international human rights law. The Proclamation introduced the ‘heckler’s veto’ doctrine in the preamble when the alleged speech became hateful, the law will stifle and suppress the speaker.⁹ In Ethiopia, where ethnicity is the

² Abadir (n 1).

³ Aljazeera, ‘Ethiopia passes controversial law curbing hate speech,’ 13 February 2020 <<https://www.aljazeera.com/news/2020/02/ethiopia-passes-controversial-law-curbing-hate-speech-200213132808083.html>> accessed 23 April 2020.

⁴ Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185 /2020, Federal Negarit Gazette No. 26th Year, Addis Ababa, March 23rd 2020, art 2(2).

⁵ United Nations Special Rapporteur on the right to freedom of opinion and expression, David Kaye, Visit to Ethiopia, 2-9 December 2019, End of Mission Statement<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=Ebe&fbclid=IwAR1Q60F7tJX5vuEoNWXcETJ0TVjU28E6yUqWG7TGr_GAOq5OW6pm3XG1wNQ>accessed 23 April 2020.

⁶ UN Special Rapporteur (n 5).

⁷ Human Rights Watch, ‘Ethiopia: Bill Threatens Free Expression. Revise Draft Law on Hate Speech, Disinformation’ <<https://www.hrw.org/news/2019/12/19/ethiopia-bill-threatens-free-expression>> accessed 23 April 2020.

⁸ Proclamation (n 4) art 2(7).

⁹ Ibid, Preamble Para 1 “it has become necessary to prevent and suppress by law the deliberate dissemination of hate speech and disinformation”.

defining political ideology and basis of political organisation,¹⁰ this ‘heckler’s veto’ could be deployed to stand up with those harmed ethnic groups.

Various representatives of civil society organisations repeatedly shared their concerns that it is not hate speech alone that could result in harming individuals and undermine the reform process.¹¹ Hate speech is a widely condemned problem in Ethiopia, but it is also a symptom of politics—a tool used to mobilise supporters in a country whose organisational structures are based on ethnic identity.¹² As such, no law alone can address the potential of hatred to be used to rally one’s supporters. Ethnic parties seek garner support from their constituencies by invoking offensive and hateful statements against other ethnic groups. Hence, hate speech is becoming a political weapon for mass mobilisation, and ideology framing. In a democratic society, what is needed is not necessarily more law but more speech¹³ i.e., more professional sources of verifiable information — and a broad and deep national dialogue aimed at creating an agreed process for addressing grievances and building democratic institutions.¹⁴

Affirmatively, the Proclamation introduced a provision on content moderation and social media responsibility, which makes Ethiopia one amongst few sub-Saharan African countries which have such a modern law. The law obliges social media companies to remove or moderate contents within 24 hours.¹⁵ Yet, in Ethiopia where media literacy is at an infant stage, the idea of content moderation is unknown *per se*. The other problem lies in the practice of social media networks moderating and defining hate speech. Social media networks such as Facebook do not understand the nuance of some terms appearing in their platforms, and encounter difficulty in moderating content as it requires understanding the local dialects. Given the absence of judicial review and courts’ reluctance to apply

¹⁰ See Mesenbet Assefa Tadeg, ‘Making Space for Non-Liberal Constitutionalism in Free Speech: Lessons from a Comparative Study of the State of Free Speech in Ethiopia and Thailand,’ (2019) 30 Journal of Ethiopian Law 12

¹¹ Center for Advancement of Rights and Democracy in Ethiopia (CARD) co-hosted panel discussion on Freedom of Expression, Hate speech and Election in partnership with Ameha Mekonnen and Associates Law Office (AMLO) and Network of Digital Rights in Ethiopia (NDRE) on the 29th of February 2020 at Intercontinental Addis Hotel. <<https://www.cardeth.org/card-co-hosted-panel-discussion-on-freedom-of-expression-hate-speech-and-election/>> accessed 28 June 2020. See also Network of Digital Rights in Ethiopia (NDRE) workshop on ‘Concerns raising with Ethiopia’s Draft Hate Speech Law” where the author presented a working paper, held at Hotel Lobelia on December 28, 2019.

¹² UN Special Rapporteur (n 5).

¹³ See the case of *Whitney v. California*, the US Supreme Court, 274 U.S. 357, 372 May 16, 1927, the concurring opinion of Justice Brandeis, finds that hate speech and fake news can be deterred through more speech, ‘If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.’ <<https://globalfreedomofexpression.columbia.edu/cases/whitney-v-california-brandeis-j-concurring/>> accessed 25 April 2020.

¹⁴ UN Special Rapporteur (n 5).

¹⁵ Proclamation (n 4) art 8(2).

international human rights instruments, this article argues that legislating a Proclamation and defining hate speech broadly would muzzle the right to freedom of expression.

The remainder of this article is organised into four parts. The first part sketches practical conundrums regarding hate speech in Ethiopia. In practice, there is a deep social fissure, absence of historical consensus and disagreement on state building. For example, a symbol of heroism for one ethnic group could be a villain for another group. All these are becoming a debacle for the hate speech legislative intervention. Thus, defining hate speech without working on national reconciliation, dialogue and building common destiny may be a futile legislative exercise. Part two critically examines the definition of hate speech under the Proclamation. It investigates the various definitions of hate speech presented during the drafting stage and the one approved by parliament. Some conceptual thoughts on hate speech, and various attempts to define hate speech law will be discussed under part three. Specifically, international law efforts and steps from online platforms are discussed. Also, the major elements that constitute hate speech crime are also explained. The last part offers some recommendations.

1. Hate Speech Conundrums in Ethiopia

Ethiopia is dubbed as the 'museum of peoples' because of being the home of more than eighty nations, and nationalities. Since 1991, the country has been organised as a federation on the basis of ethnicity. The federal form of arrangement favours Ethiopian people for self-government but others claims that the tribal-archetype of the federation is an original sin¹⁶ for the country's pandemonium, including the sprouting of divisive hate speeches. In this regard, Minasse Haile aptly articulated that 'the leaders of the Tigray People's Liberation Front (TPLF) (framers of the Constitution) applied the Soviet model of federation—based on ethnic self-determination to the nine tribal homelands they created.'¹⁷ This would give rise to the over politicisation of ethnicity where ethnic groups tend to claim exclusive ownership of resources, privileges and entitlements in their respective regions.¹⁸ This ethnic cleavage has been intensified and fuelled by hate speech through creating 'us' and 'them' narratives, resulting in social fissure and resentment in the country. As a result, people have been labelled, perceived, and treated as 'settlers' by native ethnic groups and displaced.

¹⁶ See Yonatan Tesfaye Fessha, 'The Original Sin of Ethiopian Federalism' (2017) 16 *Ethnopolitics* 232-245

¹⁷ Minasse Haile, 'Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the Republic's - *Cucullus Non Facit Monachum*,' (2005) 13 *Cardozo Journal of International and Comparative Law* 1-60, 11

¹⁸ See Revised Benishangul Gumuz Regional State Constitution, adopted in November 2020, art 2 stipulates "Gumuz, Berta, Shenasha, Mao and Komo" are the 'native peoples' of the region. So, the rest are perceived as 'Settlers'. Harari Regional Constitution, adopted 10 October 2005, Art 8 made the 'Harari people' the sole owners of the region.

The 1995 Constitution of Ethiopia is founded on the recognition of ethnicity favouring group rights over individual rights. For instance, the Constitution places the Nations, Nationalities and Peoples as the ultimate sovereign power holders, and guardians of the country.¹⁹ Besides, the Constitution aims at “rectifying historically unjust relationships,”²⁰ which presupposes the existence of an ethnic group perceived as ‘oppressor’ or ‘exploiter’ of other ethnic groups throughout Ethiopian history. Arguably, the Constitution has institutionalised ethnicity that created tribal homelands, which in turn fuels hate speech. The UN Independent Expert on Minority Issues, Gay McDougall, articulated the situations as:

Self-determination is provided for in the creation of nine ethnically-based regional states of the federation, with the right to draft regional constitutions, to promulgate laws, to establish and administer government functions and to secede. Ethnically-based federalism has served, however, to politicise ethnicity as the most salient individual and group marker, leading to new arenas, dynamics and dimensions of ethnic division, discrimination and exclusion.²¹

Hate speech is rooted in modern Ethiopian history. For instance, racism and slavery were practised in Ethiopia.²² There were pejorative expressions for ‘slaves’ in Ethiopia. Teshale Tibebu asserted that in Ethiopian history there was a derogatory expression for darker skinned Ethiopians called ‘Barya’ to connote at least two things: first ‘slave’, and a phenotypical designation (a very dark skin, kinky hair, flat noses, thick lips).²³ The public perception of the term ‘Barya’ expressed in images and metaphors referring to disease, sexuality, skin colour, hair, virginity, behaviour and manners.²⁴ All these remarks in one way or another demoralise darker skinned individuals and are a clear manifestation of hate speech. In her final report to the UN Human Rights Council,²⁵ the UN Independent Expert found that:

Certain ethnic groups are more commonly subjected to discrimination and exclusion, both on the interpersonal and institutional levels, based on skin colour and other physical features. Reportedly, derogatory terms such as “slave”, are commonly used in reference to certain

¹⁹ Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazette, 21 August 1995, 1st Year No.1 Addis Ababa, art 8.

²⁰ Constitution (n 19) preamble para 5.

²¹ UN Human Rights Council, ‘UN Human Rights Council: Addendum to the Report of the Independent Expert on Minority Issues, Gay McDougall, Mission to Ethiopia’ (28 November-12 December 2006), (28 February 2007, A/HRC/4/9/Add.3) 2.

²² Teshale Tibebu, *The Making of Modern Ethiopia: 1896-1974* (The Red Sea Press, 1995) 58

²³ Teshale (n 22) 58.

²⁴ Teshale (n 22) 58.

²⁵ UN Independent Expert (n 21) para 63.

ethnic groups, alluding to their historic dominance by other groups, and patterns of exploitation during the slave trade. Such overt discrimination may be the case, even in regions where those targeted for abuse are numerically in the majority and have the constitutional right to political power in regional government, such as is the case in Gambella.

In Ethiopia, there has been a growing conflict and violence unfolding in the country due to ethnic rivalry and religious tensions since April 2018. This is partly exacerbated by hate speech and inflammatory speeches.²⁶ The Attorney General of Ethiopia justified the need for a law on hate speech in the country as there is a strong case to ease hatred which was a cause for ethnic-led displacement and violence in different parts of the country. However, rights groups opposed the Proclamation as it may bring an unintended collateral damage on civic space and potential threat to the right to freedom of expression.

Both in online and offline conversations, there are so many forms of hate speech.²⁷ Recently, the Center for Advancement of Rights and Democracy in Ethiopia (CARD) started an initiative to easily identify hate speech terms called 'hate speech lexicology'.²⁸ The aim of this initiative is to inform and guide social media companies to moderate hateful contents. The preliminary findings reveal that there are cornucopia political, ethnic and derogatory terminologies in social media conversations in Ethiopia. For example: '*Sefari*' or '*Mettie*' refer to 'settlers' and 'newcomers' in other regions; while '*Ye Ken Jib*' denote to corrupt leaders in connection with TPLF and other dishonest individuals. Also, there are derogatory expressions in the form of ethnic epithets such as '*Neftegna*' to denote 'the Amhara people', '*Galla*' to refer 'the Oromo people', '*Tsila*' to refer 'Tigrian people'—and '*Wolamo*' for 'Wolaita people'.²⁹ The use of one or more of these inflammatory expressions would give rise to anger, and at times exclusion, internal displacement and discrimination. These hate speeches and coded 'dog whistle' terms were used in recent ethnic and religious based attacks in Ethiopia.³⁰ For instance, in the wake of the killing of singer *Hachalu Hundessa*,

²⁶ See Abiy Ahmed Ali, *Nobel Lecture: Nobel Peace Prize 2019*, 11 December 2019, Prime Minister Abiy remarked that 'The evangelists of hate and division are wreaking havoc in our society using social media.' <<https://www.youtube.com/watch?v=jESA8MLAuCw>> accessed 7 October 2020.

²⁷ Elias Meseret, 'Hate speech and disinformation concerns escalate in Ethiopia' Devex (6 May 2020) <https://www.devex.com/news/hate-speech-and-disinformation-concerns-escalate-in-ethiopia-97095?fbclid=IwAR1ZUqpjSMQD6z_cFh0kCjXcGF9AWAfl3CPR7S6mBUDgbGEJbD62SaUqbnY> accessed 25 June 2020.

²⁸ See Center for Advancement of Rights and Democracy (CARD) <<https://www.cardeth.org/>> accessed 25 June 2020.

²⁹ Iginio Gagliardone and *et al*, 'Mechachal: Online Debates and Election in Ethiopia: From Hate Speech to Engagement in Social Media' (University of Oxford and Addis Ababa University, 2016) 40

³⁰ See Minority Rights Group International (MRG), *Recent violence in Ethiopia's Oromia region shows hallmark signs of ethnic cleansing*, 22 July 2020 <<https://minorityrights.org/2020/07/22/ethnic-cleansing-romia/>> accessed 7 October 2020. MRG says 'media outlets were actively propagating the attacks live and giving guidance to the attackers. It urges both broadcasting media and social media platforms including Facebook and Twitter to be on the

individuals tagged as '*Sefari*', '*Neo-Neftegna*', and '*Neftegna*' were subject to violent attacks in the Oromia region of Ethiopia, and a similar violence was happened in Benishangul Gumuz region for those residents labelled as '*Keyi*' (coloured people).³¹

To tackle hate speech, the legislative intervention may be one solution. However, in Ethiopia where judicial review is absent, having such kind of law would be a counterproductive legislative intervention. Ethiopian courts do not have judicial review power.³² As per the Constitution when any Federal or State law is contested as being unconstitutional, it is the political body, i.e., the House of Federation that finally interprets the Constitution.³³ So, challenging some of the vaguely formulated provisions of the Proclamation before courts would be impossible.

As the UN Special Rapporteur on freedom of expression, noted in his Ethiopia's mission final report; 'hate speech suppression law alone cannot solve all the problems. What is needed is not necessarily more law, but vibrant and robust debate, efforts to combat the root causes of tensions, and a broad and deep national dialogue to address grievances—and build strong democratic institutions that can adequately and effectively respond to criminal acts.'³⁴ Along the same vein, Yared Legesse argues that robust speech protection is decisive in deeply divided societies —such as Ethiopia, and this can be achieved through enabling the people to actively explore commonalities through assembly and speech.³⁵ He further emphasised that it is only through dialogue and coming together that deeply divided societies can discover common interests that can transcend ethno-linguistic and other cleavages.³⁶

National dialogue that embraces political, faith-based and religious and community leaders from different ethnic groups across the country may well address outstanding differences,

alert for hate speech against minorities in Ethiopia and quickly take down harmful content that encourages inter-ethnic hatred and violence.'

³¹ David Gilbert, 'Hate Speech on Facebook is Pushing Ethiopia Dangerously Close to a Genocide' *Vice Media Group* (15 September 2020) <<https://www.vice.com/en/article/xg897a/hate-speech-onfacebook-is-pushing-ethiopia-dangerously-close-to-a-genocide>> 7 October 2020.

³² Minasse Haile, 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development,' (1996) 20 *Suffolk Transnational Law Review* 20, 1-84, 54

³³ Constitution (n 19) art 84 (2).

³⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Ethiopia, David Kaye, A/HRC/44/49/Add.1, 29 April 2020, Human Rights Council Forty-fourth session, 15 June-3 July 2020, para 55.

³⁵ Yared Legesse Mengistu, 'Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws,' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech* (Cambridge University Press 2012) 362

³⁶ Yared (n 35).

narratives and interests.³⁷ This could be further bolstered through National Reconciliation as espoused in the National Reconciliation Commission Proclamation.³⁸

2. The Definition of Hate Speech under the Hate Speech Suppression Proclamation 1185/2020

As the Deputy Attorney General explained at the parliamentary discussion, the aim of the law is to punish those perpetrators who make dangerous statements. In the past few years, 'we have learned tragic violence, ethnic and religious based attacks, deaths, and civilian displacements in different parts of the country, triggered and exacerbated by hateful speech.'³⁹ Thus, the aim of the law is to quell all these odds and to ensure rule of law and also underscored that the government is guided by good faith and will strive to promote freedom of expression.

There was a fragmentation of laws governing hate speech in Ethiopia⁴⁰ until the Hate Speech Suppression Proclamation was adopted. For example, the Criminal Code includes a provision countering hate speech under article 486(b) which provides that anyone who 'by whatever accusation or any other means foments dissension, arouses hatred, or stirs up acts of violence or political, racial or religious disturbances' is guilty of a crime. This provision has now been repealed by the Proclamation.⁴¹ Besides, the Criminal Code punishes blasphemous speeches under petty offenses.⁴² In the jurisprudence of Ethiopian courts pertaining to hate speech, prosecutors overlooked the application of article 486 in two notable cases, instead invoking other substantive criminal provisions. *Federal Prosecutor v.*

³⁷ Abdulnasir Bereket Adem, 'Depolarizing the discourse' *Ethiopia Insight* (June 16, 2020) <<https://www.ethiopia-insight.com/2020/06/16/depolarizing-the-discourse/>> accessed 25 June 2020.

³⁸ Reconciliation Commission Establishment Proclamation No.1102/2018, Federal Negarit Gazette, 25thYear No. 27Addis Ababa 5th February 2019), art 6(10). The Reconciliation Commission, *inter alia*, shall have the power to 'make Reconciliation among peoples to narrow the difference created and to create consensus.'

³⁹ Yohannes Eneyew 'Muting sectarianism or muzzling speech?' *Ethiopia Insight* (31 January 2020) <<https://www.ethiopia-insight.com/2020/01/31/muting-sectarianism-or-muzzling-speech/>> accessed 23 April 2020.

⁴⁰ Yared (n 35) 363.

⁴¹ Proclamation (n 4) art 9.

⁴² *Criminal Code* [Ethiopia], Proclamation No. 414/2004, 9 May 2005, art 816 'Whoever, apart from the cases punishable under the Criminal Code (Arts 492 and 493), in a public place or in a place open to the public or that can be viewed by the public, by gestures or words scoffs at religion or expresses himself in a manner which is blasphemous, scandalous or grossly offensive to the feelings or convictions of others or towards the Divine Being or the religious symbols, rites or religious personages, is punishable with fine or arrest not exceeding one month.'

*Hailu Shawel et al.*⁴³ and *Prosecutor v. Elias Gebru Godana*.⁴⁴ In the former case the Prosecutor charged the accused, Bedru Adem, a politician, for incitement of genocide for a speech made during an election campaign. While the latter case shows the prosecutors indicted Elias who was an editor of *Enqu* magazine for provocation to commit a crime against the constitutional order in violation of Art 257 (e) of FDRE Criminal Code.⁴⁵

The Broadcasting Proclamation forbids any broadcasting programs intended for transmission that cause dissension among nationalities or instigate dissension among peoples; or incite war.⁴⁶ Although it does not specifically prohibit hate speech, the Federal Constitution requires the legal prohibition of propaganda for war as well as the public expression of opinion intended to injure human dignity.⁴⁷

When we delve into the contents of the Hate Speech Proclamation, it has a restrictive preamble. The first paragraph reads: 'to prevent and suppress by law the deliberate dissemination of hate speech.'⁴⁸ This law is generally targeting speech be it offensive or hateful, thus there should be maximum safeguards and restraints. This might be done through enacting a human rights friendly preamble. Apparently, the law seeks to police speech using the law, rather than through more speech. Indeed, there is no 'heckler's veto'

⁴³ See *Federal Prosecutor v Hailu Shawel et al*, Federal High Court, Criminal Case Number 43246/99 (September 2007) the indictment for the crime of incitement to genocide related to speech made by the leaders and members of the CUD during the election campaigns in 2005. The evidence presented in the Federal High Court particularly focused on a speech made by Bedru Adem, one of the prominent leaders of CUD, in Assela town, located in the regional State of Oromiya. In his speech addressed to a large audience he made the following speech, 'the power of the Federal Government is totally in the hands of Tigrayans and the EPRDF; and thus, they should be shoved back to their former turf by the united power of the people'. The Federal High Court ruled that this was merely "hate speech," and was not intended to destroy the target group in part or in whole.

⁴⁴ *Prosecutor v Elias Gebru Godana*, Federal High Court, File No 552/06 (2014). The details of his charge indicate that he was accused of attempting to destroy the unity of the people of Ethiopia by trying to instil hatred and conflict in the public in violation of the Criminal Code. The specific charges related to an article written in *Enqu* magazine on its March 2012 issue. In the article titled "Whose and to whom are the statutes built and being built?" he asks readers' questions including, "the Oromo people came to Ethiopia in the 16th Century, should we remind them that they are our new neighbours? Whose country are they going to secede from? They should remember the contract and obligation they entered with Emperor Gelawdiwos".

⁴⁵ Criminal Code (n 42) art 257(e) : Whoever, with the object of committing or supporting any of the acts provided under Arts 238-242, 246-252: (e) launches or disseminates, systematically and with premeditation, by word of mouth, images or writings, inaccurate, hateful or subversive information or insinuations calculated to demoralize the public and to undermine its confidence or its will to resist, is punishable with simple imprisonment, or where the foreseeable consequences of his activities are particularly grave, with rigorous imprisonment not exceeding ten years.

⁴⁶ Broadcasting Service Proclamation, Proclamation No. 533/2007 of 2007, Federal Negarit Gazette 23 July 2003, Art 30(4) (d-e)

⁴⁷ Constitution (n 19), art 29(6).

⁴⁸ Proclamation (n 4), Preamble para 1.

under international human rights law,⁴⁹ which would mandate the stifling of speakers when those who are offended choose to show their displeasure through harmful acts.⁵⁰ In other words, international human rights law prohibits the application of heckler's veto doctrine. However, the Proclamation introduces the 'heckler's veto' doctrine in the preamble that when the alleged speech becomes hateful or offensive, the law will stifle/suppress the speaker.⁵¹ In the Ethiopian context where ethnicity is a defining political ideology and party organisation, heckler's veto could easily be applied to stand up with those offended/harmed ethnic groups.

The Proclamation defines hate speech as a 'speech that deliberately promotes hatred, discrimination or attack against a person or a discernible group of identity, based on ethnicity, religion, race, gender or disability.'⁵² This definition is somehow nebulous, and overbroad and potentially incompatible with international human rights law. As much as possible, laws should be clear, precise and unambiguous in their formulations. Freedom of expression may only be limited by laws which are clear and precise.⁵³ In other words, the legality requirement obliges states to enact laws in a clear and certain manner.⁵⁴ The law at the drafting stage did not define what constituted 'hatred', 'discrimination' or 'attack.' The approved version addresses this by defining 'discrimination'⁵⁵ and 'attack/violence',⁵⁶ but fails to define the term 'hatred'. In this respect, the Proclamation should have drawn inspirations from the Camden Principles⁵⁷ to define this vague term. Thus, such overbroad

⁴⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, the regulation of online "hate speech", Seventy-fourth session, Agenda item 70 (b), A/74/486, (9 October 2019) 7.

⁵⁰ Evelyn M. Aswad, 'To ban or not to ban blasphemous videos' (2013) 44 *Georgetown Journal of International Law* 1322.

⁵¹ Proclamation (n 4), Preamble para 1.

⁵² Proclamation (n 4) art 2(2).

⁵³ UN Human Rights Committee (HRC), '*General comment no. 34, Article 19, Freedoms of opinion and expression*,' 12 September 2011, CCPR/C/GC/34, para 25.

⁵⁴ General Comment 34 (n 53) para 25 said 'a law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.'

⁵⁵ Proclamation (n4) Art 2(5) defines discrimination as any act of denying including legally accepted and attack against a person or a group based on ethnicity, religion, gender or disability.

⁵⁶ Proclamation (n 4) Art 2(6) defines violence instead of attack as 'any injury of property, body or life against an individual or a group of people.' There is drafting flaw and inconsistency—in using the term 'attack' and 'violence' in the definition part. The two terms could refer to different meanings.

⁵⁷ ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality*, April 2009. For example: Principle 12 (1) defines 'hatred' as 'the intense and irrational emotions of opprobrium, enmity and detestation towards the target group.'

formulations could create interpretation ambiguities, and violate the legality thresholds under the ICCPR⁵⁸ and the Ethiopian Constitution.⁵⁹

Unlike the draft bill which lacked the intent and ‘incitement’ elements, the Proclamation incorporated the intent requirement through the term ‘deliberately’⁶⁰ under the definition part and also recognises the ‘incitement’ requirement. Specifically, the law uses the term ‘promotes’ (ማከሳሳት) instead of ‘advocacy’ (መወትወት). The term ‘promote’ does not necessarily imply the intent requirement. The term ‘incitement’ refers to statements about ethnic, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.⁶¹ Incitement though subject to judicial application implies causation and contexts.

Most importantly, the Proclamation does not draw inspiration from the most accepted norm under international human rights law regarding hate speech laws—the ‘Rabat Plan of Action’. As discussed below, the Rabat Plan of Action outlines six factors to determine whether a speech constitutes hate or not. These include: context, the status of the speaker, intent, content, audience, and likelihood of effectively inciting harm.⁶² Civil society organisations such as the Network of Digital Rights in Ethiopia (NDRE) had submitted an alternative draft bill and inserted a provision that incorporates the Rabat factors⁶³ into consideration; however, it was rejected later.

Also, the Proclamation punishes disseminating hate speech.⁶⁴ During the drafting stage, it was unclear from its provision whether the term “disseminating of hate speech” includes *mere* sharing and distribution of hateful content. How could the public prosecutor indict all the followers who disseminate hate speech online if it goes viral? In a country where ‘echo-chambers’ are common, it would be very difficult to fully enforce this kind of stipulation, casting doubt as to its practicality. Even when the law was approved, the definition of

⁵⁸ International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR), art 19(3).

⁵⁹ Constitution (n 19) art 29(6).

⁶⁰ Proclamation (n 4) art 2(2).

⁶¹ Camden Principles (n 57) Principle 12(iii).

⁶² United Nations Office of the High Commissioner for Human Rights, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, 11 January 2013, para 29. See a similar provision under Principle 23 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019) Lawrence Mute, Special Rapporteur on Freedom of Expression and Access to Information in Africa.

⁶³ Network for Digital Rights in Ethiopia (NDRE) Alternative Draft on Hate Speech and Disinformation Suppression in Ethiopia (January 2020) (the document on author’s file), Art 11 reads ‘Courts should consider the following factors before judging on hate speech charges: a) context, b) the status of the speaker, c) intent, d) content, e) audience, and f) likelihood of effectively inciting harm.’

⁶⁴ Proclamation (n 4) Art 4.

'dissemination' was still problematic. It is defined as "spread or share a speech on any means for many persons, but it does not include like or tag on social media".⁶⁵ Per the literal reading of this provision, any person who 'shares' any content on social media is deemed to be a disseminator of hate speech, and will be subject to liability. While the drafters did narrow the scope of 'disseminating', it lacks specificity and remains subjective. It would have been preferable if it uses the term 'advocacy' rather than 'disseminating' under article 4, since the latter falls short of demonstrating intent.

The Proclamation would have a chilling effect on freedom of expression. It says that if the offense of hate speech was committed through a social media account with more than 5,000 followers, the person responsible for the act shall be punished with simple imprisonment not exceeding three years, or/and a fine not exceeding 100,000 birr (3,334 USD as at August 2020).⁶⁶ This is an instance where journalists and activists could be targeted for having 5,000 followers. Here there is also an apparent contradiction between the Amharic and the English versions: the former uses "and", meaning both imprisonment and fine can be imposed together, while the latter uses "or", meaning the court may order imprisonment or fine, but not both. In interpretation issues, the Amharic version prevails in the event of ambiguity on the basis of the Federal Negarit Gazette establishment law.⁶⁷ Accordingly, the severe criminal provision that includes both imprisonment and steep fines applies. It is bizarre to see the 5,000 followers' standard as a threshold; the move seems to be unprecedented, but arbitrary. Is that based on Facebook's friendship limit or comparative experience? Unlike Egypt where the law obliges personal social media accounts with 5,000 followers to come under media regulations,⁶⁸ the 5,000 touchstone in Ethiopia is stricter and is an aggravating ground for a charge rather than a starting point.

Last but not least, the fine is large compared to the fines for crimes, such as female circumcision, and alarming the public in the Criminal Code. For example, for female circumcision, the law orders a fine of 500 birr (17 USD). Thus, for a hate speech, an individual gets a punishment of 50,000 birr (1,667 USD); the magnitude is 100 times more. Also, given the modest income of many social media users, this law could lead to self-

⁶⁵ Proclamation (n 4), Art 2(7) 'Dissemination' means spread or share a speech on any means for many person, but it does not include like or tag on social media.'

⁶⁶ Proclamation (n 4) art 7(4).

⁶⁷ Federal Negarit Gazeta Establishment Proclamation, 1st Year No.3, Addis Ababa, 22nd August 1995, art 2(4). 'The Federal Negarit Gazeta shall be published in both the Amharic and English Languages; in case of discrepancy between the two versions the Amharic shall prevail.'

⁶⁸ See Egypt: Law on the Organisation of Press, Media and the Supreme Council of Media 2018.

censoring of free speech on the internet and could force some to reduce their followers to avoid punishment.⁶⁹

3. Thoughts on the Concept of Hate Speech

Hate speech is an emotive term and lacks a universally accepted definition. Defining hate speech is a Sisyphean exercise in a sense that any definition should take specific examples, contexts and situations. In this respect, Justice Stewart famously summarised his thoughts on identifying obscenity (offensive speech) as "I know it when I see it."⁷⁰ As Andrew Sellars pertinently stated, 'what makes hate speech even more difficult than obscenity is that for hate speech Justice Stewart's statement is less likely to be true.'⁷¹ The common view appears to be that different forms of speech may or may not fit the definition of 'hate speech' depending on the speech's particular context, which rarely makes it into the definition itself.⁷²

Hate speech is a threat to human dignity and reputation. Its aim is to compromise the dignity of those at whom it is targeted, both in their own eyes and in the eyes of other members of society.⁷³ It aims to besmirch the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing.⁷⁴ Drawing on Jeremy Waldron's work, an expression that can be considered hateful (be it conveyed through text, images or sound) sends two types of messages. The first is to the targeted group and functions to dehumanise and diminish members assigned to this group.⁷⁵ It reads:

Do not be fooled into thinking you are welcome here. [...] You are not wanted, and you and your families will be shunned, excluded, beaten, and driven out, whenever we can get away with it. We may have to keep a low profile right now. But do not get too comfortable. [...] Be afraid.

⁶⁹ Yohannes Eneyew Ayalew 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' (2020) 20 African Human Rights Law Journal 315-345, 329.

⁷⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)

⁷¹ Andrew F. Sellars, 'Defining Hate Speech' Harvard University Berkman Klein Center Research Publication No. 2016-20) (December 8, 2016) 14

⁷² Bhikhu Parekh, *Is There a Case for Banning Hate Speech?* The Content and Context of Hate Speech, in Michael Herz and Peter Molnar (eds), (Cambridge University Press 2012) 37-40.

⁷³ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 5.

⁷⁴ Waldron (n 73).

⁷⁵ Waldron (n 73) 2.

Another function of hate speech is to let others with similar views know they are not alone, to reinforce a sense of an in-group that is (purportedly) under threat.⁷⁶ A typical message sent this time to like-minded individuals can read like:

We know some of you agree that these people are not wanted here. We know that some of you feel that they are dirty (or dangerous or criminal or terrorist). Know now that you are not alone. [...] There are enough of us around to make sure these people are not welcome. There are enough of us around to draw attention to what these people are really like.

Kenneth Ward further explains hate speech as 'any form of expression through which speakers primarily intend to vilify, humiliate, or incite hatred against their targets.'⁷⁷ This can be seen as a blend of the intents—covering both speech that is directly hateful and speech that incites hatred in others.⁷⁸ There is also a degree of speech in Ward's definition, noting that a speaker should be seen as employing hate speech if 'their attacks are so virulent that an observer would have great difficulty separating the message delivered from the attack against the victim.'⁷⁹

While Susan Benesch had looked to a particular subset of hate speech that is more directly linked to the incitement of mass violence, which she calls "dangerous speech" which is explained as "Any form of expression (e.g. speech, text, or images) that can increase the risk that its audience will condone or commit violence against members of another group."⁸⁰ Benesch looks to five variables that are relevant for determining the dangerousness of the speech, whether (1) the speaker is powerful with a high degree of influence; (2) there is a receptive audience with grievances and fear that the speaker can cultivate; (3) a speech act that is clearly understood as a call to violence; (4) a social or historical context that is propitious for violence; and (5) an influential means of dissemination.⁸¹ Benesch's formulation is specifically targeted toward incidents of mass violence and the speech that foments such violence.

The South African Equality Court has offered some guidance in elucidating hate speech in the case of *Nelson Mandela Foundation Trust and Another v. Afriforum NPC* by stressing on the ordinary grammatical meaning of the term as "speech that expresses hatred towards

⁷⁶ Waldron (n 73) 2.

⁷⁷ Kenneth D. Ward, 'Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag Burning and Hate Speech,' (1998) 52 University of Miami Law Review 733,765.

⁷⁸ Ward (n 77).

⁷⁹ Ward (n 77) 766.

⁸⁰ Susan Benesch, *Proposed Guidelines for Dangerous Speech*, Dangerous Speech Project (Feb. 23, 2013), <<http://dangerousspeech.org/guidelines/>>accessed 30 April 30, 2020.

⁸¹ Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide,' (2008) 48 Virginia Journal of International Law 485, 519–25.

a person or his or her group based on race or other attributes such as religion, sex, ethnicity, sexual orientation and the like.”⁸² In this case, the court ruled that gratuitous displays of the old national flag constitutes hate speech.⁸³

Few countries have presented some definitions for hate speech under their human rights Acts and criminal laws. For instance, the Canadian Criminal Code prohibits statements that incite hatred against any group where such incitement is likely to lead to a breach of the peace.⁸⁴ While the South African Equality Act bans advocacy of hatred through publishing or communication targeting any protected group.⁸⁵ Germany’s Criminal Code defines hate speech as an attack on the human dignity of others by insulting, maliciously maligning or defaming segments of the population.⁸⁶ Correspondingly, the New Zealand Human Rights Act outlines hate speech as threatening, abusive, or insulting words likely to excite hostility against or bring into contempt any group of persons on protected grounds.⁸⁷ Rwanda has enacted a genocide ideology law to halt hate speech after the infamous genocide era. Hate speech could fall in the ambit of genocide ideology when a person who, in public, either verbally, in writing, through images or in any other manner, commits an act that manifests an ideology that supports or advocates for destroying, in whole or in part, a national, ethnic, racial or religious group.⁸⁸ Holocaust denial, also known as genocide denial, is a hate speech crime under Rwandan Law.⁸⁹ When we come to Ethiopia, hate speech is understood as speech that deliberately promotes hatred, discrimination or attack against a person or a group based on protected status.⁹⁰

It can be recalled that there are similarities and differences between these various instances of hate speech regulation. But all of them are focused with the use of words which are

⁸² *Nelson Mandela Foundation Trust and Another v. Afriforum NPC and Others*, Equality Court of South Africa (EQ02/2018) [2019] ZAEQC 2, August 21, 2019, para 94.

⁸³ *Nelson Mandela Foundation Trust and Another v. Afriforum NPC and Others* (n 82), para 78 The case was instituted after a protest march in 2017 had included the display of the old flag, and the Foundation argued that these displays brought back painful memories of the inhumane apartheid system. An Afrikaans interest group opposed the application, arguing that the prohibition against hate speech in South African legislation applied only to verbal communication and so did not cover the physical display of a flag. The Court held that in order to give effect to the spirit of the Constitution, the purpose of the legislation and international legal obligations, hate speech must be interpreted to include the display of a flag.

⁸⁴ Criminal Code of Canada, C-46, 1985, Section 319 (1)

⁸⁵ South African Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, art 10(1)

⁸⁶ Germany Criminal Code, section 130(1)”

⁸⁷ New Zealand: Human Rights Act 1993 / Human Rights Amendment Act 1994, 1 February 1994, section 61(1)

⁸⁸ Rwanda: Law N° 59/2018 of 22/8/2018 On the Crime of Genocide Ideology and Related Crimes, art 4

⁸⁹ Rwanda Law (n 88), Art 5 and see *Garaudy v. France*, ECtHR (App no 65831/01) 7 July 2003 para 23. ‘A historian had authored a book in which he denied the Holocaust. The Court stated that the denial of well-documented crimes against humanity must be seen as the most serious racial defamation of Jewish people, and that such statements also incited hatred towards this group.’

⁹⁰ Proclamation (n 4) art 2(2).

deliberately abusive, hateful, insulting, threatening or demeaning directed at protected groups, calculated to foment hatred against them.⁹¹ Also, some of these laws, in an impartial spirit, threaten to punish insulting words directed at any protected group in the community even when the group is a dominant or majority group.⁹² For instance, in *Afri-Forum v. Malema*, South African First Instance Equality Court ruled that Julius Malema, was found guilty of hate speech against white minorities after he, on several occasions, sang verses from a South African liberation song. The words of the song translated to “shoot the Boers”/farmers they are rapists/robbers.⁹³ The court found that Malema’s words constituted hate speech, and further declared: ‘the words undermine the minorities’ dignity, are discriminatory and harmful...[n]o justification exists allowing the words to be sung...the words were in any event not sung on a justifiable occasion’⁹⁴ and the court thereby banned Malema from singing the song, in public or in private.⁹⁵

Racial and ethnic groups are leading examples of the kinds of groups that are supposed to be protected by these laws, but the protection has been extended to groups defined by religion as well.⁹⁶ For example, in *Norwood v. UK*, the European Court of Human Rights (ECtHR) held that a clear and vehement attack on a religious group would suffice to constitute a violation of article 17 of the European Convention on Human Rights.⁹⁷ Norwood, a member of an extreme right-wing political party, placed a poster on his apartment window that called for the removal of all Muslims from Britain.⁹⁸ The court reasoned that article 10 on freedom of expression cannot be invoked against article 17, which states that no person has the right to engage in any activity with the aim of destroying the rights and freedoms of someone else.⁹⁹

In addition to these domestic laws, there are attempts under international law and regional instruments aiming at regulating hate speech. The first binding international treaty to deal directly with the issue of hate speech was the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD), adopted by the UN General Assembly in 1965.¹⁰⁰ Toby Mendel argues that the ICERD provisions are not only the first to address hate

⁹¹ Waldron (n 73) 8.

⁹² Allegations of anti-white hate speech have existed, for example, in South Africa, and Namibia.

⁹³ *Afri-Forum v. Malema*, The Equality Court of South Africa, Johannesburg, case No 20968/2010, September 2011.

⁹⁴ *Afri-Forum v. Malema* (n 93), paras 108-109.

⁹⁵ *Afri-Forum v. Malema* (n 93), para 120.

⁹⁶ For example, in the United Kingdom, in 2006, amendments to the Public Order Act prohibited hate speech against religious groups.

⁹⁷ *Mark Anthony Norwood v. United Kingdom*, the European Court of Human Rights (ECHR) Application no. 23131/03, July 2003.

⁹⁸ *Norwood v. United Kingdom* (n 97), para 1-3.

⁹⁹ *Norwood v. United Kingdom* (n 97) 12-14.

¹⁰⁰ International Convention on the Elimination of All Forms of Racial Discrimination, (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD)

speech, but also by far the most far-reaching.¹⁰¹ The ICERD ordains States under their domestic law to punish or suppress racially motivated hate speech.¹⁰² The Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation No. 35 (2013) entitled combating racist hate speech provided that 'the criminalisation of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, *inter alia*, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.'¹⁰³

The CERD has identified five aspects of hate speech and recommends that the States parties declare and effectively sanction as offences punishable by law:¹⁰⁴ dissemination of ideas based on racial superiority, dissemination of ideas based on racial hatred, incitement to racial discrimination, incitement to acts of racially motivated violence, and participation in organisations engaged in racial discrimination. Article 4 of the ICERD aims at preventing the above forms of hate speech. Thus, the focus of article 4 is on "prevention rather than cure"¹⁰⁵ and in part by using the force of law to deter activities aimed at promoting or inciting racism or racial discrimination.

ICERD, by virtue of its focus on racial discrimination, does not guarantee the right to freedom of expression.¹⁰⁶ However, article 4 does require that any measures taken to implement it have due regard for the principles set out in both the UDHR and article 5 of ICERD, which provides for equality before the law in the enjoyment of rights, including freedom of expression.¹⁰⁷ The CERD said the relationship between the proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other.¹⁰⁸

¹⁰¹ Toby Mendel, *Hate Speech Rules Under International Law*, Center for Law and Democracy, (February 2010) 2.

¹⁰² ICERD (n 100) Art 4 of the Convention provides that States parties are obligated, *inter alia*, to: (a) 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.'

¹⁰³ UN Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation No. 35: Combating racist hate speech,' 26 September 2013, CERD/C/GC/35, para 12

¹⁰⁴ General Recommendation No. 35 (n 103), para 13.

¹⁰⁵ Stephanie Farrior, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law concerning Hate Speech,' 14 *Berkeley Journal of International Law* 1 (1996) 48

¹⁰⁶ Mendel (n 101) 3.

¹⁰⁷ ICERD (n 100) art 5(d)(viii).

¹⁰⁸ General Recommendation No. 35 (n 103) para 45.

While the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁹ adopted by the UN General Assembly in 1966, guarantees the right to freedom of expression;¹¹⁰ it allows the restriction of hate speech under article 19(3) whenever the measures are a) provided by law; b) for the protection of one of the legitimate interests listed; and c) necessary in a democratic society.¹¹¹ The other provision of the ICCPR that is directly linked with hate speech regulation is article 20. It provides that [a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.¹¹² The drafting history of article 20(2) shows proposals to restrict article 20(2) to incitement to violence were rejected.¹¹³ The UN Human Rights Committee on its General Comment No.34(2011) observes that ‘articles 19 and 20 are compatible with and complement each other.’¹¹⁴ In addition, the acts that are addressed in article 20 are all subject to restriction pursuant to article 19 (3). This means a limitation that is justified on the basis of article 20 must also comply with article 19 (3) that is legality, legitimacy, necessity and proportionality.¹¹⁵ What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19 (3), is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* (special law) with regard to article 19.¹¹⁶

The other remarkable effort to harmonise article 19(3) and article 20(2) of the ICCPR is the ‘Rabat Plan of Action’—a multi-stakeholder process convened by the U.N. Office of the High Commissioner of Human Rights.¹¹⁷ The Rabat Plan has a six-part test for assessing when speech is severe enough to warrant punishment for hate speech under article 20:¹¹⁸ (1) the social and political context in which the statement is made;¹¹⁹ (2) the position or status of

¹⁰⁹ ICCPR (n 58).

¹¹⁰ ICCPR (n 58), art 19(1) ‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.’

¹¹¹ ICCPR (n 58) art 19(3).

¹¹² ICCPR (n 58) art 20(2).

¹¹³ Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987), 398-411, 408.

¹¹⁴ General Comment 34 (n 53), para 50.

¹¹⁵ *Ross v. Canada*, HRC 18 October 2000, Communication No. 736/1997, para. 11.1.

¹¹⁶ General Comment 34 (n 53), para 51.

¹¹⁷ Rabat Plan of Action (n 62).

¹¹⁸ Rabat Plan of Action (n 62) para 29.

¹¹⁹ Rabat Plan of Action (n 62), para 29(a) ‘Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.’

the speaker in society;¹²⁰ (3) the specific intent to cause harm;¹²¹ (4) the degree to which the content of the speech was “provocative and direct,” and the “nature of the arguments deployed in the speech”;¹²² (5) the extent and reach of the speech and the size of the audience;¹²³ and (6) the likelihood of effectively inciting harm.¹²⁴ Regionally, the Inter-American Convention on Human Rights¹²⁵ specifically provides for the banning of advocacy of hate speech. In Europe, the EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law adopted in 2008 gives guidance on how to combat hate speech.¹²⁶ The Framework Decision defines hate speech as one of three things:¹²⁷ public incitement to hatred or violence against any protected group, public dissemination of pictures or other materials and publicly condoning or denying genocide, and other core crimes to stir up violence or hatred against protected groups.

Notably, the concept of hate speech is now being framed before online platforms. There are many social networks engaged with messaging and social media services. However, Facebook, YouTube, Telegram and Twitter are quite popular social networks in Ethiopia. While using these services, platforms themselves have their own policies and community standards regarding hate speech. Facebook has its own Community Standard to moderate hate speech. As of April 30, 2020, the Community Standard of Facebook defines hate speech as:

A direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability. We also provide some protections for immigration status. We

¹²⁰ Rabat Plan of Action (n 62), para 29(b) ‘the speaker’s position or status in the society should be considered, specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed.’

¹²¹ Rabat Plan of Action (n 62), para 29(c) ‘Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.’

¹²² Rabat Plan of Action (n 62), para 29(d) ‘Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.’

¹²³ Rabat Plan of Action (n 62), para 29(e) ‘Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the internet.’

¹²⁴ Rabat Plan of Action (n 62), para 29(f) ‘It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.’

¹²⁵ American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, art 13(5)

¹²⁶ European Union: Council of the European Union, *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, 28 November 2008.

¹²⁷ EU Council Framework Decision (n 126), art 1.

define attack as violent or dehumanising speech, statements of inferiority, or calls for exclusion or segregation.¹²⁸

The above definition is said to be very detailed in terms of listing the protected groups. However, it does not provide the intention nor the incitement requirements to commit hate speech under human rights law. Facebook does not allow posting the following types of contents deemed to be hate speech. These are: contents/speeches with violent content (Tier 1),¹²⁹ contents that promote inferiority (Tier 2),¹³⁰ and contents that targets individuals on their protected status. (Tier 3).¹³¹ In the case of *CasaPound v. Facebook*, the Court of Rome ruled that Facebook must reactivate the account and restore the pages of the Italian neo-fascist party CasaPound and Facebook's removal of pages in connection with hate speech was unfounded.¹³²

YouTube's Community Guideline aims to promote free expression.¹³³ However, the Community Guideline has serious rules on hate speech. It defines hate speech as: 'A speech that promotes or condones violence against individuals or groups based on race or ethnic origin, religion, disability, gender, age, nationality, veteran status, caste, sexual orientation or gender identity, or content that incites hatred on the basis of these core characteristics.'¹³⁴ Simply put, the YouTube platform takedowns two forms of speeches that are said to be hateful—dangerous speech and speeches that incites hatred. By similar vein, the Twitter Rules and Policies discourage hate speech. It defines hate speech as 'speech that promotes violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.'¹³⁵ Twitter does not allow accounts whose primary purpose is inciting harm towards others on the basis of these categories.¹³⁶

Before concluding this part, it is important to summarise the elements of the hate speech crime. On the basis of the above definitions, hate speech has three key elements namely

¹²⁸ Facebook Community Standards, Hate Speech <https://www.facebook.com/communitystandards/hate_speech> accessed 30 April 2020.

¹²⁹ Facebook Community Standards (n 128), Tier 1, example: violent speech or dehumanising speech.

¹³⁰ Facebook Community Standards (n 128), Tier 2, example: speech targeting physical disability or Islamophobic speeches.

¹³¹ Facebook Community Standards (n 128), Tier 3, Contents that calls for segregation.

¹³² *CasaPound v. Facebook*, The First Instance Court of Rome Business Division December 12, 2019, R. G. 59264/2019. The Italian version of the judgment can be found here <<https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/01/sentenzacpifb.pdf>> accessed 1 May 2020.

¹³³ YouTube Community Guideline 2020 <<https://www.youtube.com/about/policies/#community-guidelines>>accessed 30 April 2020.

¹³⁴ YouTube Community Guideline (n 133).

¹³⁵ Twitter Rules and Policies 2020 <<https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>>accessed 30 April 2020.

¹³⁶ Twitter Rules and Policies (n 135).

intent, incitement and proscribed acts. In terms of intent, as per article 20(2) of the ICCPR and article 13(5) of the IACHR require advocacy of hatred, while article 4(a) of ICERD does not. The advocacy element can be understood as an intent requirement, so that only statements made with the intent of inciting hatred are covered.¹³⁷ The Proclamation uses the term 'deliberately' to convey the intent requirement.¹³⁸ In *Jersild v. Denmark*¹³⁹, the European Commission of Human Rights (ECmHR) held that Jens Jersild, a journalist, had been convicted for a television programme which included hate speech statements by racist extremists, although the purpose of the programme was really to expose racism in Denmark.¹⁴⁰ The ECmHR held 'although the applicant deliberately left the disputed statements in the programme, it finds it established that his intentions were not to disseminate racist ideology but rather to counter it through exposure.'¹⁴¹

Incitement is the second element of hate speech crime. Pursuant to article 20(2) of the ICCPR and article 13(5) of the IACHR, hate speech exists only when accompanied by incitement. Two of the four relevant provisions in article 4(a) of ICERD require incitement, but the other two prohibit the mere dissemination of certain ideas, namely those based on superiority and racial hatred.¹⁴² This was a matter of some controversy when article 4 of ICERD was discussed at the UN General Assembly, and a motion to delete these provisions was tabled but defeated.¹⁴³ The Proclamation uses the term 'promote' instead of 'incite' though the Amharic version uses 'incitement' (ማከሳሳት).¹⁴⁴ The term incitement is very complex and what constitutes it appears to be controversial.¹⁴⁵

However, courts have used different factors to assess incitement¹⁴⁶ such as causation and context. While causation is an important factor to determine what constitutes incitement. It is clear that inciting an act is not the same thing as causing it.¹⁴⁷ For example: in the case of *Ross v. Canada*, a teacher was removed from the classroom for his anti-Semitic/Holocaust denial publications. The Supreme Court of Canada noted the evidence that a 'poisoned environment' had been created within the relevant school board and held that "it is possible to 'reasonably anticipate' the causal relationship" between that environment and the

¹³⁷ Twitter Rules and Policies (n 135).

¹³⁸ Proclamation (n 4) art 2(2).

¹³⁹ *Jersild v. Denmark*, European Commission of Human Rights (ECmHR), 22 August 1994, Application No. 15890/89.

¹⁴⁰ *Jersild v. Denmark* (n 139), para 34.

¹⁴¹ *Jersild v. Denmark* (n 139), para 44.

¹⁴² Mendel (n 101) 6.

¹⁴³ Natan Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (Alphen aan den Rijn, 1980) 46.

¹⁴⁴ Proclamation (n 4) art 2(2).

¹⁴⁵ Mendel (n 101) 6.

¹⁴⁶ For different factors used under international criminal law see Audrey Fino, 'Defining Hate Speech: A Seemingly Elusive Task,' (2020) 18 *Journal of International Criminal Justice*, 31–57.

¹⁴⁷ Mendel (n 101) 6.

author's publications.¹⁴⁸ The UN Human Rights Committee (HRC) found no violation of the right.¹⁴⁹ Whereas context is clearly of the greatest importance in assessing whether particular statements are likely to incite hatred – as it may have a bearing on both intent and causation – and many of the hate speech cases refer to contextual factors.¹⁵⁰ In case of *Faurisson* against France, for example, the HRC noted a statement by the, 'then Minister of Justice, which characterised the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism.'¹⁵¹

The last element of hate speech crime is proscribed acts.¹⁵² Article 13(5) of the IACHR is limited to incitement to violence or similar illegal actions. Both article 4(a) of ICERD and article 20(2) of the ICCPR go beyond that to additionally cover incitement to discrimination, hatred or hostility. In this regard, the Proclamation extends the scope of proscribed acts to hatred, discrimination or attack.¹⁵³

Conclusion

The Hate Speech Suppression Proclamation continues to be a *cause célèbre* in Ethiopia—sparking debates at various stages of drafting and even after being approved by parliament. As the government expressed its intention, the law aims to prosecute grave cases of hate speech. The article has discussed how hate speech can be defined in different contexts. It highlighted how different domestic laws, international law, and social media networks offered various definitions for hate speech. Drawing from these attempts, the article flagged that hate speech has three key elements, namely intent, incitement and proscribed acts (discrimination, hatred and violence or attack).

The article has found that the Proclamation has the following major flaws. First, the law defines 'hate speech' broadly and fails to define the term 'hatred', which is one of the major ingredients of hate speech. Second, the law failed to incorporate the standards used to legislate hate speech which are found under the Rabat Plan of Action. This means the law fails to limit the offense by principles of context, status of the speaker, intent, the likelihood of effectively inciting harm, the content of the speech was provocative, and the size of audience found in the Rabat Plan of Action. Importantly, given the country is organised on the basis of an ethnically-centred political system, the law could be used to silence critics of

¹⁴⁸ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, para. 101.

¹⁴⁹ *Ross v. Canada* (n 115), para 11.6.

¹⁵⁰ *Ross v. Canada* (n 115), para 11.6.

¹⁵¹ *Faurisson v. France*, HRC, 8 November 1986, Communication No. 550/1993, para.4

¹⁵² Mendel (n 101).

¹⁵³ Proclamation (n 4) art 2(2).

ethnic parties. Because of the ethnic arrangement of administration at federal and regional level, it is possible that robust political debate could be penalised under the Proclamation. Regrettably, in Ethiopia where judicial review is not clearly provided in the Constitution and courts are oblivious to their role in enforcing human rights, legislating hate speech law could gag freedom of expression. Part of the reason for the failings in the law could be attributed to the fact that the Advisory Council which has been central to the reform of laws was not involved in the drafting of the Hate Speech Suppression Proclamation. Moreover, the drafting process was rushed, with limited opportunities for input from experts, civil society organisations and the broader public.

The article suggests that the Proclamation should be re-drafted with precision taking the legality requirement under international human rights law into account. In particular, such revision must provide clear definitions for vague terms such as ‘hatred’ by taking inspirations from the Camden Principles. In the meantime, in applying the law, the police, prosecutors and judges should interpret the relevant provisions carefully and narrowly with a view of tackling the offences of hate speech. Indeed, enforcing hate speech law requires strong institutions like the judiciary, prosecution, companies and civil society organizations. As such, the article recommends that the government should work with civil society organisations and companies on media literacy, education, and content moderation.

Finally, defining hate speech as explained in this article —without addressing the elephant in the room, i.e., ethnic polarisation, the ethnic form of governance, mutual mistrust, ‘oppressor versus oppressed’ narrative, and the issue of judicial review— would be a meaningless legislative exercise. The government should instead work on national reconciliation, meaningful grass-root dialogue, and building common destiny to heal deep social fissures and resentments. Nonetheless, defining hate speech under Ethiopian law remains to be a Sisyphean endeavour as any definition should take different situations, contexts and factors into account.

The Right to Freedom of Assembly and Petition: Reform Initiatives in Ethiopia

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‘[T]here is no freedom without noise – and no stability without volatility.’

Nassim Nicholas Taleb

Abstract

This article examines the protection of the right to freedom of assembly in Ethiopia focusing on the limitations of the existing legal framework and the changes introduced under a new draft legislation recently approved by the Legal and Justice Affairs Advisory Council. Following a brief discussion on the protection of the right to freedom of assembly under international human rights law, the article explores the normative content and limitations of Article 30 of the FDRE Constitution as well as Proclamation No. 3/1991 which provides for the right to freedom of assembly. The article explores the gaps and limitations of Proclamation No. 3/1991 such as provisions which are inconsistent with international human rights standards; the failure to make a meaningful distinction between indoor and outdoor assemblies; the absence of provisions regulating simultaneous assemblies, counter assemblies and spontaneous assemblies; as well as the lack of detailed regulations relating to the rights and duties of organizers and participants of assemblies. The article also examines problems encountered in the implementation of the proclamation such as the de facto institution of a permission procedure for assemblies contrary to the notification regime prescribed under the law. This will be followed by analysis of the changes introduced under the Draft Assembly Proclamation in terms of modifications in the notification procedure for assemblies, the recognition of various forms of assemblies including those exempt from the notification requirement, the rights and duties of organizers and participants of assemblies as well as the introduction of new rules aimed at enforcing the right to petition recognized under the FDRE Constitution. The article concludes by highlighting the major departures of the draft legislation and its potential contributions.

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Introduction

Alongside the rights to freedom of expression, association and participation in public affairs, the right to freedom of assembly constitutes one of the foundations for pluralistic democracy. Maina Kiai, the former UN special rapporteur on the rights to freedom of assembly and association, said that '[i]t is human nature – and human necessity – that people come together to collectively pursue their interests'.¹ The statement aptly captures the intrinsic and instrumental values of the right to freedom of assembly. Being inherent in human nature, freedom of assembly can be regarded as an end in itself. On the other hand, the recognition and protection of the right plays crucial instrumental role in advancing democratic politics.

The recognition of the right to freedom of assembly is essential for building a vibrant and pluralistic democratic culture. The exercise of freedom of assembly has been regarded as 'a form of direct democracy' which supplements conventional representative democracy.² The people in democratic countries institutionalise their power mainly through electing their representatives, but they do not institutionalise all power as they do not always speak through the ballot-box.³ The people reserve some power for themselves and speak through demonstrations and protests, which 'ought to be viewed as a direct expression of popular sovereignty'.⁴ According to Stuart Woolman, freedom of assembly supports democratic governance in diverse ways, such as by serving as a catalyst for public debates, improving government accountability between elections, allowing the public expression of minority views and channelling 'the violence inherent in mass action into a less dangerous form'.⁵

While freedom of assembly is viewed favourably in democratic systems, it is frequently trampled on by authoritarian regimes which find the right to be destabilizing and particularly threatening to their rule. Authoritarian regimes seek to maintain a façade of stability and peace by suppressing peaceful assemblies only to find themselves eventually caught up in highly explosive and violent mass protests undoing years of stability and potentially dealing a fatal blow to the regimes.⁶ Ethiopia is a good example among countries

¹ Maina Kiai and Jeff Vize, 'Three Years after Tunisia: Thoughts and Perspectives on the Rights to Freedom of Assembly and Association from United Nations Special Rapporteur Maina Kiai' (2014) 10/1 *Journal of Global Ethics* 114-121, 120.

² Stuart Woolman, 'Assembly, Demonstration, Picket and Petition' in Iain Currie & Johan De Waal, *The Bill of Rights Handbook* (5th edn, Juta & Company 2005) 407.

³ Henk Botha, 'Fundamental Rights and Democratic Contestation: Reflections on Freedom of Assembly in an Unequal Society' (2017) 21 *Law Democracy and Development* 221-238, 223.

⁴ Stuart Woolman, 'You Break It, You Own It: South African Assembly Jurisprudence after Garvis' (2015) 9 *Vienna Journal on International Constitutional Law* 548-571, 550

⁵ Woolman (n 2) 407.

⁶ Nassim Taleb and Mark Blyth, 'The Black Swan of Cairo: How Suppressing Volatility Makes the World Less Predictable and More Dangerous' (May/June 2011) 90/3 *Foreign Affairs*, 33-39, 33.

frequently haunted by the spectre of repressive authoritarianism followed by violent revolutions. All the changes of government witnessed in Ethiopia's modern history beginning from the toppling of the Imperial regime in 1974 were instances of mighty regimes crumbling in the face of mass protests or violent uprisings.

Widespread popular protests which defied repressive measures adopted by the ruling Ethiopian People's Revolutionary Democratic Front (EPRDF) were the main reason for the change of leadership in April 2018 and the eventual demise of a powerful segment of the ruling elite. The protests played crucial role in pushing the government to adopt important reform initiatives. Following the change of leadership, the Attorney General established the Legal and Justice Affairs Advisory Council (Advisory Council) with the responsibility of spearheading legal reform initiatives.⁷ The Advisory Council has undertaken crucial legislative reforms including the revision of the 2009 charities and societies proclamation⁸ notorious for its deleterious effect on the operation of civil society organizations and the anti-terrorism law⁹, which was frequently used to silence political dissidents. The Council has identified the right to freedom of assembly as one of the areas that require legislative reform in cognizance of the importance of the right in facilitating the transition towards democracy. To this end, the Advisory Council established the Working Group on Freedom of Assembly and the Right to Protest (Assembly Working Group).

This article examines the protection of the right to freedom of assembly in Ethiopia focusing on the limitations of the existing legal framework and the changes introduced under the Draft Proclamation on the Rights of Assembly and Petition (Draft Assembly Proclamation) prepared by the Assembly Working Group. Following the introduction herein, section one discusses the protection of the right to freedom of assembly in international human rights law. The second section examines the constitutional protection of the right of assembly and petition under Article 30 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution). Section three turns the focus on the analysis of the gaps and limitations of the existing law, the 1991 Proclamation to Provide for Peaceful Demonstration and Public Political Meetings (Demonstration Proclamation).¹⁰ The fourth section examines changes introduced under the Draft Assembly Proclamation in view of the

⁷ Attorney General, Directive No 24/2018.

⁸ Organizations of Civil Societies Proclamation No 1113/2019 *Federal Negarit Gazette* 25th Year No 33 (12 March 2019), repealing Charities and Societies Proclamation No 621/2009 *Federal Negarit Gazette* 15th Year No 25 (13 February 2009).

⁹ Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020 *Federal Negarit Gazette* 26th Year No 20 (25 March 2020), repealing Anti-Terrorism Proclamation No 652/2009 *Federal Negarit Gazette* 15th Year No 57 (28 August 2009).

¹⁰ Proclamation No 3/1991, Peaceful and Democratic Transitional Conference of Ethiopia *Negarit Gazeta*, 50th Year No 4 (Addis Ababa, 12 August 1991).

gaps and limitations of the Demonstration Proclamation. The article concludes by highlighting the major departures of the draft legislation and its potential contributions.

1. Freedom of Assembly in International Human Rights Law

The right to freedom of assembly is recognized in several international and regional human rights instruments as well as national constitutions and bills of rights. Article 20 (1) of the Universal Declaration of Human Rights (UDHR) provides: 'Everyone has the right to peaceful assembly and association'. Article 21 of the International Covenant on Civil and Political Rights (ICCPR) similarly states: 'The right of peaceful assembly shall be recognized'. Article 11 of the African Charter on Human and Peoples' Rights (Banjul Charter) provides that: 'Every individual shall have the right to assemble freely with others'. The normative content of the right to freedom of assembly has been elaborated in the general comments, concluding observations, resolutions and decisions of monitoring bodies established under the relevant instruments as well as decisions of domestic judicial bodies.

According to the recently issued General Comment No. 37 of the Human Rights Committee the term 'assembly' is to be understood as 'a gathering of persons for a purpose such as expressing oneself, conveying a position on a particular issue or exchanging ideas'.¹¹ While repeatedly highlighting the 'expressive nature' of assemblies, the general comment recognizes that assemblies may also be organized for other reasons such as 'to assert or affirm group solidarity or identity' or for entertainment, cultural, religious or commercial purposes. The general comment broadly interprets Article 21 of the ICCPR as protecting peaceful assemblies whether they take place in 'public or private spaces' such as outdoor and indoor assemblies as well as online meetings.¹² Assemblies can be stationary or moving and take various forms such as meetings, demonstrations, marches, processions, rallies, sit-ins, candlelit vigils and flash mobs.¹³

The right to freedom of assembly can be enjoyed by a variety of actors whether individuals or groups, natural or legal persons, registered or unregistered associations, including political parties, trade unions, and religious groups.¹⁴ States are required to guarantee the right to all without discrimination on grounds such as race, colour, ethnicity, age, sex, language, religion or belief, political or other opinion, national or social origin, birth, minority, indigenous or other status, disability, or other status.¹⁵ The African Commission

¹¹ Human Rights Committee, General Comment no 37, UN Doc. CCPR/C/GC/37 (17 September 2020) para 12.

¹² Ibid para 6.

¹³ Ibid.

¹⁴ OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (3rd edn, 2019) para 17

¹⁵ General Comment No 37 (n 11) para 25.

on Human and Peoples' Rights recognizes that the right to freedom of assembly under the Banjul Charter applies to non-nationals including 'stateless persons, refugees, foreign nationals, asylum-seekers, migrants and temporary visitors'.¹⁶ Similarly, the Human Rights Committee has stated that laws prohibiting foreign nationals from participating in peaceful assembly violate the right to freedom of assembly under Article 21 of the ICCPR.¹⁷

The right to freedom of assembly normally has expressive purposes. In his report titled 'Protest and Human Rights', the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights articulates the expressive function of freedom of assembly as follows:

[Public demonstration] is a form of individual or collective action aimed at expressing ideas, views, or values of dissent, opposition, denunciation, or vindication. Examples include the expression of political, social, or cultural opinions, views, or perspectives; the vocalization of support or criticism regarding a group, party, or the government itself; the reaction to a policy or the denunciation of a public problem; the affirmation of identity or raising awareness about a group's situation of discrimination and social exclusion.¹⁸

Because of the importance attached to the expressive purpose, assemblies should be facilitated to take place 'within sight and sound' of the target audience, as far as possible.¹⁹ The right to freedom of assembly includes the right to hold a counter-assembly organized to convey disagreement with the purpose of another assembly. A counter-assembly should also be facilitated, as far as possible, to occur 'within sight and sound' of its target audience, i.e. another assembly.

The protection accorded to assemblies applies to peaceful assemblies. The idea of peacefulness means that assemblies should not involve acts of violence or threats of violence or the use of weapons. The peacefulness of assemblies should be presumed absent convincing evidence to the contrary.²⁰ The mere existence of conduct that temporarily obstructs or hinders the activities of third parties such as by blocking traffic does not affect the peacefulness of assemblies.²¹ Similarly, the existence of conduct that may annoy or

¹⁶ African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa* (2017) para 67.

¹⁷ Human Rights Committee, Concluding Observation on Tajikistan, CCPR/C/TJK/CO/3 (22 August 2019) para 49.

¹⁸ Inter-American Commission on Human Rights – Office of the Special Rapporteur for Freedom of Expression, *Protest and Human Rights: Standards on the rights involved in social protest and the obligations to guide the response of the State*, OEA/Ser.L/V/II CIDH/RELE/INF.22/19 (September 2019) para 1, available at <http://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf> (accessed 16 December 2020).

¹⁹ OSCE/ODIHR-Venice Commission Guidelines (n 14) para 82.

²⁰ *Ibid* 9.

²¹ *Ibid*.

offend individuals or groups does not mean the assembly concerned is not peaceful.²² If public assemblies are to be restricted solely on the ground that they cause temporary inconvenience to the public or because the ideas conveyed by the assemblies offends some members of the public, the protection of the right to freedom of assembly becomes meaningless. Assemblies should be facilitated as long as they do not impose unnecessary and disproportionate burdens on the rights and freedoms of other persons.

In general, restrictions that may be placed on the right to freedom of assembly should be compatible with the twin requirements set out under Article 21 of the ICCPR that any restrictions should be 1) 'in conformity with the law' and 2) 'necessary in a democratic society' to protect legitimate interests. The protected interests that can be invoked to justify the necessity of a given restriction are: national security, public safety, public order (*ordre public*), public health, public morals or the protection of the rights and freedoms of others. The requirement of 'conformity with the law' essentially means that any restriction should have a legal basis under domestic law. As per the jurisprudence of the European Court of Human Rights (ECtHR), the domestic law in question should be 'accessible to the persons concerned' and be 'formulated with sufficient precision' to regulate the conduct of those persons.²³ On the other hand, the requirement that restrictions be 'necessary in a democratic society' underscores the fact that the effective protection of freedom of assembly presupposes the existence of a society and system of government guided by the values and principles of democracy.

While interpreting the phrase 'necessary in democratic society' under Article 10(2) of the European Convention on Human Rights, the ECtHR reasoned that the effective protection of freedom of expression requires the existence of a 'democratic society' imbued with the values of 'pluralism, tolerance and broadmindedness'.²⁴ According to the court, commitment to these democratic values is necessary since freedom of expression applies 'not only to "information" or "ideas" that are favorably received ..., but also to those that offend, shock or disturb the State or any sector of the population'.²⁵ The same reasoning can be applied in the context of the protection of freedom of assembly. A society that is committed to the values of 'pluralism, tolerance and broadmindedness' is able to tolerate some noise and inconvenience resulting from people exercising their freedom of assembly. On the other hand, repressive systems bereft of commitment to democratic values including limitations on government power, and giving precedence to stability and tranquility over

²² Ibid.

²³ *Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) para 49; *Mkrtchyan v Armenia* App no 6562/03 (ECtHR, 11 January 2007) paras 39-43; *Vyerentsov v Ukraine*, App no 20372/11 (ECtHR 11 April 2013) paras 52 and 54.

²⁴ *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 49.

²⁵ Ibid.

freedom, may invoke any of the protected interests (e.g., national security or public order) to effectively curtail the enjoyment of freedom of assembly.

In this connection, the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on the Republic of Korea stated that the restrictions imposed on assemblies on grounds 'such as obstruction of traffic, disturbance of the daily lives of citizens, high noise levels' or situations whereby press conferences 'were deemed unlawful assemblies because participants shouted slogans' are not compatible with the requirements of Article 21 of the ICCPR.²⁶

The ECtHR holds that the requirement that restrictions be 'necessary' does not have 'the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.²⁷ Further, the requirement of necessity includes the requirement that any restriction should be proportional to the protected interest in question. The OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly describe the requirement of proportionality as follows:

The least intrusive means of achieving a legitimate aim should always be given preference. The principle of proportionality requires, for example, that authorities do not routinely impose restrictions which would fundamentally alter the character of an event, such as relocating assemblies to less central areas of a city. Banning or prohibiting an assembly should always be a measure of last resort and should only be considered when a less restrictive response would not achieve the [objective].²⁸

One question frequently raised in relation to restrictions concerns whether laws requiring permits for assemblies or notification of assemblies will be compatible with requirements of international human rights law. In this regard, the Human Rights Committee has expressed concerns over laws requiring prior permission of assemblies by the authorities.²⁹ The Committee's General Comment No. 37 on Freedom of Assembly emphatically states: 'Having to apply for permission from the authorities undercuts the idea that peaceful assembly is a basic right'.³⁰ Similarly, the former UN special rapporteur on the rights to freedom of assembly and association holds the position that 'the exercise of fundamental

²⁶ Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea, A/HRC/32/36/Add.2 (15 June 2016) para 28.

²⁷ *Handyside* (n 24) para 48.

²⁸ OSCE/ODIHR-Venice Commission Guidelines (n 14) para 29.

²⁹ For example, Human Rights Committee's concluding comments on the United Republic of Tanzania recommended that the United Republic of Tanzania take steps 'to guarantee freedom of assembly without the requirement for pre-permission or such other restrictions as may jeopardize the freedom in question without necessarily being a threat to public order', Human Rights Committee, Comments on the United Republic of Tanzania, CCPR/C/79/Add 12 (28 December 1992) para 11.

³⁰ General Comment no 37 (n 11) para 70.

freedoms should not be subject to previous authorization by the authorities'.³¹ On the other hand, the special rapporteur opines that it is permissible to prescribe 'a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly'. The African Commission on Human and Peoples' Rights also holds the view that the exercise of freedom of assembly 'does not require the authorization of the state' while also noting that 'a system of prior notification may be put in place'.³²

However, prior notifications of assemblies may not always be necessary or compatible with permissible restrictions on freedom of assembly. In this regard, laws requiring the notification of assemblies 'too early' may unduly impinge on the enjoyment of the right.³³ The former UN special rapporteur on the rights to freedom of assembly and association holds the position that the notification of assemblies should be facilitated within 'a maximum of, for example, 48 hours prior to the day the assembly is planned to take place'.³⁴ General Comment No. 37 of the Human Rights Committee shies away from prescribing a maximum time providing instead that the 'period of advance notification might vary according to the context and level of facilitation required, but it should not be excessively long'.³⁵

Further, it is worth noting that the notification regime may not be universally applicable to all forms of assemblies. For instance, indoor assemblies are exempted from the notification requirement in the domestic legal systems of Germany, Belgium, France, Hungary and Serbia.³⁶ The reason indoor assemblies are exempted from the requirement of notification is associated with the fact that they do not present the kinds regulatory difficulties raised by outdoor assemblies, which involve the serious task of balancing of the interests of participants of assemblies and third parties affected by the assemblies.³⁷ In Finland, Moldova

³¹ Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/20/27 (21 May 2012) para 28.

³² ACHPR Guidelines (n 16) para 71.

³³ For example, the Human Rights Committee's concluding comments on stated that the committee 'takes note with concern of the requirement that prior notification be made seven days before any public meeting is held', Human Rights Committee, Concluding comments on Maritius, CCPR/C/79/Add.60 (4 April 1996) para 20

³⁴ Report of the Special Rapporteur (n 31) para 28.

³⁵ General Comment no 37 (n 11) para 72.

³⁶ Anne Peters and Isabelle Ley, 'Comparative Study on National Legislation on Freedom of Peaceful Assembly', Requested by the European Commission for Democracy through Law (19 June 2014) paras 120, 141, 155, 161, 358, 410, 468.

³⁷ OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly* (OSCE/ODIHR, 2nd edn 2007) para 1.2.

and Armenia the notification requirement does not apply to public assemblies with low number of participants.³⁸

On the other hand, failure to meet the notification requirement on the part of organizers of assemblies does not automatically render the assemblies unlawful. According to the Human Rights Committee, failure to notify ‘does not absolve the authorities from the obligation, within their abilities, to facilitate the assembly and to protect the participants’.³⁹ What is more, human rights monitoring bodies and domestic legal systems often exempt from the notification requirement spontaneous assemblies held as a direct response to current events or occurrences which are perceived to necessitate an immediate reaction.⁴⁰

2. The Right of Assembly and Petition under the FDRE Constitution

The right to freedom of assembly is recognized, alongside the right to petition, under Article 30 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution). The provision titled ‘The Right of Assembly, Demonstration and Petition’ reads:

1. Everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition. Appropriate regulations may be made in the interest of public convenience relating to the location of open-air meetings and the route of movement of demonstrators or, for the protection of democratic rights, public morality and peace during such a meeting or demonstration.
2. This right does not exempt from liability under law enacted to protect the well-being of the youth or the honour and reputation of individuals, and laws prohibiting any propaganda for war and any public expression of opinions intended to injure human dignity.

Like all human rights recognized under Chapter Three of the Constitution, the protection of freedom of assembly under Article 30 of the Constitution and the restrictions thereof should be interpreted in conformity with international human rights instruments adopted by Ethiopia as provided under Article 13 (2) of the Constitution.

2.1. Scope of the Right of Assembly and Demonstration

The use of the term *everyone* under Article 30 (1) makes it clear that the Constitution does not limit the exercise of this right to Ethiopian nationals. Nationals of other countries who

³⁸ OSCE/ODIHR-Venice Commission Guidelines (n 14) 114.

³⁹ General Comment no 37 (n 11) para 71.

⁴⁰ Ibid paras 14, 72; OSCE/ODIHR-Venice Commission Guidelines (n 14) para 79.

happen to be in Ethiopia are equally guaranteed the right. In this regard, the FDRE Constitution departs from both the 1955 Constitution and the 1987 Constitution, which limited the enjoyment of freedom of assembly to Ethiopian citizens only.⁴¹ Similar to the 1991 Transitional Period Charter of Ethiopia, the Constitution enables the exercise of the right by persons who are not Ethiopian nationals.

Article 30 (1) should be interpreted in line with the Constitution's non-discrimination clause (Article 25) in a manner consistent with the Human Rights Committee's General Comment No. 37 and the Guidelines on Freedom of Association and Assembly in Africa adopted by the African Commission on Human and Peoples' Rights. Therefore, freedom of assembly should be guaranteed without discrimination on grounds such as race, colour, nationality, ethnicity, sex, language, religion, political or other opinion, property, birth, disability or other status. In this sense, the protection of freedom of assembly under Article 30 (1) of the Constitution will apply to a broad category of persons including children, foreign nationals, stateless persons, refugees, asylum-seekers, migrants and temporary visitors.

The use of the word 'everyone' under Article 30 (1) might give the impression that freedom of assembly is only guaranteed to natural persons. However, the interpretation of the provision in light of international human rights law, as necessitated by Article 13 (2) of the Constitution, dictates that the enjoyment of the right should be extended to legal persons, registered or unregistered associations, political parties, trade unions, and religious groups.

Article 30 (1) of the Constitution employs language apparently making a distinction between the concepts of 'assembly' and 'demonstration'. In contrast, the term 'assembly' is broadly conceived in international human rights law to include various forms of assemblies such as meetings, demonstrations, marches, processions, rallies, sit-ins, candlelit vigils, flash mobs, and pickets.⁴² However, some domestic legal systems do make a distinction between the terms 'assembly' and 'demonstration'. In France, for example, the term 'assembly' (or public meeting) refers to meetings that take place in private or public facilities accessible to the public while the term 'demonstration' applies to gatherings taking place on public roads.⁴³

The wording of the second half of Article 30 (1) of the Constitution provides some clue as to the distinction between the terms 'assembly' and 'demonstration'. The provision speaks of 'appropriate regulations' that can be made 'in the interest of public convenience' in relation to 'the location of open-air meetings' and 'the route of movement of demonstrators'.

⁴¹ Art 45 of the 1955 Constitution & Art 47(1) of the 1987 Constitution.

⁴² General Comment no 37 (n 11) para 6; ACHPR Guidelines (n 16) para 3.

⁴³ Peters & Ley (n 36) para 53.

The use of the phrase ‘route of movement of demonstrators’ suggests that the word ‘demonstration’ refers to moving assemblies as opposed to static assemblies. The ordinary connotation of the Amharic word ‘ሰላማዊ ሰልፍ’ (*‘selamawi self’*) used in the Amharic version in place of ‘demonstration’ also gives the impression that the term ‘demonstration’ applies to moving assemblies. By exclusion, the term ‘assembly’ is arguably meant to apply to static assemblies, whether taking place indoors or outdoors (i.e. open-air meetings). The terms ‘assembly’ and ‘meeting’ can be used interchangeably since the Amharic version of Article 30 uses the same word ‘ሰብሰባ’ (*‘sebseba’*) in place of the words ‘assembly’ and ‘meeting’ used in the English version. The specific identification of ‘open-air meetings’ for ‘appropriate regulations’, suggests a distinction between open-air assemblies and indoor assemblies.

In general, it is safe to conclude that the term ‘assembly’, as employed under Article 30, specifically applies to static assemblies, whether taking place indoors or outdoors, while the term ‘demonstration’ refers to moving assemblies. In this sense, it seems the usage of the terms ‘assembly’ and ‘demonstration’ under Article 30 is influenced by the Demonstration Proclamation already in force at the time of the adoption of the Constitution. As it will be shown in the following section, the distinction between the terms ‘assembly’ and ‘demonstration’ as employed under the Constitution generally corresponds to that between ‘public political meeting’ and ‘demonstration’ used in the proclamation. It suffices to mention here that the proclamation essentially defines ‘demonstration’ to mean a ‘procession’.

2.2. Applicable Limitations

The right of assembly, like most human rights, is subject to limitations. International human rights instruments and constitutional texts provide for the restriction of human rights through limitation clauses, which can be general or specific.⁴⁴ The FDRE Constitution does not contain a general limitation clause applicable to all fundamental rights and freedoms guaranteed under Chapter 3, unlike the constitutions of some countries.⁴⁵ It restrictively defines some constitutional rights and circumscribes others by specific limitation clauses.

Article 30 (1) provides that ‘appropriate regulations’ can be made ‘in the interest of public convenience’ in relation to ‘the location of open-air meetings’ and ‘the route of movement of demonstrators’. The need to regulate the location of outdoor assemblies and moving rallies is clearly understandable. These forms of assemblies often affect the interests of third parties, say, by blocking traffic or restricting access to public spaces. Thus, it may sometimes

⁴⁴ Abdi Jibril Ali, ‘Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the *CUD Case*’ (2012) 1/2 *Haramaya Law Review* 1-27, 5.

⁴⁵ cf Constitution of the Republic of South Africa (1996), Sec 36; Constitution of Kenya (2010), Art. 24.

be necessary to impose restrictions relating to the location or route of outdoor assemblies in order to protect the rights of other persons. However, the phrase 'appropriate regulations' employed under Article 30 (1) can be problematic if it is to be interpreted as merely requiring that restrictions be 'appropriate' to protect a legitimate objective, in this case the protection of the rights and freedoms of other persons. To be sure, a requirement that restrictions be appropriate clearly falls short of the more stringent requirement of international human rights law that restrictions be 'necessary' to protect a legitimate objective. Therefore, the phrase 'appropriate regulations' should be interpreted in light of international human rights standards as required under Article 13 (2) of the Constitution.

Further, the rule under Article 30 (1) permitting restrictions 'in the interest of public convenience' should not be interpreted to mean outdoor assemblies and demonstrations should not cause any inconvenience, whatsoever, to members of the public. The provision should not be used to justify the relocation of assemblies whenever 'public convenience' is at stake. In this regard, General Comment No 37 of the Human Rights Committee states that 'peaceful assemblies may in principle be conducted in all spaces to which the public has access or should have access, such as public squares and streets'.⁴⁶ Therefore, the imposition of restrictions on the location or route of movement of assemblies for the sake of 'public convenience' envisaged under Article 30 of the Constitution should be interpreted to apply only under exceptional circumstances. The principle being that assemblies can be conducted in all spaces, any restrictions on the location of assemblies should be justified in terms of Article 21 of the ICCPR.

It is important to note that public convenience is not, in and of itself, a ground for limiting the right to freedom of assembly in international human rights instruments.⁴⁷ The exercise of the right to freedom of assembly may entail some inconvenience to third parties. The mere existence of conduct that impedes or obstructs the activities of third parties should not be a ground to ban or disperse an otherwise peaceful assembly. Any limitations on outdoor assemblies should not unduly restrict access to the streets and other public places.⁴⁸ To be consistent with international human rights law, limitations on the exercise of the right to freedom of assembly should be 'prescribed by law' and justified by the requirements of necessity and proportionality to the legitimate interest sought to be protected, namely national security, public safety, public order, public health, public morals and the rights and freedoms of other persons.

According to Article 30(1), the right of assembly and demonstration can be limited 'for the protection of democratic rights, public morality and peace'. The protection of the rights and

⁴⁶ General Comment no 37 (n 11) para 55.

⁴⁷ cf ICCPR, Art. 21.

⁴⁸ Abdi (n 44) 10.

freedoms of others is a legitimate objective commonly recognized in most limitation clauses in international human rights treaties and national constitutions. The text of Article 30 is narrower as it refers to the protection of ‘democratic rights’, which are guaranteed under Articles 29 to 44 of the Constitution. The right of assembly and demonstration can be limited to protect public morality. What constitutes ‘public morality’ varies from time to time and from one culture to another even in one country.⁴⁹ For the limitation on the ground of protecting public morality to be necessary, it must be ‘essential to the maintenance of respect for fundamental values of the community’.⁵⁰ Limitations can also be imposed in order to maintain peace during assemblies.

Additional grounds for restrictions mentioned under Article 30 (2) of the Constitution include those relating to the protection of the well-being of the youth, honour and reputation of individuals, prohibition of propaganda of war and opinions that harm human dignity. While these interests can be generally said to be consistent with international human rights law, it is possible that they can be abused by the government to curtail freedom of assembly. For instance, there is a risk that the objective of protecting the honour and reputation of individuals can be used to stifle criticisms of government officials. In this regard, General Comment No. 37 states that restrictions on assemblies ‘should not be used to prohibit insults to the honor and reputation of officials or State organs’.⁵¹

2.3 Petition

The right to petition first emerged in medieval England ‘as a form of communication between the crown and its subjects in a period when the political and social institutions of modern governance were either nonexistent or in their infancy’.⁵² Its origin predates ‘modern notions of separation of powers’ and the recognition of human rights including freedom of assembly.⁵³ When the judiciary evolved as the principal dispute resolution organ, the historical importance of the right to petition as a means of registering grievances diminished.⁵⁴ However, a renewed interest in petition emerged with the advancement of information and communication technologies that simplified ways of collecting signatures

⁴⁹ The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, para 27.

⁵⁰ Ibid.

⁵¹ General Comment no 37 (n 11) para 49.

⁵² Gary Lawson and Guy Seidman, ‘Downsizing the Right to Petition’ (1998-1999) 93/3 Northwestern University Law Review 739-766, 744.

⁵³ Ibid 755-756.

⁵⁴ Woolman (n 2) 410.

and submitting petitions. National parliaments in different countries have been establishing e-petition systems in recent times.⁵⁵

The right to petition the government was recognized in Ethiopia's past constitutions. Article 31 of the 1931 Constitution read: 'All Ethiopian subjects have the right to present to the Government petitions in legal form'. Similarly, Article 63 of the 1955 Revised Constitution stated that: 'Everyone in the Empire shall have the right to present petitions to the Emperor in accordance with the law'. The 1987 Constitution of the Dergue regime also recognized the right of petition providing under Article 52 that 'Ethiopians have the right to submit complaints against state organs and mass organizations or officials thereof'.

While the 1931 Constitution only recognized the right of petition, the subsequent constitutions of 1955 and 1987 which also included freedom of assembly recognized the right separately from the right of petition.⁵⁶ Article 30 of the FDRE Constitution merges them into a single right. The merger of the two rights is not surprising given the close relationship and historical connections between the rights.⁵⁷ In many instances, individuals exercising their right to freedom of assembly meet to discuss and articulate their complaints and then submit a petition to the concerned government organ. However, the right of petition may also be exercised independently of freedom of assembly.

Article 30 simply states that everyone has the right to petition. The provision does not provide any guidance as to the nature of the petitions envisaged or the government organs to which they are to be addressed. There is no subsidiary law enacted to put the right of petition into effect. One may ponder whether the right of petition under Article 30 applies to any claim or complaint submitted to any branch of government including the courts. Article 37 of the Constitution specifically providing for the right of access to justice provides some guidance. The provision does not use the term 'petition' but guarantees the right of everyone 'to bring a justiciable matter to, and obtain a decision or judgement by, a court of law or any other competent body with judicial power'.

One may argue that both Article 30 and 37 are essentially about the right to petition, but different in their scope of application. Article 37 is very specific on two points. First, it clearly specifies the subject-matter of a petition, which is 'a justiciable matter'. The Federal Supreme Court has indicated the meaning of a 'non-justiciable matter' in its decisions. For example, in *Abadit Lemlem v Zalanbesa City Administration and Brihan Zerefe*, the Court stated that

⁵⁵ Ralf Lindner and Ulrich Riehm 'Electronic Petitions and Institutional Modernization: International Parliamentary E-Petition Systems in Comparative Perspective' (2009) 1/1 JeDEM 1-11, 1.

⁵⁶ The 1955 Constitution, Arts 45 and 63; The 1987 Constitution, Arts 47 and 52.

⁵⁷ Ericarendt, 'Freedom of Assembly,' in J. Beatson and Y. Cripps (eds), *Freedom of Expression and Freedom of Information - Essays in Honour of Sir David Williams* (OUP 2000) 167.

administrative matters, matters assigned by law to non-judicial organs for adjudication or matters over which courts' jurisdiction is ousted by law are non-justiciable.⁵⁸ In other cases, the Court considered political decisions/actions⁵⁹ or religious matters⁶⁰ non-justiciable.

Secondly, Article 37 clearly identifies the branch of government to which the petition is to be submitted. The provision specifically concerns the right to bring a matter to courts or other judicial organs. It excludes petitions submitted to the other branches of the government, i.e. the legislature and the executive. Therefore, it is safe to conclude that the right to petition envisaged under Article 30 applies to petition addressed to the legislative and the executive branches of the government or other independent government entities other than judicial bodies. Such petitions are not usually constrained by the requirement of justiciability that needs to be met in relations to matters brought before judicial bodies.

3. Gaps in the Demonstration Proclamation

The Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting (i.e. Proclamation No. 3/1991), issued under Transitional Period Charter No. 1/1991, is the main law regulating the exercise of freedom of assembly in Ethiopia. The Proclamation, which merely consists of a total of 12 articles including miscellaneous provisions, is lacking in the provisions necessary for the full enjoyment of the right to freedom of assembly in accordance with the FDRE Constitution and international standards. This section examines the normative content of the proclamation focusing on the gaps and limitations of the law as well as problems encountered in practice.

3.1 Scope of Application

The Demonstration Proclamation applies to 'peaceful demonstration' and 'public political meeting'. It does not contain provisions relevant to the constitutional right to petition. The Proclamation does not use the term 'assembly', which is used in the Constitution. As it was

⁵⁸ Cassation File No. 48217 (Judgment of 13 October 2010), Judgments of the Federal Supreme Court Cassation Division (November 2011), Vol 11 page 249.

⁵⁹ *Teizazu Argaw v Benshangul-Gumuz State Council*, Cassation File No. 63417 (Judgment of 22 July 2011), Judgments of the Federal Supreme Court Cassation Division (November 2011), Vol 12 page 464.

⁶⁰ *Hamerework Kedestmariam Betechristian Sebeka Gubae Office v Meheret Berhan & 5 others*, Cassation File No. 18419 (Judgment of 12 May 2006), Judgments of the Federal Supreme Court Cassation Division (November 2011), Vol. 8, p. 229; *Hohetesemay Kedestmariam Betechristian Sebeka Gubae Office v Ayele Addisu*, Cassation File No. 47806 (Judgment of 29 December 2009), Judgments of the Federal Supreme Court Cassation Division (November 2011), Vol 9, page 203.

enacted before the Constitution, the drafters of the Proclamation could not have Article 30 of the Constitution in mind.

Article 2 of the Proclamation, respectively, defines 'peaceful demonstration' and 'public political meeting' as follows:

1. 'Peaceful demonstration' means any public and orderly procession in which a group of people express their ideas through speeches, songs, mottos, placards etc ... in a public square, street, or any other suitable place, without carrying arms and without disturbing the public peace.
2. 'public political meeting' means any meeting in which a group of people publicly discuss political and politics-oriented issues, using loud speakers if necessary, inside a building, a compound, a public square or any other suitable place without carrying arms and without disturbing the public peace.

The use of the word 'procession' as the operative word in the definition of 'peaceful demonstration' means that the term essentially applies to moving assemblies. The definition makes it clear that the term 'peaceful demonstration' is employed as a literal translation of the Amharic word 'ሰላማዊ ሰልፍ' ('*selamawi self*'), which in its ordinary (literal) sense means a procession or moving rally. On the other hand, the definition of 'public political meeting' under Article 2 (2) of the Proclamation gives the impression that the term applies to a meeting confined to a given place, whether indoors or outdoors, where the participants discuss political issues amongst themselves.

The difference between 'peaceful demonstration' and 'public political meeting' partly relates to the question of whether the assembly in question mainly has expressive purposes targeting an outside audience or it mainly involves discussions among participants of the assembly. According to Article 2 of the proclamation, it appears 'peaceful demonstration' has an overtly expressive purpose targeting an outside audience. The definition highlights the expression of ideas in different forms such as through speeches, songs, mottos, placards etc. It does not matter whether the expressed ideas oppose or support one cause or another as both are expression of ideas. On the other hand, 'public political meeting' mainly involves discussion among assembly participants. However, the portrayal of 'public political meeting' as a meeting involving public discussion among participants of the meeting can be problematic. In reality, static assemblies are not always organized to discuss political issues among the participants. Such assemblies may also be organized to express opinions directed towards an outside audience. This is particularly true for static assemblies organized in public places such as public squares or streets.

While Article 2 suggests a distinction between ‘peaceful demonstration’ and ‘public political meeting’, the proclamation does not make any distinction in the regulation of the two forms of assembly. This raises a question as to the purpose of the distinction. Domestic legal systems normally make distinctions between assemblies for regulatory purposes. It may be argued that ‘peaceful demonstration’ particularly affects the interests of third parties since it is a mobile assembly typically taking place in public places such as streets. This may not be necessarily the case with ‘public political meeting’ which can also take place in a publicly or privately-owned building or structure. However, mobility is a poor measure of the impact of assemblies on third parties. A static rally taking place in a public square clearly affects the interests of third parties who want to access the area for various reasons. On the other hand, a moving rally involving a small number of persons may not cause as much burden on the interests of third parties. In any case, the distinction between ‘peaceful demonstration’ and ‘public political meeting’ does not carry much significance in view of proclamation’s failure to make any distinction in the regulation of the two forms of assembly.

Finally, Article 2 of the proclamation incorporates the idea of peacefulness as part of both the definitions of ‘peaceful demonstration’ and ‘public political meeting’. Peaceful assemblies are those conducted ‘without carrying arms and without disturbing the public peace’. However, the proclamation does not define the term ‘arm’ and the Amharic version gives the impression that the prohibition relates to conventional firearms. The proclamation should have provided a definition of the term ‘arms’ broadly defining the term to proscribe the use of any object which can be used cause physical or psychological harm to persons, or damage to property.

The scope of application of ‘peaceful demonstration’ is not clearly demarcated. The Proclamation does not expressly exclude some gatherings and processions that might fulfil the definition of ‘peaceful demonstration’. For example, some religious celebrations such as groups going to Eid prayers or participating in Ethiopian epiphany may be said to fulfil the elements of the definition because such groups conduct peaceful processions in public and express ideas, say, by singing religious songs. The Proclamation could have excluded religious and cultural processions from its scope similar to the 1967 Public Assembly Proclamation.⁶¹

On the other hand, Article 2 (2) of the proclamation makes it clear that the term ‘public political meeting’ does not apply to all kinds of meetings, but only to political ones. Thus, it excludes non-political meetings such as commercial, educational, religious or cultural meetings. The participants of ‘public political meetings’ discuss political issues. Discussions certainly involve expression of ideas and exchange of information. That means both ‘public

⁶¹ Public Assembly Proclamation No 243/1967, Art 2.

political meeting' and 'peaceful demonstration' involve expression of ideas. However, the expressive purpose is more important in the case of demonstration the main purpose of which is the expression of ideas to an outside audience. In public political meetings, however, the expressed ideas are mainly intended for the participants, not for an external audience.

As discussed above, a major limitation of the Demonstration Proclamation pertains to the fact that there is no distinction in the regulation of demonstrations and public political meetings under the proclamation. Both types of assemblies are subject to the same regulatory regime, say, in terms of the notification requirement, putting into question the whole point of making any distinction between the two. The proclamation could have limited the application of restrictions especially with regard to in-house political meetings that can be conducted without much interference with the rights of others.

Among other factors, the level of interference with the rights of others that may be caused by a demonstration will depend on the number of individuals participating in the demonstration. A small demonstration (e.g., by 10 persons) may have little interfere with the rights of others while a large demonstration (e.g., by 500 persons) may have serious impact on the interests of those who do not participate in the demonstration. Some countries consider the number of participants in defining and regulating demonstrations. In South Africa, for example, a small demonstration by not more than 15 persons is distinguished from large demonstrations or assemblies for the purpose of regulation.⁶² The Demonstration Proclamation fails to distinguish and separately regulate a small demonstration from a large one.

The confusion relating to its scope of application, has also affected the implementation of the Demonstration Proclamation. As Commissioner Fiseha Garedew explains, notifications for every small assembly reaches the Bureau of Security and Administration of Addis Ababa City for evaluation and comments.⁶³ Commissioner Fiseha added that his office receives notices for commercial meetings such as company shareholders' meeting, food expo organised by hotels and musical concerts. This means assemblies that have commercial and cultural purposes could be subject to the same restrictions applicable to 'peaceful demonstration' and 'public political meetings' defined in the Demonstration Proclamation.

⁶² Woolman (n 2) 408.

⁶³ Interview with Commissioner Fiseha Garedew, Deputy Head of Bureau, Security and Administration of Addis Ababa City (Addis Ababa 14 November 2019).

3.2 Notification Procedure

Article 3 of the Demonstration Proclamation permits any individual, group or organisation to organise demonstrations and meetings.⁶⁴ According to Article 4(1) of the Proclamation, organisers have the obligation to give notice: ‘Any individual, group or organization that organizes a peaceful demonstration or public political meeting has the obligation to give written notice 48 hours before the intended peaceful demonstration or public political meeting is to take place’. Article 4(2) identifies organs receiving the notice: ‘The written notice shall be submitted to the municipality office if the peaceful demonstration or public political meeting is to take place in town, and to the *wereda* administrative office if it is to take place out of town’. Article 5 of the Proclamation details information to be provided in the written notice while Article 6 specifies the obligation of state organs that receive the notice. This section discusses legal and practical issues related to the notification procedures.

3.2.1 Obligation to Give Notice

Assembly organisers have the obligation to give a written notice about the planned assembly. According to the African Commission, the notification procedure should be simple, involving ‘the filling in of a clear and concise form, available and submittable online and elsewhere, requesting information as to the date, time, location and/or itinerary of the assembly, and the name, address and contact details of principle organizer(s)’.⁶⁵ Evaluated against this standard, the notification procedure prescribed under the Demonstration Proclamation can be said to be simple. The Proclamation requires that the written notice contains details of peaceful demonstration or public political meeting, including the objective, place, date, time, duration, estimated number of participants, support requested from the government, and the organisers’ full name, addresses and signatures.⁶⁶

The Demonstration Proclamation does not clearly require the preparation of forms to be filled by the organisers, nor does it envisage online submission of such forms. In Addis Ababa, the mayor’s office prepares forms requiring the above details to be filled by the organisers, but the form is not submittable online.⁶⁷ Establishing a system that allows online submission of notice certainly facilitates the exercise of the right to freedom of assembly. Given the limited access to information and communication technologies in Ethiopia, promulgating a law that requires online submission of notice may not be a pragmatic

⁶⁴ Demonstration Proclamation, Art 4(1) 5(1)(f).

⁶⁵ ACHPR Guidelines (n 16) para 72 (b).

⁶⁶ Demonstration Proclamation, Art 5(1).

⁶⁷ Mr Abere Kasa, Advisor at Office of the Mayor, Addis Ababa City provided a copy of the form during his interview conducted on 11 November 2019.

legislative solution. Yet, legislative reform may consider codifying the existing practice of filling forms prepared in advance and include an option of accepting notices submitted online.

The Demonstration Proclamation does not contain provisions relevant to counter-assemblies and spontaneous assemblies. A counter-assembly is organised to oppose the cause of another planned assembly. It is clear that counter-assemblies are also subject to the notification procedures since the proclamation requires the notification of all meetings and demonstrations irrespective of the purposes of the assemblies. The conduct of counter-assemblies may require regulations to avoid clashes between participants of the main assembly and the counter-assembly. A solution may be requiring counter-assemblies to take place at another time or place, but this would reduce the importance of counter-assemblies which, in principle, need to take place within 'sight and sound' of their target audience, i.e. the main assembly.

Spontaneous assembly is another form of assembly not regulated by the Demonstration Proclamation. As discussed under section two above, a notice need not be submitted for organising a spontaneous assembly which is held as a direct reaction to a current event that is perceived to call for an immediate reaction.⁶⁸ The demonstration Proclamation does not recognize spontaneous assemblies or exempt them from the notification requirement. In Addis Ababa, the practice shows that spontaneous assemblies are dispersed for failure to notify. For example, a demonstration held in front of Saudi Arabian Embassy, opposing the maltreatment of Ethiopians in Saudi Arabia on 15 November 2013 was dispersed by police because of failure to notify the assembly.⁶⁹

The Demonstration Proclamation requires organisers to give a written notice 48 hours before the intended peaceful demonstration or public political meeting.⁷⁰ The period of notice is not uniform across different countries. For example, among member states of the Organisation of Security and Cooperation in Europe, the period of notice ranges from 6 hours to 26 days.⁷¹ Some countries distinguish different kinds of assemblies and provide different notice periods. For example, Cameroon requires organisers to give notice three days in advance for meetings and seven days in advance for demonstrations.⁷²

⁶⁸ ACHPR Guidelines (n 16) para 75.

⁶⁹ Tsega Andualem Gelaye, 'Protection of the Right to Freedom of Assembly under Ethiopian Law: Gaps and the Way Forward' (2016) 10/2 *Mizan Law Review* 296-340, 313.

⁷⁰ Demonstration Proclamation, Art 4(1).

⁷¹ Neil Jarman and Michael Hamilton, 'Protecting Peaceful Protest: The OSCE/ODIHR and Freedom of Peaceful Assembly' (2009) 1/2 *Journal of Human Rights Practice* 208-235, 218.

⁷² Japhet Biegion, Abdullahi Boru & Delly Mawazo, *Domestic Adherence to Continental and International Norms in the Practice of Policing Assemblies in Africa* (2017) 14.

In the Ethiopian context, officials in charge of assemblies at Addis Ababa City Administration find the 48 hours' notice period to be too short and unrealistic. The concerned officials say it takes about six days on average to respond to notices submitted by organisers of demonstrations or meetings and make the necessary preparations for the policing of the assemblies.⁷³

3.2.2 Receipt and Confirmation of Notice

The Demonstration Proclamation designates an entity that receives notifications, stating that the notice should be submitted to 'the municipality office if the peaceful demonstration or public political meeting is to take place in town, and to the *wereda* administrative office if it is to take place out of town'.⁷⁴ The police assume primary responsibility in policing assemblies and ensuring the protection of participants, but the Proclamation requires the notification to be given to the municipality or *wereda* administrative office. In Addis Ababa, the mayor's office consults Addis Ababa Police and Administration and Security Bureau when it receives a notice of planned assembly.⁷⁵

The Demonstration Proclamation clearly stipulates the obligation of the organisers to give notice, but the municipality officials sometimes refuse to receive the notice, especially when the planned demonstration is not favourable to the government or the ruling party. For example, Blue Party notified Addis Ababa City Administration on 5 September 2013 that it planned to organise demonstration on 7 September 2013, but the City Administration refused to receive the notice.⁷⁶ The Demonstration Proclamation does not specify the legal consequences of refusal to receive notice of assemblies.

Article 6 (1) of the proclamation provides that, upon receiving a written notice, the municipality or *wereda* administrative office has 'the responsibility to make all the necessary preparations in order to maintain peace and security and so as the daily life of the people is not disrupted'.⁷⁷ According to Article 6 (2), the municipal or *wereda* administration office may decide to change the time and place of demonstration where it 'is of the opinion that, for reasons referred to in Article 6 sub-article 1 of this Proclamation, it is preferable for the peaceful demonstration or public political meeting to be held at some other time or place'. The imposition of restrictions as to time and place of assemblies on the ground that it is found 'preferable' is clearly inconsistent with the requirement that restrictions be 'necessary'

⁷³ Interview with Commissioner Fiseha Garedew (n 63).

⁷⁴ Demonstration Proclamation, Art 4(2).

⁷⁵ Interview with Mr Abere Kasa, Advisor at Office of the Mayor, Addis Ababa City (11 November 2019).

⁷⁶ Tsega (n 69) 310.

⁷⁷ Demonstration Proclamation, Art 6(1).

to achieve a legitimate objective. As discussed in section two above, the requirement of necessity sets a much higher threshold for restrictions that does not afford the flexibility of expressions such as 'useful', 'reasonable' or 'desirable'. The same holds true for the expression 'preferable' which is much more flexible and sets a much lower threshold for restrictions than the expression 'necessary'.

When the municipality or the *wereda* decides to postpone or change the time or place of assemblies, it has the responsibility to inform the organisers in writing within 12 hours of the receipt of the notification.⁷⁸ The Amharic version of Article 6 (2) of the proclamation clearly prohibits the imposition of a blanket ban on assemblies. This is a positive feature of the proclamation which marks the distinction between a notification procedure and a permission regime. However, the power to postpone or change the place of demonstration or meeting may at times become the power to prohibit it. If a municipality or *wereda* decides to postpone a demonstration or meeting indefinitely or repeatedly, the effect of the decision is clearly a prohibition. The same is true regarding the decision to change a place of demonstration or meeting. In principle, an assembly should 'take place within sight and sound of its target audience'.⁷⁹ A demonstration loses its purpose if a municipality or *wereda* decides to change a demonstration planned to take place in the centre of a city to the outskirts of that city. Such decision was made in Addis Ababa, as a representative of the Ethiopian Federal Democratic Unity Forum (*Medrek* Party) once explained.⁸⁰

Failure to respond to a notification should be taken as 'acknowledgement that the assembly may go ahead along the lines proposed'.⁸¹ However, the practice in Addis Ababa appears to be contrary to this presumption of acknowledgment. For example, on 4 March 2013, the Blue Party, Visionary Youth Association and Private Initiative Committee for the Defence of Ethiopian People's Dignity and Heritage notified the City Administration that they planned a demonstration on 17 March 2013. The purpose of the demonstration was to oppose the construction of a museum and memorial park in Italy for Rodolfo Graziani whom they considered a fascist war criminal responsible for the massacre occurred in Ethiopia during Italian occupation.⁸² The organisers did not receive the confirmation from the City, but they went ahead with the demonstration, which was dispersed by the police for lack of recognition.⁸³ This fact demonstrates the *de facto* institution of a permission

⁷⁸ Demonstration Proclamation, Art 6(2).

⁷⁹ ACHPR Guidelines (n 16) para 90 (b).

⁸⁰ Comment of a Medrek representative at 'the Right of Assembly and Demonstration in Ethiopia' Seminar held on 5 December 2019, School of Law, Addis Ababa University.

⁸¹ ACHPR Guidelines (n 16) para 73.

⁸² Tsega (n 69) 311.

⁸³ Tsega (n 69) 312.

procedure for assemblies contrary to the notification regime prescribed under the Demonstration Proclamation.

3.2.3 Dispute Settlement

The Demonstration Proclamation does not lay down procedures for dispute settlement or institution responsible for settling disputes. Although courts certainly have jurisdiction over disputes between organisers of assembly and the authorities that are responsible to facilitate assemblies, the application of the regular rules of procedure may jeopardize the enjoyment of the right to freedom of assembly. Disputes relating to the conduct of assemblies often require a speedy resolution which is not possible under the regular rules of procedure. For example, if assembly organisers are aggrieved by the municipality's decision to postpone a demonstration, particularly on a topical issue, and sue the municipality, it would usually take a long time for the court to dispose of the case. The issue would be no more a topical issue by the time of its resolution by the court. Therefore, it is necessary to stipulate a short time span within which a dispute relating to the organisation of assembly should be settled by courts.

Another problem pertains to the reluctance of courts to assume jurisdiction over disputes relating to organisation or conduct of peaceful demonstration or public political meeting. In *Coalition for Unity and Democracy v Prime Minister Meles Zenawi Asres*, the plaintiff, a political party, challenged the Prime Minister's ban on demonstration in Addis Ababa following the 2005 national election.⁸⁴ The Court did not examine the merit of the case, but immediately referred the matter for interpretation to the Council of Constitutional Inquiry without identifying the legal issue that required interpretation, thus, declining to adjudicate the matter. Therefore, it is important to expressly lay down rules pertaining to the jurisdiction of courts and their role with regard to disputes relating to the exercise of freedom of assembly.

The Demonstration Proclamation does not provide for an internal administrative grievance handling mechanism within the municipality or *wereda* administration concerned. The receipt of notice of a planned assembly and the process of facilitating the assembly surely involves administrative decisions. The failure to handle properly notice of a planned assembly may constitute maladministration and fall under the scope of the power of the Ombudsman Institution.⁸⁵ Similarly, the implementation of the Demonstration Proclamation also concerns the Ethiopian Human Rights Commission because any failure

⁸⁴ Federal First Instance Court, Lideta Division, File No. 54024 (Decision of 3 June 2005) (26 *Ginbot* 1997)

⁸⁵ The Ethiopian Institution of the Ombudsman Establishment (As Amended) Proclamation No 1142/2019 *Federal Negarit Gazette* 25th Year No 69 (27 May 2019) Art 4.

on the part of the municipality or *wereda* in relation to the conduct of peaceful demonstration or public political meeting may constitute violations of human rights including the right to freedom of assembly and freedom of expression and information.⁸⁶

3.2.4 Consequence of non-compliance

The Demonstration Proclamation states that any person who violates its provisions is accountable under the Criminal Code,⁸⁷ but it does not state the applicable provisions of the Criminal Code. This can be contrasted with the 1967 Assembly Proclamation, which clearly categorises assemblies organised without prior permission as forbidden assemblies in accordance with Article 478 of the Penal Code. The Demonstration Proclamation does not refer to any provisions of the Criminal Code. Article 484(1) of the Criminal Code currently in force also criminalises assemblies forbidden by law, which certainly applies to meetings by organised criminals or by members of outlawed organisations.

Assemblies that do not comply with the notification procedures stipulated in the Demonstration Proclamation should not be regarded as 'forbidden assemblies' since this will be tantamount to reinstituting a permission system for assemblies. In international human rights law, assembly organisers are not subject to penalty for the mere failure to notify.⁸⁸ Even when assembly organisers are at fault, they should be subject to monetary sanctions only, not imprisonment.⁸⁹ The practice in Addis Ababa appears to be contrary to the international standards. Participants and organisers are arrested and charged even when a written notice was submitted but the concerned authority keeps silent. For example, 43 individuals were arrested on 17 March 2013 for participating in the demonstration organised to oppose the construction of a museum and memorial park in Italy for Rodolfo Graziani.⁹⁰ Therefore, it is probably necessary to expressly state that assemblies that do not comply with the notification procedures are not assemblies forbidden by law.

4. The Draft Assembly Proclamation

The Draft Assembly Proclamation was drafted by the Assembly Working Group established by the Advisory Council. The drafting process was undertaken between November 2019 up to March 2020. The main drafters who are authors of this contribution were responsible for

⁸⁶ Ethiopian Human Rights Commission Establishment Proclamation No 210/2000 *Federal Negarit Gazette* 6th Year No 40 (4 July 2000) Art 6(1).

⁸⁷ Demonstration Proclamation, Art 9.

⁸⁸ ACHPR Guidelines (n 16) para 102 (a).

⁸⁹ ACHPR Guidelines (n 16) para 102(c).

⁹⁰ Tsega (n 69) 312.

conducting a diagnostic study on the state of protection of the right to freedom of assembly in Ethiopia and drafting a new draft legislation consistent with constitutional and international standards relating to the right to freedom of assembly. The Draft Assembly Proclamation which was prepared under the direction of and in close consultation with the Assembly Working Group and the Advisory Council was further enriched by inputs obtained from a public consultation forum held in Addis Ababa in February 2020.

The Assembly Working Group and the Advisory Council first adopted the diagnostic study outlining the gaps and limitations of the 1991 Demonstration Proclamation as well as the problems encountered in the implementation of the proclamation. The Draft Assembly Proclamation finally approved by the Advisory Council addresses the issues identified in the diagnostic study.

The Draft Assembly which consists of a total of 37 articles contains detailed provisions relating to the guiding principles of freedom of assembly, the rights and duties of organizers and participants of assemblies as well as third parties, the procedure for the organization of assemblies, duties of the state and law enforcement officials as well as provisions meant to ensure accountability for violations of provisions of the draft proclamation. Further, the draft contains provisions designed to enforce the right to petition recognized under Article 30 of the FDRE Constitution along with the right of assembly.

4.1 Scope of Application

Article 3 of the Draft Assembly Proclamation delineates the scope of application of the proclamation as follows:

- 1) This proclamation shall apply in respect of assemblies of individuals aligned by a common cause organized for the purposes of expression of their views, the defense of common interests, demanding their human rights and to express their common positions and protests to the government and other parties as well as in respect of petitions submitted to government entities with a view to defending rights, the Constitution, the law or the general interest.
- 2) The following assemblies are outside the scope of this proclamation:
 - a. Assemblies and public ceremonies organized by state organs;
 - b. Assemblies related to religious ceremonies or festivities;
 - c. Labor strikes and picketing that is confined to place of work; and

- d. Assemblies related to educational, business, sports, social or cultural activities.

Article 2 (1) of the Draft Assembly Proclamation defines the term 'assembly' as 'an intentional and temporary gathering of individuals aligned by a common cause for the purposes of expression of their views, the defense of common interests, demanding their human rights and protests'. From the definition, it is clear that not every gathering constitutes an assembly. First, assemblies are 'intentional gatherings', as opposed to incidental ones. For example, a gathering may be formed when many people are present at the same place such as a marketplace, a bus station or an airport. Nevertheless, such a gathering does not constitute an assembly since the gathering is formed incidentally as people go about their lives (eg shopping). Secondly, assemblies are temporary gatherings which are normally dispersed within a short time span after meeting their goals (e.g., expression of views or demands).

Thirdly, the most important characteristic feature of assemblies lies in their expressive nature. Both Article 2 (1) and Article 3 (1) of the draft highlight the expressive nature of assemblies which distinguishes them from ordinary gatherings of individuals. An intentional gathering of persons which does not involve the expression of opinions in some form or another may not be considered an assembly for the purpose of the draft proclamation. For example, a gathering of people who come together to participate in, say, a funeral procession or the Great Ethiopian Run surely constitutes an intentional gathering. However, such a gathering will not be considered an assembly unless, for example, it suddenly takes on political overtones. The expressive goals specifically mentioned under Article 2 (1) include expression of views, defense of common interests, and demands for the protection of human rights and protests.

For regulatory purposes, the Draft Assembly Proclamation divides assemblies in to two broad categories, i.e. indoor assemblies and public assemblies. An 'indoor assembly' is defined as 'an assembly taking place at a publicly or privately-owned building and confined to a meeting hall or compound'.⁹¹ On the other hand, 'public assembly' is defined as 'an assembly taking place at a public square, park, stadium, highway or street or any other place ordinarily open for use by the public with or without payment, whether or not the assembly is at a particular place or moving'.⁹² The main logic behind the distinction is to distinguish assemblies affecting the interests of third parties from those that do not. Assemblies which are confined to a building or compound do not affect the interests of third parties to the degree assemblies which take place in areas ordinarily open to the public do. For example,

⁹¹ Draft Assembly Proclamation, Art 2(2).

⁹² Ibid Art 2(3).

an assembly taking place in a public square or park ordinarily open for public use will surely affect the interests of people who want to access the park for leisure. On the other hand, an assembly taking place in a meeting hall or conference center does not have much impact on the interests of third parties.

The distinction between indoor and public assemblies has clear advantages from the regulatory perspective. Making a distinction between assemblies on the basis of their impact on third parties corrects the pitfalls of the Demonstration Proclamation in force which makes a distinction between assemblies on the basis of their static or mobile nature. As demonstrated in 4.1 above, mobility is a poor measure of the impact of assemblies on third parties. A static rally which occupies a public square clearly affects the interests of third parties who want to access the area for various reasons.

Article 3 (2) of Draft Assembly Proclamation expressly excludes some assemblies from its scope. The cases that do not fall under the scope of the draft include assemblies organised by the state organs, labour strikes and picketing, and assemblies related to religious, educational, business, sports, social or cultural activities.⁹³ These assemblies are excluded for different reasons. The exclusion of assemblies organized by state organs such as the federal and regional parliaments is necessary for obvious reasons. These institutions should be able to perform their regular functions unconstrained by the regulations under the draft. Picketing being a specific form of assembly arising from labour disputes and mostly conducted in front of place of work, the drafters thought its regulation is better left for laws governing labour relations. Assemblies related to religious, educational, business, sports, social or cultural activities are excluded because of their minimal expressive nature. The moment these take on overt expressive goals, for example, by turning into political protests they will fall within the scope of the draft proclamation.

At this juncture, it should be made clear that the exclusion of a given assembly from the scope of the draft proclamation does not mean the assembly in question is not protected. Assemblies which fall within the ambit of freedom of assembly (e.g., religious or cultural assemblies) may be excluded from the scope of a law regulating assemblies for various practical reasons. An assembly protected under the right to freedom of assembly may be excluded because it does not raise serious regulatory issues. Similarly, an assembly can be excluded with a view to facilitating the maximum enjoyment of freedom of assembly for participants of such assembly by exempting them from regulatory burdens. For instance, the reason why the draft assembly did not include provisions on virtual assemblies is not

⁹³ Ibid Art 3(2).

because the protection of freedom of assembly does not apply to assemblies taking place online. Online assemblies are excluded because they do not raise serious regulatory issues.

The provisions on the scope of application of the Draft Assembly Proclamation did not raise serious debate in the Assembly Working Group or in the Advisory Council. However, participants of the public consultation held in Addis Ababa made two suggestions.⁹⁴ First, they suggested that the Draft Assembly Proclamation should be applicable to assemblies organised by the state organs. Otherwise, they argued, the Draft Proclamation gives undue advantages to the ruling party by excluding it from its scope of application. The drafters explained that the draft excludes assemblies, which are necessary for the normal function of the State such as parliamentary meetings. It does not exclude assemblies by political parties including the ruling party.

Second, the participants suggested that the Draft Assembly Proclamation should be applicable to assemblies organised by religious institutions because these institutions conduct non-religious assemblies. In general, religious institutions are becoming political actors in many parts of the world. Ethiopia is no exception. Religious institutions do hold non-religious assemblies in Ethiopia. In 2019, for example, several bodies under the Ethiopian Orthodox Tewahido Church planned a demonstration 'to protest attacks on various churches and religious establishments'.⁹⁵ In the same year, several thousand Muslims across Ethiopia protested against the burning of four mosques in Amhara State.⁹⁶ These are political assemblies or demonstrations, not religious assemblies envisaged by the Draft Assembly Proclamation. Thus, the draft law is applicable when religious institutions organise political assemblies or regular religious assemblies take on political overtones. In other words, only religious assemblies, such as the celebration of Ethiopian Epiphany or Eid prayers, are exempted from the scope of the draft proclamation. In short, the provisions of the Draft Assembly Proclamation address the concerns raised by the participants of public assemblies.

4.2 Rights and Duties Pertaining to Assemblies

In a major departure from the Demonstration Proclamation in force, the Draft Assembly Proclamation includes detailed provisions relating to the rights and duties of organizers and

⁹⁴ Minutes of Public Consultation held at Intercontinental Addis Hotel on 15 February 2020.

⁹⁵ Tamiru Tsige, 'Planned Ethiopian Orthodox demonstration called off' *The Reporter* (14 September 2019) available at <https://www.thereporterethiopia.com/article/planned-ethiopian-orthodox-demonstration-called> (accessed 5 November 2020).

⁹⁶ 'Ethiopian Muslims protest after several mosques burned', *Aljazeera* (24 December 2019), available at <https://www.aljazeera.com/news/2019/12/24/ethiopian-muslims-protest-after-several-mosques-burned/> (accessed 6 November 2020).

participants of assemblies as well as third parties. Article 2 (1) of the draft lays down the basic principle that ‘any individual, group, or legal person has the right to organize ... assemblies and to participate in such assemblies, peacefully and without arms’. This right is supported by a correlative duty imposed on the state ‘to respect, protect and fulfil the right to freedom of assembly’ in accordance with the draft proclamation, the Constitution and international human rights standards.⁹⁷ The right to freedom of assembly shall be guaranteed equally and without discrimination.⁹⁸

The rights of participants of an assembly specifically spelt out under Article 6 of the draft proclamation include the rights to ‘participate in any ... assembly of their own free will and volition’, ‘speak in an assembly and take part in the decisions made at the assembly’, ‘use and display any information, messages and mottos of their choice’, and ‘express feelings using any device and items that are not expressly prohibited by law’. Further, the provision recognizes the rights of participants to ‘be protected against any interference or any impediments to their freedoms from parties opposed to an assembly in which they take part’, ‘leave an assembly of their own free will ... at any point after taking part in an assembly’, and ‘submit petitions to any government entity to communicate their views, complaints or grievances’.

The above-mentioned rights of participants clearly also apply to organizers of assemblies who are themselves participants of assemblies within the meaning of the term under the draft. However, Article 9 of the draft additionally recognizes rights specifically applying to organizers of assemblies. These include the rights to ‘determine the purposes and objectives of an assembly’, ‘determine the venue and time at which an assembly will be held’, ‘determine a leader for an assembly’, ‘determine who will address the participants of the assembly and the order in which they shall speak’, ‘choose from the participants of that assembly, and hand over administrative responsibilities related to that assembly to those people’, ‘make arrangements for activities related to fund raising’, and ‘set up temporary tents, building of stages and use other items used for the assembly’. Further, organizers have the rights to ‘be consulted by the Police and other officials in order to facilitate the successful conduct and peacefulness of the assembly’, ‘disseminate information about the assembly using media and other devices’ and ‘carry out any other tasks necessary for the successful conduct of the assembly’.

The protection of freedom of assembly would not be complete or effective without participants of assemblies assuming appropriate duties relevant to the exercise of their freedoms. Therefore, the Draft Assembly Proclamation prescribes duties applying to both

⁹⁷ Draft Assembly Proclamation, Art 4 (2).

⁹⁸ Ibid Art 4 (5).

participants and organizers of assemblies. The duties applying to assembly participants pursuant to Article 7 of the draft include the duties to 'take part in an assembly peacefully and without arms', 'refrain from any acts of violence including the use of language or conduct inciting hatred', 'refrain from causing ... damage to property', 'adhere to directions given by ... organizers', and 'cooperate with law enforcement personnel'. However, the draft incorporates a limitation clause to the effect that participants of an assembly would not be subject to any penalties for merely taking part in an assembly or for the actions of other participants of an assembly or offenses committed by other participants of the assembly.⁹⁹

Again, the relevant duties mentioned under Article 7 also apply to organizers of assemblies, as the case may be. In addition, organizers are subject the duties prescribed under Article 10 of the draft which include the duties to 'make sure an assembly is conducted following the notification requirements', 'cooperate with the public authorities and the police', 'make arrangements to ensure cleanliness and safety', 'make arrangements to limit noise', and 'interrupt the meeting ... if continuing the meeting would cause immediate danger to the safety of the people, property or the environment'. The limitation clause applicable to organizers of assemblies states that organizers would not be subject to any penalties for the actions of or offenses committed by participants of the assembly.¹⁰⁰

Another feature of the Draft Assembly Proclamation which sets it apart from the Demonstration Proclamation concerns its incorporation of provisions relating to rights and duties of third parties. In this regard, Article 12 of the draft provides that persons whose interests are affected by assemblies have the rights 'to be informed in advance about meetings to be convened in their vicinity and 'be protected from unnecessary and disproportionate burdens'. Article 13 of the draft includes provisions imposing duties on two categories of persons. First, it obligates everyone 'to refrain from disrupting ... any meeting'. Secondly, it specifically prohibits business establishments that routinely rent meeting space from refusing rental without good cause.

The Draft Assembly Proclamation emphasises that assemblies shall be peaceable and unarmed. In this regard, it provides that the 'protection accorded to freedom of assembly ... shall extend only to peaceful assemblies'.¹⁰¹ The draft proclamation establishes the presumption of peacefulness 'unless there is compelling and demonstrable evidence that organizers of the assembly or the majority of participants intend to use, advocate or incite violence or have been engaged in incitement of violence or violent behaviour'.¹⁰² It also identifies activities that do not render assemblies non-peaceful. It provides that the use of

⁹⁹ Ibid Art 8.

¹⁰⁰ Ibid Art 11.

¹⁰¹ Ibid Art 5(1).

¹⁰² Ibid Art 5(2).

violence by a small number of participants does not render the whole assembly non-peaceful.¹⁰³ Further, it provides that the existence of conduct that may annoy or offend individuals or groups opposed to the ideas promoted by an assembly does not negate peacefulness of an assembly.¹⁰⁴

The Draft Assembly Proclamation defines the term ‘arms’ to mean ‘any firearm, ammunition, explosive, stick, stone, or any chemical substance or object which can be used to incite fear or cause physical or psychological harm or injury to persons, or damage to property’.¹⁰⁵ The Assembly Working Group adopted the definition without much debate. When the Draft was submitted to the Advisory Council, the Firearm Administration and Control Proclamation No 1177/2020 (Firearm Proclamation) was already enacted.¹⁰⁶ The members of the Advisory Council suggested two proposals regarding the definition. Some suggested that it is not necessary to define the term ‘arms’ as it is covered by the Firearm Proclamation while others preferred to retain the proposed definition as it is specific to the exercise of freedom of assembly.¹⁰⁷ It is important to note that the Firearm Proclamation defines different terms such as ‘firearm’ and ‘ammunition’, but not the term ‘arms’ itself.

The Definition of ‘arms’ received two comments from the participants of the public consultation. Both comments relate to the scope of the definition. One of the participants said that the definition is not comprehensive as it fails to include instruments such as a dagger and *mencha*. The Firearm Proclamation considers these two instruments among ‘harm inflicting materials’.¹⁰⁸ As the members of the Assembly Working Group explained, the definition under the draft is illustrative because the phrase ‘any ... object which can be used to incite fear or cause physical or psychological harm’ covers materials such as dagger and *mencha*. Therefore, it is not necessary to name all harm inflicting materials. The other comment relates to the kinds of firearms or other materials to be used by the law enforcement agents responsible for policing of assemblies. The participants suggested that the draft should include arms to be carried and used by law enforcement agents while policing assemblies. As the members of the Assembly Working Group explained, there are efforts by the Attorney General to draft laws regulating the use of force by the law enforcement agents. Regulating the issue in the draft would be a duplication.

¹⁰³ Ibid Art 5(2).

¹⁰⁴ Ibid Art 5 (3).

¹⁰⁵ Ibid Art 2(10).

¹⁰⁶ *Federal Negarit Gazette* 26th Year No 28 (25 March 2020).

¹⁰⁷ Minutes of Meeting of Advisory Council held on 17 January 2020 in Addis Ababa, Investment Commission Meeting Hall.

¹⁰⁸ Firearm Proclamation, Art 2(13).

4.3 Notification Procedure

Like the Demonstration Proclamation in force, the Draft Assembly Proclamation establishes a notification regime for assemblies. In this regard, it particularly emphasises that the requirement of notification does not establish a permit system.¹⁰⁹ The draft proclamation differs from the Demonstration Proclamation in important respects. First, the Draft Assembly Proclamation does not require notification of all assemblies. It exempts some assemblies from the requirement of notification, including indoor assemblies, assemblies at freedom parks and those taking place in the compounds of higher education institutions.¹¹⁰ Therefore, the notification procedure essentially applies to public assemblies. The Assembly Working Group also initially exempted public assemblies of not more than 15 persons from the notification requirement. However, members of the Advisory Council questioned the wisdom of exempting public assemblies with small number of participants arguing that it is difficult to limit the number of participants of public assemblies as the number will probably increase as the assemblies progress. Thus, the current draft does not exempt public assemblies by not more than 15 persons from the notification requirement.¹¹¹

Second, the Draft Proclamation increases the minimum period of notice. As discussed in 3.2.1 above, officials in charge of assemblies at Addis Ababa City Administration find the 48 hours period of notice stipulated in the Demonstration Proclamation to be too short and unrealistic. In view of the concerns, the Assembly Working Group first suggested that a notice must be given at least five working days prior to the planned public assemblies. The Draft Proclamation requires that a notice be given at least seven days prior to a planned assembly.¹¹² This period includes weekends and holidays since the current draft omits the reference to working days used in an earlier draft. The extension of the minimum notice period to 7 days may be considered to be a regressive step taken by the draft proclamation. However, the time to be given for notification should take into account the reality on the ground particularly given the inefficiency of the government bureaucracy including the police institution. In such a context, prescribing a very short minimum notice period which does not give enough time for the police to prepare for assemblies may eventually end up undermining freedom of assembly.

The notice should be given in writing,¹¹³ as is the case with the Demonstration Proclamation. The Assembly Working Group has considered the option of giving notice by electronic

¹⁰⁹ Draft Assembly Proclamation, Art 4(3).

¹¹⁰ Ibid Art 14(2).

¹¹¹ Minutes of Meeting of Advisory Council held on 17 January 2020 in Addis Ababa, Investment Commission Meeting Hall.

¹¹² Draft Assembly Proclamation, Art 14(1).

¹¹³ Ibid Art 15(1).

means. The option of submitting notice electronically such as through the use of the internet would surely facilitate the exercise of the right to freedom of assembly by simplifying the notification procedure. Prescribing the mandatory submission of notice by electronic means such as via email will be unrealistic in the Ethiopian context given the poorly developed information and communication technology (ICT) infrastructure in the country. Still, the police in relatively developed cities may provide alternatives that enable organisers of assemblies to submit notice by electronic means.

The Demonstration Proclamation requires assembly organisers to submit a written notice to a municipality or *wereda* administrative office, which communicates with the police. The Draft Assembly Proclamation has changed the institution responsible for receiving notice and facilitating public assemblies. One proposal considered at an early stage of the drafting process was to establish a separate organ responsible for receiving notice and facilitating public assemblies. The proposal was not accepted by the Assembly Working Group as it requires immense work and resources to establish and staff a new organ. The Assembly Working Group has also considered the option of submitting notification to the peace and security offices of city or *wereda* administrations. The proposal was abandoned on the ground that such offices may not be organised throughout the country.

On the basis of a proposal supported by members of the Advisory Council, the Draft Assembly Proclamation designates the police as responsible institution for receiving notice and facilitating the conduct of public assemblies.¹¹⁴ The advisory council found it necessary to require the submission of notifications to the police because the police ultimately assume the primary responsibility of maintaining peace and security during assemblies including through protecting participants of assemblies.¹¹⁵ Further, it is believed that assigning the responsibility to the police will also have the advantage of saving the time spent in communications between the police and municipal/*wereda* officials.

The police need not respond to notification of assemblies. Once submitting their notice, the organizers will not be waiting for the response or approval of the police to conduct their planned assembly. This is what makes a notification system different from a permission regime. As specified under Article 17 (2) of the Draft Assembly Proclamation, the police institution is normally expected to intervene only where ‘there are justifiable grounds ... to impose restrictions and conditions on the proposed assembly’. In such cases, it is expected to respond ‘within 48 hours of the receipt of the notification’. Otherwise, ‘the assembly shall proceed as proposed in the notification’ as provided under Article 17 (1) of the draft.

¹¹⁴ Minutes of Meeting of Advisory Council held on 17 January 2020 in Addis Ababa, Investment Commission Meeting Hall.

¹¹⁵ Ibid.

As clearly stipulated under Article 18 (2) of the draft, 'a restriction or condition imposed on an assembly may only be justified where it is deemed necessary in a democratic society in order to protect ... legitimate objectives'. The protected 'legitimate objectives' are limited to those recognized under Article 21 of the ICCPR, namely: 'national security', 'public safety', 'public health', 'public morals', 'public order' or the 'fundamental rights and freedoms of others'. The decision whether to impose restrictions or not requires a balancing act between the rights of participants of an assembly and the rights of other persons. In most instances, the conduct of public assemblies is bound to cause some inconvenience to third parties who do not take part in the assemblies such as through noise or blocking of access to public places such as roads. Clearly, the objective is not to make sure that assemblies would not cause any inconvenience to the interests of third parties. As a rule, 'assemblies shall be permitted to proceed ... unless they impose unnecessary and disproportionate burdens on the rights and freedoms of other persons'.¹¹⁶ Where justified on the basis of the requirements set out under Article 18 (2), the police may impose restrictions or conditions relating to 'the date ... and duration of an assembly', 'the place and route of an assembly', 'the noise level of an assembly' as well as 'the conduct of participants during assembly'.¹¹⁷

In addition to the duty to receive notice from assembly organisers, the police have a range of powers and responsibilities. The Draft Assembly Proclamation contains provisions to protect freedom of assembly from interference by non-state actors. During the public consultation, representatives of political parties raised concerns regarding the threat posed by non-state actors such as youth groups that disrupt the conduct of political assemblies.¹¹⁸ There have been several instances in recent years where informal youth groups prevented political parties from assembling thereby undermining the enjoyment of the right to freedom of assembly. The draft contains provisions that respond to such concerns. First, it imposes on everyone the duty to refrain from disrupting assemblies.¹¹⁹ The police and other members of the security forces have been entrusted with the responsibility to 'facilitate, enable and protect the right to freedom of peaceful assembly'.¹²⁰ The draft requires the police to isolate and deal with 'any party attempting to carry out violence or attempting to disrupt an ongoing assembly' to ensure that the assembly continues without disruption.¹²¹

Moreover, the draft provides that disrupting assemblies constitutes an offense subject to penalties without prejudice to the application of the Criminal Code.¹²² In this connection, it

¹¹⁶ Draft Assembly Proclamation, Art 18 (3).

¹¹⁷ Ibid 18 (1), a-d.

¹¹⁸ Minutes of Public Consultation (n 94).

¹¹⁹ Draft Assembly Proclamation, Art 13 (1).

¹²⁰ Ibid Art 24(1).

¹²¹ Ibid Art 24(8).

¹²² Ibid Art 32 (1), g.

should be noted that the act of disrupting assemblies clearly constitutes a crime under the Criminal Code.¹²³ Therefore, the police are under obligation discharge their law enforcement responsibilities and make sure that those who commit a crime through disrupting assemblies are dealt with according to the law.

The Draft Assembly Proclamation expressly authorises the police to disperse assemblies on five grounds. First, the police have the power to disperse an assembly when its peaceful character is lost because of violence against persons and properties by assembly participants.¹²⁴ However, it requires the involvement of the majority to consider that an assembly has lost its peaceful character.¹²⁵ Secondly, the police can disperse an assembly in case of ‘manifest deterioration of peace and order’.¹²⁶ This is meant to address disturbance of peace resulting from reasons other than the actions of assembly participants, e.g. violence by persons who are not assembly participants. Third, the police can disperse assemblies held in prohibited places.¹²⁷ The Draft Assembly Proclamation provides that assemblies cannot be conducted within 100 or 200 meters of certain places, including places of worships, embassies, schools, hospitals, graveyards, petrol station, airports, dams, power stations, military/security establishments and police stations.¹²⁸ During the public consultation, political parties said that the provision prohibiting the conduct of assemblies at the above mentioned places limits the enjoyment of the right to freedom of assembly.¹²⁹ However, it was explained that the Draft Proclamation, unlike the Demonstration Proclamation in force, permits assemblies passing by the prohibited places.

Fourth, the police can also disperse an assembly where the participants have been found to be in violation of justifiable restrictions imposed on the assembly on the basis of Article 18 of the draft proclamation.¹³⁰ Finally, the police can disperse assemblies based on a court order.¹³¹ The draft proclamation requires the police to ‘exercise maximum tolerance and restraint at all times’ when policing assemblies.¹³²

¹²³ Article 490 (1) of the Criminal Code provides: ‘Whoever, by word of mouth, by threats, violence or force, or in any other way, unlawfully invades or disturbs, hinders or disperses a meeting or any assembly duly authorized by law, is punishable with simple imprisonment not exceeding six months, or fine not exceeding one thousand Birr’.

¹²⁴ Draft Assembly Proclamation, Art 30 (1), a.

¹²⁵ Ibid Art 5 (2).

¹²⁶ Ibid Art 30 (1), b.

¹²⁷ Ibid Art 30 (1), c.

¹²⁸ Ibid Art 16.

¹²⁹ Minutes of Public Consultation (n 94).

¹³⁰ Draft Assembly Proclamation, Art 30 (1), d.

¹³¹ Ibid Art 30 (1), e.

¹³² Ibid Art 24 (6).

4.4 Counter-Assemblies and Spontaneous Assemblies

The Draft Assembly Proclamation contains specific provisions applicable to counter-assemblies. It defines 'counter-assembly' as 'an assembly organized to convey disagreement with the purpose for which another assembly is organized, and held at the same time, date and place or approximately at the same time, date and place as the other assembly'.¹³³ It recognises the right to organise a counter-assembly and the right to participate in counter-assembly organised by others.¹³⁴ It requires authorities to facilitate counter-assemblies to occur within 'sight and sound' of its target audience on two conditions: when counter-assemblies do not physically interfere with another assembly; and where there is no risk of imminent violence.¹³⁵ One proposal considered during the discussion of the draft by members of the Advisory Council was to schedule counter-assemblies on a date or place different from the date and place of the target assembly due to the context in Ethiopia, where small disagreements between individuals may lead to serious violence. The Draft Assembly Proclamation leaves the matter to the discretion of the authority receiving notice of assemblies. The authority may evaluate the situation and schedule counter-assemblies on the same date and place as the main assembly if there is no risk of violence.¹³⁶

The issue of spontaneous assembly was a subject of lengthy debate among members of the Assembly Working Group and the Advisory Council. The members of the Assembly Working Group were divided on whether it is necessary to recognise spontaneous assembly. The minority view held that the recognition of spontaneous assembly undermines the notification procedure established by the Draft Assembly Proclamation. Further, it was argued that the situation in the country should be taken into consideration. Ethiopia has witnessed a series of unnotified protests in recent years which, in many instances, involved acts of violence that resulted in loss of lives and destruction of property. Therefore, the minority argued explicitly recognizing spontaneous assemblies may increase the risk of violence since such assemblies do not give the police the time and opportunity to prepare for proper policing of the assemblies.

The majority of members of the Assembly Working Group favoured the express protection of spontaneous assemblies. The majority argued that spontaneous assemblies are common occurrences in healthy democratic systems. It was stated that specifically exempting from the notification requirement assemblies which respond to current events that evoke immediate public reactions does not undermine the notification system. Accordingly, the

¹³³ Ibid Art 2 (4).

¹³⁴ Ibid Art 21 (1).

¹³⁵ Ibid Art 21 (2).

¹³⁶ Ibid Art 21 (3).

Assembly Working Group's previous draft exempted spontaneous assemblies from the notification requirement.¹³⁷

Both views discussed by the Assembly Working Group resurfaced at the meeting of the Advisory Council. The members of the Advisory Council were divided on whether to maintain the proposal of the Assembly Working Group. The majority voted to subject all assemblies, including spontaneous assemblies, to the requirement of notice. However, the Advisory Council resolved that the draft include a provision to the effect that the organisation of or participation in spontaneous assemblies shall not entail an offense. Accordingly, Article 32 (3) of the Draft Assembly Proclamation states holding an unnotified assembly does not constitute an offense 'where the said assembly takes place as a direct response to a sudden occurrence' and the submission of advance notice becomes impracticable because of 'a perceived need for an immediate reaction'. In effect, spontaneous assemblies are tacitly permitted under the draft proclamation although the draft does not use the term spontaneous assembly or exempt the same from the notification requirement.

4.5 Freedom Parks

The 1991 Demonstration Proclamation does not contain a provision requiring the establishment of freedom parks for the purpose of facilitating the exercise of the right to freedom of assembly. The diagnostic study did not identify this omission as a legislative gap to be filled. Nevertheless, the concept of 'freedom park' was proposed during one of the meetings of the Assembly Working Group based on the experience of other countries. The purpose was to create a space for exercising the right to freedom of assembly at any time without the need to give notice to the police. The Assembly Working Group agreed that the establishment of freedom parks in cities and *wereda* towns certainly facilitates the enjoyment of the right. However, the Assembly Working Group did not include a provision requiring the government to establish freedom parks within a specified time after the entry into force of the Draft Assembly Proclamation. The members of the Assembly Working Group provided different reasons for rejecting the concept.

First, the members of the Assembly Working Group felt that it would be very burdensome for a developing country like Ethiopia to establish or designate freedom parks, emphasising that the government should prioritise more pressing needs such as the building of infrastructure to deliver basic services such as education and health care. Second, the members of the Assembly Working Group considered that the idea of establishing freedom parks is problematic in the Ethiopian context, which is characterised by polarised identity politics. The establishment of freedom parks makes it possible for two or more opposing

¹³⁷ Assembly Working Group's Draft, Art 28 (3).

groups to hold assemblies at the same time potentially leading to conflicts between the groups. Even when there are no opposing views, conflicts may occur because of competition for spaces in the freedom parks among several groups. For these reasons, the Draft Assembly Proclamation submitted to the Advisory Council did not include the requirement of establishing freedom parks across the country.

In fact, the experiences in other countries show that the obligation to establish freedom parks does not materialise simply because such obligation is provided by law. In 1985, for example, the Philippines enacted a law requiring the establishment of freedom parks or malls for the exercise of the right to freedom of assembly within six months after the entry into force of that law.¹³⁸ The law has been in force for around 35 years; however, some cities or municipalities in the Philippines did not establish or designate freedom parks by 2020.¹³⁹

The idea of freedom parks was raised once again at the meeting of the Advisory Council. The members of the Advisory Council liked the idea on the ground that the concept will facilitate the exercise of the right to freedom of assembly. Based on this recommendation, the Draft Assembly Proclamation was made to incorporate the concept of 'freedom park'. In fact, the introduction of the concept of 'freedom park' is one of the novel features of the Draft Assembly Proclamation. The Proclamation defines the term as 'a park, avenue or any other public meeting place especially designated for public assemblies with no notification being required for the holding of the same'.¹⁴⁰ In addition, the Proclamation imposes on the government the obligation to establish freedom parks within six months after the entry into force of the Proclamation:

Every city and Wereda administration, as the case may be, shall, within six (6) months after the coming into force of this Proclamation, and in consultation with civil society groups, establish or designate at least one suitable freedom park in their respective jurisdiction. Freedom parks must be, as far as practicable, centrally located within the city or Wereda.¹⁴¹

¹³⁸ Batas Pambansa Bilang 880, *An Act Ensuring the Free Exercise by the People of Their Right Peaceably to Assemble and Petition the Government, and for Other Purposes*, section 15, available at <https://www.ilo.org/dyn/natlex/docs/electronic/2315/102477/fl766505144/> (accessed 1 November 2020).

¹³⁹ *One News*, 'No More Rally Permits? CHR Backs Proposal For 'Enhanced' Public Assembly Law' (2 October 2020) available at <https://www.onenews.ph/no-more-rally-permits-chr-backs-proposal-for-enhanced-public-assembly-law> (accessed 1 November 2020).

¹⁴⁰ Draft Assembly Proclamation, Art 2 (6).

¹⁴¹ *Ibid* Art 23.

4.6 Dispute Settlement

The Demonstration Proclamation does not contain provisions applicable to dispute settlement. It is not necessary to state that courts have jurisdiction over disputes arising from the organisation of assemblies. However, the Draft Assembly Proclamation addresses two practical problems. First, courts have been reluctant to adjudicate disputes relating to fundamental rights and freedoms including those relating to the right to freedom of assembly. Thus, the Draft Proclamation expressly states that organisers of public assemblies can contest before courts ‘the imposition of restrictions and conditions on an assembly’.¹⁴²

Second, ordinary court procedures are lengthy, as noted in 4.2.3 above, but disputes relating to the organisation of public assemblies require speedy resolution. It would be appropriate to provide a short time frame for the resolution of such disputes. Therefore, the Draft Proclamation requires courts to dispose of public assembly cases within 72 hours. An earlier formulation of this provision adopted by the Assembly Working Group proposed an internal appeal to the mayor of the concerned city or to the *wereda* administrator, who has the obligation to determine the matter within 24 hours along with recourse to courts, which should decide the matter within 48 hours. Based on the proposal of the Advisory Council, the power to receive notice of public assembly is given to the police, eliminating the role of a mayor or *wereda* administrator in decision-making.

The issue of court jurisdiction was a matter of lengthy debate because of the federal structure in Ethiopia. Two views were vying for recognition both at the discussions of the Assembly Working Group and the Advisory Council. The first view suggested that federal and state first instance courts should have jurisdiction over disputes arising from the organisation or conduct of public assemblies. The main concern of the supporters of this view was to ensure assembly organisers can readily access the courts. In the Ethiopian context, the supporters argued, state first instance courts are in *wereda* towns, physically close to assembly organisers. This gives organizers the benefit of readily accessing the courts without spending much time and expenses to travel to zonal cities where state high courts are located. The supporters of this view distinguish legislative jurisdiction from jurisdiction of courts. They argue that the Constitution does not determine jurisdiction of courts over political rights although the regulation of political rights such as the right to freedom of assembly falls under the legislative jurisdiction of the House of Peoples’ Representatives, as stated under Article 55(2)(d) of the Constitution.

Supporters of the view also pointed out that state first instance courts do exercise jurisdiction over laws passed by the federal government in practice; for example, state first

¹⁴² Ibid Art 19 (1).

instance courts routinely assume criminal jurisdiction over the Criminal Code enacted by the federal legislature. Therefore, they conclude, access to justice can be realised better when state first instance courts are assigned jurisdiction over disputes relating to assemblies. Nevertheless, this view was the view of the minority both in the Assembly Working Group and Advisory Council.

The majority view reflected in the Draft Assembly Proclamation assigns jurisdiction to the federal first instance courts and state high courts. The supporters of this view stressed that the regulation of political rights is a 'federal matter' since Article 55 (2) (d) of the Constitution clearly provides that the House of Peoples' Representatives shall enact specific laws on the 'enforcement of political rights established by the Constitution'. Therefore, the majority argued, the federal courts have the power to adjudicate disputes relating to the enforcement of political rights including the right to freedom of assembly. However, state high courts are empowered under Article 80 (4) of the Constitution to exercise the jurisdiction of the federal first instance court. Therefore, reflecting the majority view, Article 19 (1) states that complaints regarding restrictions and conditions imposed on assemblies shall be submitted to the federal first instance court or state high court as the case may be.

4.7 Right to Petition

The Draft Assembly Proclamation contains novel provisions aimed at enforcing the right to petition recognized under Article 30 of the Constitution. The provisions did not attract serious debate during the drafting process. From the outset, the draft makes it clear that a petition is submitted to government entities other than courts. Article 2 (13) of draft defines the term 'petition' as 'the submission of a request, a proposal, a complaint or protest to a government entity except the courts with a view to defending rights, the Constitution, the law or the general interest'. The reference to 'a government entity except the courts' means that a petition is to be submitted to the legislative and executive branches of government or other independent government institutions different from the courts.¹⁴³

Article 2 (13) defines a petition by using various words (request, proposal, complaint, and protest), indicating that petitions can be used for a variety of purposes. Article 26 of the draft lays down four different objectives of petitions submitted to the government: 1) 'advocacy of a cause aimed at influencing a public authority to take or adopt certain measures', 2) 'expression of protest or an opinion contrary to that held by a public authority, with a view to causing the revision thereof', 3) 'lodging of a complaint or grievance against measures taken by a public authority requesting appropriate remedies or redress of grievances'; and

¹⁴³ Ethiopian Human Rights Commission (EHRC) and the Ethiopian Institution of the Ombudsman (EIO) can be mentioned as examples of independent institutions of government.

4) ‘denunciation of any unconstitutional or illegal practices or acts and demanding of measures against those responsible’.

The broad scope of the subject matter of petition can be contrasted with the subject matter of claims submitted to courts. As discussed in section 3.3 above, the right of access to justice under Article 37 of the Constitution only allows bringing ‘a justiciable matter’ before the courts. It is very unlikely that courts will entertain submissions merely relating ‘advocacy of a cause’ or ‘expression of protest’. Even a submission involving the denunciation of unconstitutional or illegal acts is unlikely to be considered by a court unless there is a concrete claim for which the courts can provide remedies and the applicant has legal standing to submit the complaint. The recognition of the right of petition provides a platform for individuals and groups to petition government organs on a broad range of matters unconstrained by rigorous requirements as to the justiciability of their claims. In other words, the subject-matter of a petition may include a non-justiciable matter or a justiciable matter as long as the courts are not seized of the matter or have not disposed of the matter.

A petition can be submitted by ‘any individual, group or legal person ... either individually or collectively’.¹⁴⁴ Unlike the procedure before courts, there is no need that a person submitting a petition be directly or personally affected by the issue or measure which is the subject of the petition.¹⁴⁵ A petition may be submitted physically, by post or through electronic means.¹⁴⁶ The Draft Proclamation provides that the right of petition will not be subject to any fee and that individuals should not be prejudiced for exercising their right of petition.¹⁴⁷

The legislative reform relating to the right of assembly and petition cannot ignore the renewed attention to e-petitioning. Thus, the Draft Assembly Proclamation expressly requires government entities ‘to organize systems for receiving petitions including a web interface and other systems for electronic submissions’.¹⁴⁸ The implementation of this obligation may prove to be difficult given the poor ICT infrastructure in Ethiopia. However, the existence of an express legal obligation to put in place e-petition systems may encourage government entities to strive to fulfil their obligations.

The Draft Assembly Proclamation imposes the obligation to respond to admissible petitions. Admissibility criteria include clarity, submission to competent entity, prohibition

¹⁴⁴ Draft Assembly Proclamation, Art. 25 (1).

¹⁴⁵ Ibid Art. 25(2).

¹⁴⁶ Ibid Art. 25 (3).

¹⁴⁷ Ibid Art. 25 (6).

¹⁴⁸ Ibid Art 25(4).

of anonymity, and relation to new matters.¹⁴⁹ Petitioners should clearly specify the object of their petition and submit it to a government entity that has competence over the subject-matter of their claim. Anonymous petitions are not admissible, meaning petitioners should specify their names and affix their signature to the petitions. Finally, a petition requesting reconsideration of matters determined by courts or other government entities is not admissible.

Government entities have the obligation to respond to admissible petitions. The Draft Assembly Proclamation requires government entities 'to duly investigate and study the matter which forms the object of the petition'.¹⁵⁰ The investigation envisaged in the draft may range from ascertaining information to conducting public hearings. After conducting a thorough investigation, 'the government entity to which a petition is made shall have the duty to pass a decision and communicate the same to the petitioner or petitioners concerned within one month from the date of submission of the petition'.¹⁵¹

Conclusions

The right to freedom of assembly is a fundamental human right recognized under international and regional instruments adopted by Ethiopia. The recently issued General Comment No. 37 adopted by the Human Rights Committee provides the latest authoritative guidance on the protection of the right to freedom of assembly under Article 21 of the ICCPR. While Article 30 of the FDRE Constitution, providing for the right to freedom of assembly, is generally consistent with the requirements of international human rights law, it is crucial that the provision is interpreted in light of international human rights standards as required under Article 13 (2) of the Constitution. In particular, Article 30 (1) providing for 'appropriate' regulations and restrictions 'in the interest of public convenience' needs to be interpreted and applied in a manner consistent with the requirement that restrictions be 'necessary' (and 'proportional') to protect a legitimate objective.

The absence of a detailed subsidiary legislation enforcing the right of assembly in a manner consistent with constitutional and international human rights standards remains to be a major problem. The 1991 Demonstration Proclamation that was enacted before the adoption of the FDRE Constitution is clearly lacking in the provisions necessary for the full enjoyment of the right to freedom of assembly. The proclamation suffers from serious gaps and limitations such as the failure to make a meaningful distinction between indoor and outdoor assemblies, the absence of provisions regulating simultaneous assemblies, counter

¹⁴⁹ Ibid Art 27.

¹⁵⁰ Ibid Art 29 (1).

¹⁵¹ Ibid Art 29 (2).

assemblies and spontaneous assemblies as well as the lack of detailed regulations relating to the rights and duties of organizers and participants of assemblies. Furthermore, the proclamation has been found to be wanting in light of international human rights standards. For instance, Article 6 (2) of the proclamation permitting restrictions as to the time and place of assemblies where it is found 'preferable' flies in the face of the requirement that restrictions be 'necessary' (and 'proportional') to protect a legitimate objective.

Major problems that have been encountered in the implementation of the 1991 proclamation have seriously jeopardized the exercise of freedom of assembly. For instance, the universal application of the proclamation and its notification procedure on all forms of assemblies including those which fall outside the scope of the law has seriously undermined the freedom of assembly. The proclamation adopts a notification system for assemblies and includes a ban on blanket prohibition of planned assemblies. However, the recurrent involvement of government officials in practices that run contrary to the letter and spirit of the law – ranging from refusal to accept notification for assemblies, to the imposition of unjustified restrictions and conditions on assemblies, the indefinite postponement of assemblies and, at times, the outright banning of assemblies – have effectively transformed the notification procedure into a *de facto* permission system.

The Draft Assembly Proclamation addresses the major gaps and limitations of the Demonstration Proclamation. Relevant provisions of the draft law provide better clarity regarding the scope of application of the law including by specifically mentioning forms of assemblies that are outside the scope of the law. The draft establishes a notification system, but it is unique in that the procedure essentially applies only to public (outdoor) assemblies. The assemblies specifically exempted from the notification requirement include indoor assemblies, assemblies at freedom parks and those taking place in higher education institutions. The draft includes elaborate rules on the rights and duties of organizers and participants of assemblies as well as third parties. It contains rules regulating counter-assemblies, simultaneous assemblies, and spontaneous assemblies.

In a major departure from the existing law, the draft discharges city and *wereda* administrations from their current role and designates the police institution to assume full responsibility to accept notifications for assemblies and facilitate the conduct of assemblies. The reassignment of institutional responsibilities was made in recognition of the primary role played by the police in the conduct of assemblies. On the other hand, the minimum notice period of 48 hours in the existing law has been extended to 7 days. This may be considered to be a regressive step, but the change was necessitated by concerns that the 48 hours' notice period has proved to be too short and unrealistic.

As regards the limitation of freedom of assembly, the draft explicitly incorporates the requirements set out under Article 21 of the ICCPR. It expressly requires that any restriction or condition imposed on the conduct of an assembly should be 'necessary in a democratic society' to protect legitimate objectives. Therefore, the draft clearly avoids the pitfalls of the Demonstration Proclamation in force which speaks of 'preferable' restrictions. The protected 'legitimate objectives' have been limited to those recognized under Article 21 of the ICCPR, namely: 'national security', 'public safety', 'public health', 'public morals', 'public order' or the 'fundamental rights and freedoms of others'. With regard to the limitation of freedom of assembly for the protection of the rights of others, the draft prescribes the principle that assemblies should be permitted as long as they do not impose unnecessary and disproportionate burden on the rights of others.

The draft introduces the concept of 'freedom parks' which are designated areas where assemblies can be held without notice. In this regard, city and *wereda* administrations are required to establish or designate at least one freedom park within six months after the coming into force of the draft law. Finally, the draft includes novel rules aimed at enforcing the right to petition under Article 30 of the Constitution which recognizes the right along with freedom of assembly. Petitions submitted to government entities may have the objectives such as the advocacy of a cause or expression of protest. Whether a petition is submitted by individuals exercising their right to freedom of assembly or by other persons, the enactment of provisions enforcing the right of petition will have immense contributions towards the objective of building a vibrant democratic culture.

Appraising the Reform of the Anti-Terrorism Proclamation of Ethiopia Based on Applicable Human Rights Standards

Amerti Solomon*

Abstract

The threat of terrorism became a serious concern at an international level following the 9/11 attack in the United States of America in 2001. Since then, many nations have enacted counter-terrorism legislation despite the difficulty in setting the parameters for an effective counter-terrorism law. Ethiopia was among these countries. The law Ethiopia adopted in 2009, the Anti-Terrorism Proclamation (Proc. No. 652/2009), was subject to criticism both for its content and application. It was, in fact, considered by many to be a tool for suppressing political opposition and muzzling freedom of expression. Following the legal reform process initiated in Ethiopia in 2018, the ATP was replaced in 2020 by the Proclamation to Provide for Prevention and Suppression of Terrorism Crimes (Proc. No. 1176/2020). This article portrays some of the prominent differences between these two legislation by using selected substantive and procedural issues and discussing them in light of national and international human rights standards. It also sheds light on and highlights the deliberations during the replacement process and gives recommendations on how to avert the misuse of the new counter-terrorism law while combating terrorism.

Introduction

The right to life, bodily integrity, property, health and education are just few examples of rights affected by terrorism directly and indirectly.¹ The issue of terrorism remains to be an area of concern both at the domestic and international levels. Following the terrorist attack on the Twin Towers in the United States of America in 2001, international call on states to take measures to combat terrorism intensified. The Ethiopian government enacted the Anti-Terrorism Proclamation in 2009. This infamous piece of legislation can be taken as a prime example of how measures taken to combat terrorism can themselves be a serious threat to human rights. The Anti-Terrorism Proclamation was criticized for both its substantive drawbacks and its application. Accordingly, it was one of the laws reviewed in the legal

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¹ Human Rights Council, Draft report on Negative Effects of Terrorism on the Enjoyment of Human Rights (2018), A/HRC/AC/21/CRP.2 4-8.

reform process in 2018 and was ultimately replaced by the Prevention and Suppression of Terrorism Crimes Proclamation in 2020.

This article attempts to highlight how the new proclamation departs from its predecessor by using selected provisions as examples. Accordingly, the first section of the article describes the background and application of the Anti-Terrorism Proclamation in order to give context as to what led to its replacement. The second section focuses on the legal reform process in relation to the counter terrorism law, highlighting the main arguments for and against the need for a new counter terrorism law in Ethiopia. In the third section the substantive drawbacks of selected provisions of the Anti-Terrorism Proclamation are assessed in light of human rights standards along with how the new proclamation addresses these drawbacks. This section also highlights provisions which were introduced under the new proclamation aimed at protecting human rights. Finally, the article ends with a conclusion and recommendation section.

Before delving into these discussions, it is important to note that this article, intended as an exploratory and comparative study, does not attempt to cover all areas of concerns under the repealed Anti-Terrorism Proclamation nor does it attempt to explore the new proclamation in its entirety. It does not assess the new proclamation on its own rather only compares it with its predecessor. This is by no means to imply that the new proclamation is flawless, but simply because such an analysis is beyond the scope of the article. It is, therefore, the hope of the author a close up of one of the fields of reform which make up part of a rather panoramic legal reform effort being conducted in the country.

1. Background and Application of the Anti-Terrorism Proclamation 652/2009

The attack by Al-Qaida on the Twin Towers in the United States of America on September 11, 2001, impelled intense dialog on terrorism at an international level. As a result, the UN Security Council adopted Resolution No. 1373 on September 28, 2001, a resolution that calls upon states to undertake numerous measures such as prohibiting the financing of terrorism and accelerating the flow of information among states.² This resolution also established a Counter Terrorism Committee (“CTC”) that oversees the implementation of the resolution calling on states to report to the same.³

At the regional level, however, long before the attack on the Twin Towers, the Organization of African Unity (“OAU”), now the African Union (“AU”) had adopted the OAU Convention on the Prevention and Combating of Terrorism in 1999 (“OAU Convention on

² United Nations Security Council Resolution No. 1373 (2001) para 1 (a)(b) para 3.

³ Ibid, para 6.

Terrorism”) which entered into force in December 2002.⁴ The Convention perceives terrorism as a violation of human rights and requires states to take measures to combat the same, *inter alia* by promulgating domestic legislation.⁵

Accordingly, the Ethiopian government, argued that a special law was necessary to fulfill the international obligation, as a member state to the UN and a signatory to the OAU Convention on Terrorism.⁶ Furthermore, the government asserted the necessity of a special law due to the inefficiency of existing laws to prevent and control terrorism in the country where the development, peace, and security of the country is threatened by the same.⁷ Although these were some of the justifications for passing the counter-terrorism law in Ethiopia, it was only on August 28, 2009, years after the adoption of the international instruments, that the House of Peoples’ Representatives promulgated the Anti-Terrorism Proclamation in 2009 (“ATP”).⁸ Besides, as evidence of threats of terrorism, the government presented terrorist attacks that occurred in the country a decade before the passing of the ATP, without new evidence to show an increased, clear, and present danger faced at the time of promulgating the law.⁹

The counter assertion was that the law ‘curtails individuals’ substantive rights by widely defining terrorism and conflating dissent with terrorism; ‘it erodes procedural constitutional rights by widening the power of the state security apparatus’.¹⁰ Moreover, the government had been reporting to the CTC about the adequacy of its existing laws when terrorist attacks in the country were raised by the Committee as serious concerns that required special counter-terrorism legislation.¹¹ These attacks were later invoked by the government as justifications for the enactment of the ATP.¹² Hence it was not irrational to question if the reasons given by the government were unfeigned.

It might have been difficult at the time to deem one argument more convincing than the other, however over the years, the content of the law coupled with its application unfolded a series of events that proved the suspicions reflected in the latter arguments valid. In this regard, it is important to highlight examples of its application.

⁴ OAU Convention on the Prevention and Combating of Terrorism (1999).

⁵ Ibid, art 2 (a).

⁶ Anti-Terrorism Proclamation, 2009, Proc. No 652, Neg Gez. Year, no 57, preamble para 5.

⁷ Ibid, para 2.

⁸ Anti-Terrorism Proclamation (n 6).

⁹ Wondwossen Demissie Kassa, ‘Examining Some of the *Raisons D’Etre* for the Ethiopian Anti-Terrorism Law’ (2013) vol. 7 Mizan Law Review 54.

¹⁰ Zelalem Kibret, ‘The Terrorism of ‘Counterterrorism’: The Use and Abuse of Anti-Terrorism Law, The Case of Ethiopia’ (2017) vol.13 European Scientific Journal 512.

¹¹ Wondwossen (n 9) 53.

¹² Ibid.

During the application of the ATP, many were accused of being members of organizations that were formerly proscribed as terrorist by the House of Peoples' Representatives, namely Oromo Liberation Front ("OLF"), Ogaden National Liberation Front ("ONLF"), Ginbot 7 and other groups proscribed as terrorists internationally.¹³ Most politicians, journalists, or individuals who expressed dissent were often accused of links to these groups.

For instance, Andargachew Tsege was a known critic of the government and leader of Ginbot 7 charged under the proclamation, Bekele Gerba Deputy Chairman of the Oromo Federalist Congress, was arrested in 2011 as a suspected member of OLF; Eskender Nega a journalist critical of the government and the ATP itself was accused of having links with Ginbot 7.¹⁴ Okello Akway a former governor of the Gambella region had linked the government with the massacre of hundreds of Anuak people in Gambella and criticized the state for the ongoing human rights violations before he was charged with coordinating with terrorist groups and plotting a terrorist attack.¹⁵ Ryot Alemu, a journalist critical of the government while a group of journalists and bloggers called Zone Niners.¹⁶ The group wrote pieces critical of the government and all were eventually accused of creating instability using social media and receiving financial and ideological support from Ginbot 7 and OLF.¹⁷ Yonatan Tesfaye, a former spokesperson for the opposition party Blue Party (Semayawi Party), was charged with incitement, planning, preparation, conspiracy, and attempt to commit a terrorist act in line with OLF objectives.¹⁸ It was also common to arrest a large number of people involved in protests under the ATP, for instance in the case *Gurmessa Ayano et al*, the Federal Prosecutor charged more than fifty people under the ATP in connection with the 2015/2016 Oromo protests.¹⁹ The inflated overstretch to politicians and activists in such an obvious manner called for inquiring the motivating factor behind the enactment of the law and raised doubt on the necessity of the law to tackle terrorism.²⁰

In addition, as pointed out by the special rapporteur on freedom of expression David Kaye, the ATP gave the government extensive powers of surveillance and the state 'conducted targeted hacking against individuals in and outside of Ethiopia without any evident judicial

¹³ Human Rights Watch Ethiopia, 'World Report 2012: Events of 2011' (Jan 2012) (<https://www.hrw.org/world-report/2012/country-chapters/ethiopia> accessed 20 December, 2020).

¹⁴ The Oakland Institute, 'Ethiopia's Anti-Terrorism Law: A Tool to Stifle Dissent' (2015) 7.

¹⁵ Amnesty International Public Statement, 'Ethiopia: 25 Years of Human Rights Violations' AFR 25/4178/2016 (June 2016) 6 and The Oakland Institute (n 14) 6-8.

¹⁶ The name represented 8 zones in Kaliti Prison while the 9th zone represented Ethiopia where freedom and human rights are restricted.

¹⁷ The Oakland Institute (n 14) 8.

¹⁸ Amnesty International Public Statement (n 15) 3.

¹⁹ Ibid.

²⁰ Zelalem (n 10) 531.

authorization or oversight'.²¹ It is also argued that the substantive shortcomings of the law - from the definition of terrorist act to admissible evidence- were conducive for the violation of human rights of those accused during its application. All in all, under the guise of terrorism and the ATP as an instrument, it was evident that the government delegitimized political dissent, suspended judicial guarantees of individuals, and suppressed free press.²²

2. The Reform Processes

Due to its evident misuse and substantive shortcomings, the ATP was the basis of human rights violations and grievance. Thus, calls for its amendment were common including from international organizations like the AU and UN Human Rights Committee.²³ Therefore following the unprecedented reforms in the country that began in 2017, the ATP was one of the legislations reviewed in the legal reform process headed by the Federal Attorney General. A group of selected individuals were tasked by The Legal and Justice Affairs Advisory Council ("LJAAC") to analyze the proclamation and suggest reform options. Below are some of the considerations during the process of replacing the ATP with the new counter-terrorism law, the Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020 ("Terrorism Crimes Proclamation").²⁴

During the reform process, the first step was preparing a diagnostic report which identified the shortcomings of the ATP and how these contributed to the misuse of the law. This was followed by finding the best means of addressing these problems. The alternatives suggested at the time were coming up with an entirely new law, incorporating counter-terrorism provisions in the existing criminal law, or forgoing a counter-terrorism law altogether.²⁵ With regards to this, the arguments for and against a special counter-terrorism law

²¹ United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression David Kaye, Visit to Ethiopia End of Mission Statement, (2009) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E> accessed 15 December 2020.

²² Awol Allo, 'Protests, Terrorism, and Development: On Ethiopia 's Perpetual State of Emergency' (2017) vol.10 Yale Human Rights and Development Law Journal 169.

²³ ACHPR, Forty-Seventh Ordinary Session 12 – 26 May 2010 'Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia' (Banjul, 2010) para. 57; ACHPR, 51st Ordinary Session 18 April to 2 May 2012 'Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia' (2012) Res. 18; ACHPR, 56th Ordinary Session 21 April to 7 May 2011, 'Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia' (2011). Look at also United Nations Human Rights Committee, 102nd Session, (29 July 2011) 'Concluding Observations of the Human Rights Committee on Ethiopia' (19 Aug.2011) CCPR/C/ETH/CO/1 para 15.

²⁴ Prevention and Suppression of Terrorism Crimes Proclamation, Proc No.1176, Neg Gez. Year 2020 no. 20.

²⁵ የፀረ ሽብርተኝነት አዋጅ የጥናት ቡድን, የበኢ.ፌ.ዴ.ሪ ጠቅላይ አቃቤ ሕግ የህግና የፍትህ ጉዳዮች አማካሪ ጉባኤ, የፀረ ሽብርተኝነት አዋጅ ጥናትና ምክረ-ሃሳብ (2011E.C) Unpublished 31-40.

dominated the discussions and are highlighted below. Overall, the issues identified in the diagnostic report of the ATP and the proposed solution were presented to the public and concerned bodies such as prosecutors, judges, defense lawyers, opposition parties, victims, and scholars whose input was gathered through public consultations, meetings, and written submissions. The working group used all these inputs in its deliberations with the LJAAC and the drafting process.²⁶

2.1. Arguments for a Counter-Terrorism Law

Terrorism has a direct and indirect impact on human rights; directly because it deprives individuals of their right to life, liberty, dignity and indirectly by prompting states to legislate counter-terrorism laws which limit human rights.²⁷ The indirect impact emanates from the state's obligation towards human rights namely the duty to respect, protect, and fulfill. The obligation to fulfill requires states to take measures 'including legislative, judicial, administrative or educative measures, to fulfill their legal obligations'.²⁸ Therefore, states not only have the right but also the responsibility to create effective counterterrorism legislation to protect human rights. Following this indirect impact negative outcomes that may follow, such as abuse and misuse are, areas of concern.²⁹ However, 'counter-terrorism has to reconcile the necessity of combating terrorism with the constitutional legal and ethical demands of a democratic state'.³⁰ For instance, at the regional level, the OAU Convention on Terrorism, under article 2 requires states to review their laws, establish criminal offenses for terrorist acts, and attribute the appropriate penalties.³¹ On the other hand the AU also has Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa.³² This proposes the stipulation that counter-terrorism and human rights – with all the challenges- must go hand in hand. The UN General Assembly explicitly reinforces this idea stating that it recognizes ' effective counter-terrorism measures and the protection

²⁶ የሽብር ወንጀልን ለመከላከል እና ለመቆጣጠር በተዘጋጀ ረቂቅ አዋጅ ላይ የተዘጋጀ አጭር ማብራሪያ (2012 E.C) Unpublished, 3.

²⁷ Mark D. Kielsgard, 'A Human Rights Approach to Counter Terrorism' (2006) vol.36 California Western International Law Journal 260.

²⁸ Ibid.

²⁹ Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32 (2008) 4.

³⁰ Gregory M. Scott et al, '21 Debated Issues in World Politics' (2004) Pearson Education Inc 152.

³¹ OAU Convention (n 5) art 2.

³² African Commission on Human and Peoples' Rights, 'Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa' (2015) One of the General Principles under part 1 (I) provides that states 'should not use combatting terrorism as a pretext to restrict fundamental freedoms, including freedom of religion and conscience, expression, association, assembly, and movement, and the right to privacy and property'.

of human rights are not conflicting goals, but complementary and mutually reinforcing, and stresses the need to promote and protect the rights of victims of terrorism'.³³

In addition to the state obligation justification, it is argued that the very nature of a terrorist act sets it apart from other crimes and thus requires more stringent legislation than the ordinary criminal law.³⁴ The intention behind the criminal act is what sets a terrorist act apart from other crimes, a notion further discussed in upcoming sections. Hence, the argument is that there needs to be a law that condemns this intention while equipping the state with the necessary investigation, and prevention methods that are vital in combating terrorism.³⁵ Such laws are also vital at an international level to facilitate cooperation among states in combating terrorism by addressing a range of issues from controlling the financing of terrorism to extradition agreements.³⁶ Furthermore, the relevance of the law with regards to justice, support, and rehabilitation of the victims of terrorism or those who are lobbied into terrorist groups should not be undermined.³⁷

Lastly, Ethiopia, like other nations in the world, is not immune to terrorist attacks. It is argued that the threat is increased due to the geographical location of Ethiopia where neighboring countries like Kenya and Somalia have experienced several terrorist attacks over the years.³⁸ Furthermore, incidents in the country that have unfolded in recent years are indicators of how violence from within is a threat with increasing concerns that a series of crimes that may amount to terrorism might increase. In summary, terrorism threat in Ethiopia can emanate from 'the proliferation of insurgent groups and other political groups aiming at unconstitutional change; Somalia-based radicalized Islamic groups such as Al-Shabaab; and the threatening inter-ethnic conflicts'.³⁹

Therefore, for all the above reasons and more the country ought to be equipped with proactive laws to combat terrorism. Hence, the focus ought to be on how to strike a balance between safeguarding individuals from terrorism and carefully limiting their rights when doing so; as opposed to forgoing a counter-terrorism law altogether.

³³ United Nations General Assembly, Resolution adopted by the General (20 September 2006), A/RES/60/288, para IV 9.

³⁴ የፀረ ሽብርተኝነት አዋጅ የጥናት ቡድን (n 25) 38.

³⁵ Ibid.

³⁶ OAU Convention (n 4) art 6.

³⁷ የሽብር ወንጀልን ለመከላከል እና ለመቆጣጠር በተዘጋጀ ረቂቅ አዋጅ ላይ የተዘጋጀ አጭር ማብራሪያ (n 25) 6.

³⁸ E. Kessels, M. Schwartz T.Durner, 'Violent Extremism and Instability in the Greater Horn of Africa An Examination of Drivers and Responses' (2016) 23 & 29.

³⁹ Hiruy Wubie Gebreegziabher, 'The Right to Privacy in the Age of Surveillance to Counter Terrorism in Ethiopia' (2018) vol.18 African Human Rights Law Journal 395.

2.2. Arguments against Counter-Terrorism Law

The negative aspects of the indirect impact of terrorism set the groundwork for the arguments against the need for a counter-terrorism law in Ethiopia. Measures taken by states have themselves posed a serious danger to human rights and rule of law due to instances where states engage in torture and ill-treatment to combat terrorist acts. Under the guise of combating terrorism, 'the legal and practical safeguards available to prevent torture, such as regular and independent monitoring of detention centers have often been disregarded'.⁴⁰ This was the case in Ethiopia as can be seen from the brief description of the law's application earlier. The country has more experience of the hitches of the misuse of a counter-terrorism law than that of a terrorist attack. In short, the argument is that the people are in more danger from abuse of counter-terrorism law -in the absence of a developed democracy and human rights culture- than they are from terrorism.⁴¹ Therefore, the state must first focus on building a strong justice system, accountable law enforcement, and strong human rights institutions before rushing to legislate another law.⁴²

After much deliberation, all the options were presented and the ultimate decision was left for the lawmaker, i.e., the House of Peoples' Representatives, for it was a policy decision that needed to be informed with various other factors than analysis made by experts drafting the law. Hence the working group continued to prepare the draft law, which later became the Terrorism Crimes Proclamation.

3. Comparison of the ATP and Terrorism Crimes Proclamation

3.1 Definition of Terrorism under the ATP

Defining terrorism in a precise manner has proven to be difficult due to its complex nature which is reflected in the lack of an internationally accepted definition to date. This difficulty can partly be attributed to the different actors such as political agitators, revolutionaries, insane persons, and their various motives ranging from religion and politics to the economic motivation of organized criminals.⁴³ When considering all these and more, often instances occur where one man's terrorist is another's freedom fighter making terrorism a 'we will know it when we see it phenomenon'.⁴⁴

⁴⁰ UN Fact Sheet (n 29) 9.

⁴¹ የፀረ ሽብርተኝነት አዋጅ የጥናት ቡድን, (n 25) 33.

⁴² Ibid.

⁴³ G Abeyie, Daniel E, 'Police Studies' (1981) vol. 4 35.

⁴⁴ W. J. Fulton, 'Counter-Terrorism' (1990) 152&153.

The OAU Convention on Terrorism defines a terrorist act under article 1 sub (3). This provision provides different criminal activities such as causing death, serious bodily injury, or damage to environment or heritage as terrorist acts if intended to cause intimidation, fear, coercion of the government, disruption of public service or create general insecurity in a state.⁴⁵ The UN Security Council Resolution no. 1566 on the other hand does not define a terrorist act or terrorism but rather stipulates acts with three characteristics that ought to be punished.⁴⁶ First, acts committed including against civilians, with the intent to cause death or serious bodily injury, or taking of hostages.⁴⁷ Second, acts committed with the purpose of provoking a state of terror in the general public or a group of persons or particular persons, and third, acts constituting offenses within the scope of and as defined in the international conventions and protocols relating to terrorism.⁴⁸ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has expressed support for this approach as a means of confining the term to conduct which is of a genuine terrorist nature.⁴⁹

Despite the lack of a coherent definition at an international level, states are called upon to combat terrorism and are expected to do so in their respective context. In turn, 'this paves the way for legislation which define terrorism in ways that leave room for intentional or unintentional misuse of the term which runs the risk of legitimizing the conducts of oppressive government's and human rights abuses.'⁵⁰

It can be argued that this was the case in the Ethiopian context. The problem in the 'definition of terrorism is not just something whose effects can end up curtailing a single human right. It rather has cross-cutting human rights implications by making the law susceptible to abuse'.⁵¹ Article 3 of ATP defines a terrorist act in the following manner:

Terrorist Acts

Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:

⁴⁵ OAU Convention (n 4) art 2.

⁴⁶ United Nations Security Council Resolution no. S/RES/1566 (2004), para 3.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ M. Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (2005), E/CN.4/2006/98 para 42.

⁵⁰ Ibid, para 27.

⁵¹ Hiruy Wubie, 'Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective', (Sep 2012) vol. 25 Journal of Ethiopian Law 40.

- 1/ causes a person's death or serious bodily injury;
- 2/ creates serious risk to the safety or health of the public or section of the public;
- 3/ commits kidnapping or hostage taking;
- 4/ causes serious damage to property;
- 5/ causes damage to natural resource, environment, historical or cultural heritages;
- 6/ endangers, seizes or puts under control, causes serious interference or disruption of any public service; or
- 7/ threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article; is punishable with rigorous imprisonment from 15 years to life or with death.

Terrorism may properly refer to a specific set of actions the primary intent of which is to produce fear and alarm that may serve a variety of purposes⁵² as reflected under article 3. According to this provision, a terrorist act is committing any of the acts under sub-article 1 to 6 with the intention of advancing any of the agendas specified in the provision. The intention element is an important component of a terrorist act that sets it apart from other criminal acts. This is because 'the purpose for which the doer of the act committed gives a terrorist nature to what is otherwise an ordinary crime' punishable under the criminal code of Ethiopia.⁵³ In other words, the purpose of committing a specific act goes beyond personal benefit or vendetta such as seen in ordinary crimes; rather an act in the context of terrorism has the intention of bringing about change with the compulsion of the state or organizations into doing or abstaining from doing a specific act.⁵⁴

Briefly looking into the criticisms on article 3, first, it is argued that the definition is too broad. For example, sub-article 6 of the proclamation provides for 'serious interference or disruption of any public service'.⁵⁵ Of course, interference or disruption of public service with the clear intention of causing terror or harm must be punished. However, the way the sub-article is stipulated allows the inclusion of legitimate public protests or political dissent in the realm of terrorist acts.⁵⁶ This is because many protests are in fact held with the intention of compelling the government and may have the practical effect of disrupting public service as defined under Article 2(7) of the same which includes communication,

⁵² BM Jenkins, 'The Study of Terrorism: Definitional Problems' (1980) 2.

⁵³ Wondwossen Demissie Kassa, 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments' (2014) vol. 8 Mizane Law Review 392.

⁵⁴ Dersolegen Yeneabat Mekonen, 'Assessing Controversial Issues of the Ethiopian Anti-Terrorism Law: A Special Focus on Substantive Matters' (2015) vol.40 Journal of Law, Policy and Globalization 56.

⁵⁵ Anti-Terrorism Proclamation (n 7) art 3(6) also look at Awol Allo (n 22) 167.

⁵⁶ Hiruy Wubie, (n 51) 43 & Human Rights Watch Submission on Ethiopia, (2012) Report of the UN Special Rapporteur on human rights defenders to the General Assembly: Questionnaire on the use of legislation, including criminal legislation, to regulate the activities and work of human rights defenders 3.

transport, public utility, etc.⁵⁷ Hence acts of non-violent protest which normally fall within the ambit of political expressions, such as holding rallies and demonstrations could easily be labeled as terrorism. Furthermore, the providers of these public services may go on strikes themselves and the definition runs the risk of depriving these individuals of their rights to protest and even go as far as accusing them of committing a terrorist act. Therefore, by failing to exclude such instances, this definition permits the 'government to repress internationally protected freedoms and to crack down on political dissent, including peaceful political demonstrations and public criticisms of government policy'.⁵⁸ One can argue that such instances are logically exempted from being dubbed as terrorist acts. However, taking in to account the context of Ethiopia, particularly the questionable independence of the judiciary, absence of effective human rights institutions and goodwill towards human rights protection, the lack of a clear exemption is problematic.

Although the government argues this definition is similar to democracies such as the United Kingdom and Australia, the counter-terrorism laws of these states themselves have been criticized for being broad and vague.⁵⁹ Even then, these laws operate in countries where there is a strong practice of democracy and human rights where the rights benefit from the safeguard of the judiciary and advanced democracy.⁶⁰ Furthermore, unlike the ATP, the Australian counter-terrorism law clearly exempts political protests and strikes so long as they were not intended to endanger life, health, or safety.⁶¹

Another shortcoming is the punishment attributed to terrorist acts. Sub 7 of article 3 provides that whosoever threatens to commit any of the acts stipulated under sub-articles (1) to (6) of Article 3 is punishable with rigorous imprisonment from fifteen years to life. The issue contested here is that the punishment for all the acts is a minimum of fifteen years. Particularly when it comes to sub-article 4 causing serious damage to property and sub-article 6 disruption to public service the punishment is highly problematic. The United Nations special rapporteur on counterterrorism and human rights, has stated that the concept of terrorism should be limited to acts committed with the intention of causing death or serious bodily injury, or the taking of hostages, and should not include property crimes.⁶² Under the ATP not only is property damage punishable, without any distinction as to the type of property, but the punishment is also set very high equated to the loss of life.

⁵⁷ Anti-Terrorism Proclamation (n 6) art 2(7).

⁵⁸ The Oakland Institute, (n 14) 27.

⁵⁹ Wondwossen Demissie Kassa (n 53) 376.

⁶⁰ Ibid 377.

⁶¹ Ibid.

⁶² Fact Sheet No. 32 (n 29) 30.

In summary, the punishment is the same for all sorts of crimes stated under the sub-articles when these actions are clearly not of the same magnitude of harm or impact on the victims and thus the punishment ought to have differed.

3.1.2. Definition of a Terrorist Act under Terrorism Crimes Proclamation 2020

Under the Terrorism Crimes Proclamation, it is important to note that terrorist act and terrorism crime are differentiated. Article 2(2) defines terrorism crime as engaging in specific acts identified in the proclamation ranging from committing a terrorist act to heading a terrorist organization.⁶³ While the terrorist act is defined under article 3 of the proclamation and stipulates the type of acts considered as terrorism which is relevant for the discussion here. The provision provides;

Terrorist Acts

- 1/ Whosoever, with the intention of advancing political, religious or ideological causes for terrorizing, or spreading fear among the public or section of the public or coercing or compelling the Government, Foreign Government or International Organization:
 - a) Causes serious bodily injury to person;
 - b) Endangers the life of a person;
 - c) Commits hostage taking or kidnapping;
 - d) Causes damage to property, natural resource or environment; or
 - e) Seriously obstructs public or social service; is punishable with rigorous imprisonment from ten years to eighteen years.
- 2/ Where the action taken to achieve the causes mentioned in Sub-article (1) of this Article is causing death of person or causing serious damage to historical or cultural heritages or infrastructure or property or natural resource environment the punishment shall be rigorous imprisonment from Fifteen years to life or death.

Similar to the provision under the ATP, engaging in certain activities with the specific intention of advancing an agenda by targeting a specific group constitutes a terrorist act. However, there are major points of departure in the new proclamation especially in light of the drawbacks discussed under the ATP. First, unlike the ATP, article 3(4) provides for an exception where it exempts obstruction of public service due to strikes of professionals or demonstrations in the exercise of other rights recognized by law.⁶⁴ As mentioned above, this sort of exception can be seen in other jurisdictions such as Australia where 'engaging in

⁶³ Prevention and Suppression of Terrorism Crimes Proclamation (n 24) art 2(2).

⁶⁴ Prevention and Suppression of Terrorism Crimes Proclamation, (n 24) art 3(4).

advocacy, protest, dissent or industrial action where a person does not have the intention to urge force, violence or cause harm to others does not constitute as a terrorist act'.⁶⁵

Second, the punishment for terrorist acts has been classified as opposed to prescribing the same punishment for all. The punishment for taking life or destroying irreplaceable cultural heritages such as Lalibela or infrastructure such as the Great Ethiopian Renaissance Dam will have a devastating impact on the country. Therefore, such instances of destruction of property are anticipated in this provision where the punishment is severe, with a minimum of fifteen years to life.⁶⁶ The remaining acts of terrorism are punishable with ten to eighteen years, a significant departure from the previous punishment.

3.2. Planning and Preparation for the Commission of Terrorist Acts

Article 4 of the ATP deals with preparation, conspiracy, and attempt to commit a terrorist act, all of which are inchoate crimes.⁶⁷ The main concern with this provision is that it cramped all of these together and made all punishable in accordance with the penalty provided under article 3 i.e. from fifteen years or life or death.⁶⁸ In doing so, the defendant is subject to the same level of punishment as if the crime was completed while in reality, the impact of his/her action is significantly different and unmatched with a terrorist act that has been completed.⁶⁹ Furthermore, not only do these acts differ from that which has been completed, but they also vary from one another.

Under the Terrorism Crimes Proclamation article 6 provides for planning, preparation and conspiracy to commit a crime. Under this provision, planning is punishable with three to seven years and both preparation and conspiracy to commit a terrorist crime are punishable with five to twelve years.⁷⁰ The difference in the degree of punishment emanates from the difference in the level of preparedness of the individual to commit the crime. Planning includes identifying the place and means of committing the terrorist act in mind which goes beyond mere intention.⁷¹ Preparation goes a step further and involves actions taken to make the crime possible such as procuring the means of committing the terrorist crime.⁷² It is evident that in the latter case the level of determination to commit the crime is higher,

⁶⁵ Australia's terrorist act offences are contained in the Criminal Code Act 1995.

⁶⁶ Prevention and Suppression of Terrorism Crimes Proclamation, (n 24) art 3(2).

⁶⁷ Anti-Terrorism Proclamation, (n 6) art 4.

⁶⁸ Ibid

⁶⁹ የፀረ ሽብርተኝነት አዋጅ የጥናት ቡድን (n 25) 12.

⁷⁰ Prevention and Suppression of Terrorism Crimes Proclamation (n 24) art 6.

⁷¹ Ibid art 6(2).

⁷² The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414, (2004), art 26.

accordingly the level of punishment attributed by the proclamation is also higher. Hence the Terrorism Crimes Proclamation better deals with the issue of inchoate crimes.

3.3. Encouragement of Terrorism under the ATP

Like many other rights, freedom of expression is subject to limitations to protect public order and national security which among others, emanate from state responsibility to protect people from a terrorist act.⁷³ For example, the Council of Europe's Convention on the Prevention of Terrorism ("Europe's Convention on Terrorism") requires states to criminalize unlawful and intentional encouragement to commit a terrorist act.⁷⁴ Article 5 of the Convention provides three elements to be considered in defining incitement to terrorism. First, is the act of communication i.e. publication distribution, etc. Second, there must be a subjective intention by the individual to incite terrorism and finally, there must be an objective danger that the person's conduct will incite terrorism.⁷⁵ The United Nations Special Rapporteur, Martin Scheinin, on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism refers to this definition in defining incitement to terrorism.⁷⁶ Encouragement to terrorism was another provision of the ATP which was highly criticized⁷⁷ and when using the definition under Europe's Convention on Terrorism as a yardstick definition, article 6 has some serious drawbacks. It provides:

Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.⁷⁸

The first element, the act of publication is included and no apparent problem is observed in that regard. Coming to the second element of subjective intention, it is important to highlight the moral element of a crime, one out of the three cumulative elements under Ethiopian Criminal Law required to make an act punishable.⁷⁹ The moral element addresses the state of mind of the accused at the time of committing a specific crime i.e. whether the crime was committed intentionally or by negligence.⁸⁰ When assessing article 6 in light of this, the article provides that a statement is considered as encouragement of a terrorist act

⁷³ International Covenant on Civil and Political Rights, (1966) art 19 (3).

⁷⁴ Council of Europe Convention on the Prevention of Terrorism, (2005).

⁷⁵ M. Scheinin (n 50) para 56 (c).

⁷⁶ Ibid.

⁷⁷ Article 19, Comment on Anti-Terrorism Proclamation of Ethiopia 2010 9.

⁷⁸ Anti-Terrorism Proclamation (n 6) art 6.

⁷⁹ Criminal Code of Ethiopia (n 72) art 23(2).

⁸⁰ Ibid, art 57.

.i.e. a crime, if it is likely to be understood by some or all members of the public as direct or indirect encouragement. This means under the ATP, it is the subjective understanding of the third party, as opposed to the subjective intention of the producer of the content, that is used as the moral element of punishing an act. Therefore, an individual can be accused of encouraging terrorism even on instances where he/she had neither the intention nor has been negligent about his/her statements. Hence criminal guilt of a person emanates from the understanding of another individual over which the producer of the content has no control over. With regards to the third element of objective danger that the content of the producer will encourage terrorism is not taken into consideration under article 6.

Another shortcoming of the provision is the use of wide parameters that risk criminalizing almost all content such as the phrase 'some or all of the members of the public'. What some people find encouraging in their quest to take a specific action, others may consider as a mere statement. But because the parameter is wide, the understanding of a few individuals will suffice to dub the statement as an encouragement to terrorism. Similarly, the phrase 'direct or indirect encouragement' covers a wide range of speech since those which are not considered objectively direct may fall within the indirect encouragement ambit.

All these issues in the provision risk punishing individuals for practicing free speech and with all these serious concerns, the provision penalizes encouragement with a minimum of ten years. The provision has a chilling effect on the legitimate exercise of the right which is of serious concern 'given that freedom of expression is an essential foundation of a democratic society, and its enjoyment is linked with other important rights, including the rights to freedom of thought, conscience and religion, belief and opinion'.⁸¹ The Human Rights Committee of the UN has expressed its concerns with regards to the ATP and particularly article 6 stating that while it appreciates the promulgation of a counter-terrorism law, some provisions of the proclamation, such as those criminalizing encouragement may lead to abuse against the media.⁸² Furthermore, the use of such parameters has made article 6 subject to criticism for being contrary to the principle of legality. This is because the provision is not crafted with sufficient precision to allow individuals to regulate their conduct accordingly.⁸³

⁸¹ UN Fact Sheet (n 29) 20.

⁸² United Nations Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee: Ethiopia, (2011), para 16.

⁸³ Ibid.

3.3.1 Encouragement to Terrorism under the Terrorism Crimes Proclamation

The definition under the EU Convention discussed above is also relevant in assessing the provision under the new proclamation. The Terrorism Prevention Proclamation covers encouragement under article 10 sub 2. The Article provides:

- 1) Notwithstanding the provision of Sub-article (1) of this Article, whosoever in clear manner incites by statement, writing, using image or by any other conduct to cause the commission of any of the acts provided for under Article 3 of this Proclamation or publish, produce, communicate, distribute, store, sell, or make available to the public through any means anything with substance of such kind shall be punishable with rigorous imprisonment from three year to seven years, provided that the crime was attempted or committed.
- 2) Notwithstanding the provision of Sub-article (2) of Article 36 of the Criminal Code, where the act mentioned has been committed as provided for in Sub article (1) or (2) of this Article but the intended crime has not materialized or attempted, the person who commits the acts mentioned in the sub-articles shall be punished with rigorous imprisonment from one year to five years.

The provision provides for the first element, i.e. the element of distribution which will not be discussed further due to the obvious nature. With regards to the second element, subjective intention, this provision significantly departs from the previous approach. Although the word 'intention' is not used, the phrases 'in a clear manner' and 'to cause the commission of' indicate that the new law considers the intention of the producer of the content. This resonates with the above yardstick definition for it considers the subjective intention of the producer as opposed to the understanding of the receiver of the content.

When it comes to objective danger, article 10 (2) requires that the content must lead to either the attempt or commission of a terrorist act for it to be punishable from three to seven years. In this instance, the danger posed by the content in resulting the commission of a terrorist crime has already materialized. Hence one can argue that the third element of objective danger has indeed been applied under this sub-article. However, under sub-article 3 a content can still be punishable even where the crime was neither committed nor attempted. Although with reduced punishment, the criminalization is without considering if the content poses a danger of leading to the commission of a terrorist act. All in all, unlike the ATP, the new proclamation is not nonchalant about the third element of objective danger. Even though it is not used as the basis of criminalizing content, it is applied in determining the level of punishment. Here, it must be emphasized that although objective threat element is lacking under sub 3 it is important to remember an earlier discussion about intention and terrorism where it was said that intention is an element which gives a crime its terrorist

nature.⁸⁴ Thus it can be argued that criminalizing clear intention to encourage terrorism and making such content available may be justified perhaps with reservation to the level of punishment.

Lastly, an interesting feature of sub-article 2 of article 10 is that it covers not only the authors of the content but also those who 'publish, produce, communicate, distribute, store, sell, or make available to the public through any means'.⁸⁵ This creates a wider group of persons (legal or natural) that may be held responsible for incitement. Here it is important to highlight a difference between the Amharic and English versions. While the English version states that those who make available content that incites a terrorist act are punishable the Amharic version includes the element of knowledge as to the nature of the content and making it available anyway. This can be inferred from the reading of the Amharic version which states 'እንደዚህ ዓይነት ይዘት ያለው ነገር መሆኑን እያወቀ ያተመ'.⁸⁶ Therefore the Amharic version, which is the binding version, is better for it includes the element of knowledge.

3.4. Procedural Issues

3.4.1 Remand

When it comes to the shortcomings of the ATP with regards to remand it is important to briefly highlight article 20 sub (1) to (3). In principle, a remand order is given when the investigating police requires additional time to complete an investigation.⁸⁷ Under the Criminal Procedure Code of Ethiopia ("Criminal Procedure Code") a maximum of 14 days is granted for each remand order, while under the ATP it 'shall be a minimum of 28 days'.⁸⁸ This means, under the ATP, even if the time required by the police is, for example, 8 days the court is required by law to give at least 28 days. Furthermore, by using the word 'shall' the proclamation takes away the court's discretion to evaluate the situation and give the additional time it deems appropriate. This is in clear contradiction with article 19 (4) of the Constitution which requires the court to ensure that the responsible law enforcement authorities carry out investigation respecting the arrested person's right to a speedy trial when determining the additional time necessary.⁸⁹ However, it is important to mention that unlike the Criminal Procedure Code, the ATP puts four months in total as the maximum period given for remand, even though it does not stipulate what happens if the investigation period takes longer than four months. Despite this 'safeguard' the provision remains to be

⁸⁴ Refer to previous discussion on definition of terrorism.

⁸⁵ Prevention and Suppression of Terrorism Crimes Proclamation (n 24) art 10 (2) Sub 2.

⁸⁶ Ibid.

⁸⁷ The Criminal Procedure Code of Ethiopia, (1967), art 59 & Anti-Terrorism Proclamation (n 6) art 20(3).

⁸⁸ Anti-Terrorism Proclamation, (n 6) art 20(3).

⁸⁹ Constitution of the Federal Democratic Republic of Ethiopia, (1995) art 19(4).

problematic for it does not avert the limitations highlighted above. The provision continues to limit the discretion of the court and sets the minimum date too high which poses a danger of encouraging slow-paced investigation in violation of the accused's right.

3.4.2 Bail

The ATP lacks clarity when it comes to bail. Article 20 sub 4 provides that the prosecution may appeal against bail rights while sub 5 stipulates 'if a terrorism charge is filed in accordance with this Proclamation, the court shall order the suspect to be remanded for trial until the court hears and gives a decision on the case'.⁹⁰ The latter provision gives the impression that the bail right of the accused is suspended and the individual will be held in custody until a final decision is rendered. On the other hand, bail is a Constitutionally guaranteed right under Article 19 (6) of the FDRE Constitution and its denial is the exception.⁹¹ Hence, it can be argued that the legislators of the ATP are aware of this Constitutional right, thus the proclamation does not suspend bail since it states that the prosecutor can appeal against bail cases. And logically, an appeal is only necessary when there is a decision on bail to appeal against. To clear up this confusion, it is important to look into the practical application of the ATP. In doing so, one can find that the courts denied bail right of individuals accused of terrorism citing article 20 (5) of the ATP.⁹² Therefore, the lack of clarity made way for an application in violation of the accused's Constitutionally guaranteed right. the law in a manner that violates the Constitutional right of the accused. an application which violates the constitutional right of the accused.

3.4.3 Remand and Bail under the Terrorism Crimes Proclamation

With regards to the issue of remand and bail, the Terrorism Prevention Proclamation removes these provisions without replacements. Hence the issue of remand and bail are handled with the ordinary Criminal Procedure Code which better protect the interest and human rights of the accused. The issue of remand under the Criminal Procedure Code has already been highlighted earlier. However, it is important to note that the draft Criminal Procedure and Evidence Code adopts the approach taken by the ATP and sets the maximum remand period at 4 months.⁹³ If passed, this further protects the right of the accused of all, including those accused of terrorism.

⁹⁰ Anti-Terrorism Proclamation (n 6) art 20(5).

⁹¹ FDRE Constitution (n 89) art 19 (6).

⁹² Federal Prosecutor Vs Gurmessa Ayano et al, Federal Prosecutor Vs Nigist Yirga et al, Federal Prosecutor Vs Tufa Melka et al and others.

⁹³ The Draft Criminal Law Procedure and Evidence Code, (2013 EC.) art 199 (3).

When it comes to the issue of bail, article 63 of the Criminal Procedure Code provides for specific instances- the level of punishment and death of the victim- where bail is denied otherwise making it the principle.⁹⁴ This provision is in line with the Constitution and therefore the right of a person accused under the proclamation is better protected by the application of the Criminal Procedure Code than the application of the ATP.

3.5. Admissible Evidence

Article 23 of the ATP deals with admissible evidence particularly the admissibility of hearsay and intelligence report under sub 1 and 2 respectively. According to these provisions, both hearsay evidence and intelligence report, that does not disclose the source or how it was gathered, are admissible.⁹⁵ In both instances the ability of the accused to challenge the evidence is compromised; therefore, it significantly affects the individual's Constitutional right to have access to evidence and examining witnesses against him/her.⁹⁶

When it comes to hearsay evidence, although the witness can be cross-examined, the validity of the original statement can never be scrutinized. On the other hand, intelligence reports are often prepared in a very generic form with telephone conversations in written forms, allegedly prepared from interception by National Intelligence and Security Services.⁹⁷ Therefore, the admissibility of hearsay and intelligence reports of this nature 'seriously offends the defendants' right to confrontation of the prosecution case. This may undermine the reliability of the court's verdict and likely give rise to a miscarriage of justice'.⁹⁸

Under the Terrorism Prevention Proclamation, the above provisions have been removed and there is no longer a legal ground that renders hearsay evidence admissible. With regards to an intelligence report, article 42 provides special means of investigation applicable when the investigation techniques under the ordinary Criminal Procedure Code are not effective.⁹⁹ Under sub 6 of this provision, it asserts that evidence obtained through interception by law enforcement organs are admissible only when presented directly as obtained.¹⁰⁰ Hence, unlike the ATP, the new proclamation requires a recording of the

⁹⁴ The Criminal Procedure of Ethiopia (n 87) art 63.

⁹⁵ Anti-Terrorism Proclamation (n 6) art 23 (1).

⁹⁶ Hiruy Wubie (n 51) 59.

⁹⁷ የፀረ ሽብርተኝነት አዋጅ የጥናት ቡድን (n 25) 20.

⁹⁸ Hiruy Wubie, (n 51) 59.

⁹⁹ Prevention and Suppression of Terrorism Crimes Proclamation (n 24) art 42(1).

¹⁰⁰ Ibid art42(4(6)).

intercepted phone conversation, for example, as opposed to a written report of the same prepared by NISS.

3.6. Safeguards

The Terrorism Prevention Proclamation also includes new provisions aimed at protecting human rights and dealing with violations once they have occurred. For example, article 36 (3) and article 37(2) of the proclamation discuss the responsibilities of the Federal Police and the NISS respectively. Under these provisions, both institutions are required to assign professionals who have been trained on matters of terrorism and protection of human rights in addition to possessing the required experience, skill, and good ethical behavior.¹⁰¹ The Federal Attorney is also obligated to assign prosecutors with similar qualifications.¹⁰² This obligation remains in instances where the Federal Attorney delegates its powers to regional prosecution institutions.¹⁰³ Furthermore, the proclamation obliges the Federal Attorney to follow up on the treatment of individuals who have been detained as suspects of terrorism crimes.¹⁰⁴ This creates another layer of protection for the accused and responsibility on the prosecution to make sure individual rights are respected and protected. This is in line with state responsibility to guarantee accused persons' rights and fulfill its responsibility under national and international laws.¹⁰⁵

The above provisions are principally aimed at preventing human rights violations by ensuring the professionalism of those involved in the investigation and prosecution process. These professionals are expected to execute their responsibilities in light of their human rights knowledge by refraining from the use of means contrary to human rights. This professionalism will also increase the level of accountability on instances of violation.

The proclamation also provides ways in which the Federal Attorney General and Judiciary are to address instances of human rights violations. The Judiciary is required to give priority to claims made by suspects incarcerated for terrorism crimes in relation to their detention and give the necessary order to resolve the problem.¹⁰⁶ With regards to accountability, the proclamation provides that professionals assigned to prevent, investigate, and litigate can be subject to disciplinary action, criminal and civil liability on instances where they have

¹⁰¹ Ibid art 36(3).

¹⁰² Ibid art 38(2).

¹⁰³ Ibid art 38(3).

¹⁰⁴ Ibid art 38(1(c)).

¹⁰⁵ United Nations General Assembly, Protection of human rights and fundamental freedoms while countering terrorism, (2009), A/RES/64/168, para 6(b)&(n).

¹⁰⁶ Prevention and Suppression of Terrorism Crimes Proclamation (n 24) art 39(3).

violated the rights of individuals.¹⁰⁷ The Federal Attorney has the responsibility to hold individuals accountable in times of a violation of the law. Furthermore, the victims of this violation are entitled to moral damage compensation from either the institution or the person responsible.¹⁰⁸ All these provisions are aimed at preventing the possible human rights abuse that may occur while countering terrorism discouraging such conduct and fighting impunity.

Finally, the act of terrorism violates numerous human rights varying from the right to life and property. Hence counter-terrorism laws must also take into account how to deal with the victims of terrorism. According to the special rapporteur, addressing the issues faced by victims of terrorism represents best practice for it allows the victims to rebuild their lives and helps reduce the tension in the society that might create a conducive environment for the recruitment to terrorism.¹⁰⁹ In light of this, while the ATP states the future establishment of victims' fund by a Council of ministers regulation, the Terrorism Prevention Proclamation establishes the victims' fund.¹¹⁰ The objective of the fund is to provide support towards the prevention of terrorism, cover the medical expenses of victims, rehabilitate both victims of terrorism and those who were inculcated with ideas of terrorism.¹¹¹ Therefore, this provision brings to life one of the advantages of counter-terrorism laws which is providing support to victims in addition to rendering justice.

Conclusions

Terrorism undoubtably threatens the rights of individuals all across the world. Despite this obvious threat however, it has remained difficult to have consensus on how to effectively combat terrorism whilst avoiding too much restriction on rights and misuse by state organs. Ethiopia has dealt with this issue since the promulgation of the infamous ATP in 2009. The law suffered from substantive shortcomings which were exploited and made worse during its application rendering it a tool for stifling dissent as opposed to combating terrorism.

The Terrorism Crimes Proclamation not only attempts to address these shortcomings but also incorporated new provisions aimed at preventing misuse, abuse of human rights and ensuring accountability. The new proclamation benefited from the insight gathered from

¹⁰⁷ Ibid, art 41(2).

¹⁰⁸ Ibid, art 41(3).

¹⁰⁹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Human Rights Council Sixteenth Session Agenda item 3, 'Ten areas of best practices in countering terrorism', (2010), A/HRC/16/51, para. 24.

¹¹⁰ Prevention and Suppression of Terrorism Crimes Proclamation (n 24) art 34 & 44.

¹¹¹ Ibid art 44.

the application of the ATP. However, even if the proclamation has made significant improvements, it may have drawbacks which become evident when assessed on its own.

More importantly, the improvement of the law is a vital but an insufficient step towards an effective counter terrorism. As highlighted previously, the problems in relation to the ATP cannot be attributed solely to its substantive drawbacks but also failing to apply the law in good faith, in line with existing human rights and democratic standards. As highlighted, there were Constitutional, procedural and international human rights standards that could have been applied to make sure that the ATP was not drafted with such drawbacks in the first place or at least applied better once it was passed. Therefore, there is no guarantee that the new proclamation will not be abused.

The focus ought to be on striking a balance between the direct and indirect effect of terrorism on human rights and work towards creating a better human rights culture. It must be emphasized that in the absence of good will and parallel efforts of reform in the overall justice and human rights culture of the state, having a well-crafted law is futile. This is because, human rights and justice institutions play a part in effectively fighting terrorism.

The problems during the application of the law were observed throughout from the investigation process to interpretation by courts. Hence, the effectiveness of the law is highly dependent on the NISS, police, attorneys, and the judiciary both at an institutional and individual level. These institutions are responsible in preventing misuse, ensuring accountability at all levels and make the protection of human rights part of their culture. Hence, sensitization and training of personnel on human rights is vital. Institutional capacity building including in equipment and expertise must be looked into to ensure these professionals do not resort to unacceptable means of investigation and prevention. The effective coordination of these institutions along with holding each other accountable is also imperative.

Independent institutions, mainly the Ethiopian Human Rights Commission (EHRC) and civil society organizations must actively monitor and investigate and take appropriate measures to ensure that the law is applied effectively. Particularly the EHRC must review the application of the law to give recommendation and advise on the proclamation's continuity, amendment etc. if need be.

Finally, the government must avoid political interference in the above institutions and focus on building an improved system that moves towards an improved human rights and democratic system in the country. Particularly by creating a system where political dissent is tolerated and human rights are promoted. More importantly, the government ought to work on addressing the underlining causes of terrorism. This entails understanding the

sources of dissatisfaction of different groups and trying to address their concerns within bounds to make sure people do not resort to violent means to make their voices heard. In addition, the state, EHRC and civil society organizations, after conducting the necessary research, must work on outreach programs to create awareness among citizens on the evils of terrorism and its overall impact.

Tilting at Windmills with Anti-Terrorism Laws: The Challenges of Doctrinally Challenging the Definition of Terrorism

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Abstract

Almost a decade after the now defunct 2009 Anti-Terrorism Proclamation was enacted, the notion that this law was part of a quixotic battle against dissent, rather than against the menace of terrorism, had found broad acceptance. However, although it may now seem that the proverbial dust over the debate regarding its faulty definition of terrorism has settled, a closer look at the doctrinal underpinnings of the consensus against the law shows how another debate, a legal-doctrinal one, remains unresolved. This is especially true because the literature on the law finds almost unanimous agreement as to why its definition of terrorism is flawed. Legal studies on the topic answer the why question through various iterations of the “vague and overbroad” formulation. The article will contend that this formulation should be abandoned since it, by mixing the internationally prevalent principles of lex certa and proportionality analysis with the American doctrine of overbreadth, creates a legal chimera which can hurt legal stability and predictability thereby worsening the quixotic qualities of any such future law. Comparing the definition of terrorism in the 2009 law to the 2020 Anti-Terrorism Proclamation, the article employs a comparative method that pulls from academic literature and the practices of a number of domestic and international courts to argue for the utilization of a more stable analytical structure that can bring about interpretive consistency in constitutional cases in Ethiopia.

Introduction

Chaos, confusion, and a palpable fear accompanied the unveiling of Ethiopia’s 2009 Anti-Terrorism Proclamation.¹ The government insisted that the law was meant to avert a “clear

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¹ Anti-Terrorism Proclamation, 2009, Proclamation No 652/2009, Federal Negarit Gazette, 15th Year No 57, Addis Ababa.

and present danger”.² Opposition parties, on the other hand, insisted that it was meant to crackdown on legitimate political activity and criticized the law for being “as terrifying as terrorism”.³ A couple of years after these debates, the notion that the 2009 law was part of a quixotic battle against dissent, rather than against the menace of terrorism, has found acceptance far beyond the usual circle of activists, political opponents and critics. The African Commission on Human and Peoples’ Rights (“African Commission”) took the lead in recommending the amendment of the law.⁴ This lead was followed by major UN human rights bodies, including the Human Rights Committee,⁵ the Committee against Torture,⁶ the Working Group on Arbitrary Detention⁷, the High Commissioner for Human Rights,⁸ and six Special Rapporteurs of the Human Rights Council.⁹

Evoking, as it were, Cervantes’ Don-Quixote who confuses windmills for ill-tempered giants, the government eventually came around to admitting that it was engaged in a battle against windmills, that is, its own people. However, even its admission was no less quixotic. The initial author of this confusion, the government, was adamant that the government itself was the giant and thus responsible for “state terrorism”.¹⁰ Granting politicians and political discourse can easily slip in and out of uncanny figures of speech, what lies at the heart of this paper is that legal discourse which meant to be critical of the quixotic law did not help much in clarifying the blunder.

² Wondwossen Demissie Kassa, ‘Examining some of the Raison d’être for the Ethiopian Anti-terrorism Law’ (2013) 7 *Mizan L. Rev.* 49, 49-54.

³ Hiruy Wubie, ‘Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective’ (2012) 25 *Journal of Ethiopian Law* 2, 39; Zelalem Kibret, ‘The Terrorism of ‘Counterterrorism: The Use and Abuse of Anti-Terrorism Law, the Case of Ethiopia’ (2017) 13 *European Scientific Journal* 504, 512.

⁴ ACHPR, Forty-Seventh Ordinary Session 12 – 26 May 2010 ‘Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia’ (Banjul, 2010) Par. 57: ACHPR, 51st Ordinary Session 18 April to 2 May 2012 ‘Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia’ (2012) Res. 18; ACHPR, 56th Ordinary Session 21 April to 7 May 2011, ‘Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia’ (2011).

⁵ UN Human Rights Committee, 102nd Session 11-29 July 2011 ‘Concluding Observations of the Human Rights Committee on Ethiopia’ (19 Aug.2011) CCPR/C/ETH/CO/1, Par. 15.

⁶ UN Committee Against Torture, Forty-fifth Session ‘Concluding Observations of the Committee Against Torture’ (20 January 2011) CAT/C/ETH/CO/1.

⁷ UNHRC, 65th Session 14 - 23 Nov. 2012 ‘Opinions adopted by the Working Group on Arbitrary Detention’ (2012) A/HRC/WGAD/2012/62.

⁸ OHCHR, ‘Climate of Intimidation against Rights Defenders and Journalists in Ethiopia’, OHCHR News Archive 1994 – 2013 (18 Jul. 2012); OHCHR, ‘Opening remarks by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein at a press conference during his mission to Ethiopia’ (Addis Ababa ,4 May 2017).

⁹ OHCHR, ‘UN Experts Urge Ethiopia to Stop using Anti-Terrorism Legislation to Curb Human Rights’ (Geneva,18 Sept. 2014); also, OHCHR, ‘Climate of Intimidation against Rights Defenders and Journalists in Ethiopia’ OHCHR News Archive 1994 - 2013 (2 Feb. 2012).

¹⁰ Awol K. Allo, Torture, ‘State Terrorism and Ethiopia's Transformation’ *Al-Jazeera* (23 Jun. 2018).

A common theme, or even a unanimous consensus, running through the legal discourse on the 2009 ATP was that it was fundamentally flawed in how it defined terrorism. Ethiopian academics, through both published¹¹ and unpublished¹² works, and international human rights NGOs,¹³ were rightly convinced that the definition in the 2009 law blurred the line between terrorism and political opposition. The consensus regarding the definition of terrorism was expressed through various iterations of the “vague-and-overbroad” formulation positing that the law was not precise enough in defining terrorism, that it was formulated so broadly that it imposed undue restrictions on non-terrorist activities. This article will challenge this consensus arguing that the “vague-and-overbroad” formulation hinges upon a precarious legal-doctrinal basis which ironically exacerbates the quixotic challenge of the 2009 ATP.

The case will be made that, although heuristically useful, the “vague and overbroad” formulation, and its different iterations, are doctrinally and practically problematic. The catchall formulation, which makes sense when used outside of the law, will be shown to be a decontextualized mix of the principle of legality and the American doctrine of overbreadth. This seemingly conjectural matter is of great practical consequence because it is a symptom of, and at the same it can exacerbate, the fact that the legal system has very little experience

¹¹ Dersolegn Yeneabt Mekonen, ‘Assessing Controversial Issues of the Ethiopian Anti-Terrorism Law: A Special Focus on Substantive Matters’ (2015) 40 *Journal of Law, Policy and Globalization* 54, 60-62; Hiruy Wubie (n 3) 40-49; Zelalem Kibret (n 3) 514-16; Melhik Abebe Bekele, ‘Counter-Terrorism and the suppression of Political Pluralism: An Examination of the Anti-terrorism Proclamation of Ethiopia’ (LLM Dissertation for Human Rights and Democratization in Africa, Faculty of Law, University of Ghana, 29 Oct. 2010); Peter Sekyere & Bossman Asare, ‘An Examination of Ethiopia’s Anti -Terrorism Proclamation on Fundamental Human Rights’ (2016) 12 *European Scientific Journal* 351, 361-62; Husen Ahmed Tura, ‘The Impact of Ethiopia’s Anti-Terrorism Law on Freedom of Expression in HOW DEEP IS YOUR LAW?’ (BREXIT, TECHNOLOGIES, MODERN CONFLICTS, 5th International Conference of PhD Students and Young Researchers, 27-393, 395-397 28 Apr. 2017) ,393, 395-397. The only detailed research on the definition of terrorism in the Anti-Terrorism Proclamation is made by Wondwossen Demissie Kassa who, however, approaches the law not from a human rights perspective but from that of international counterterrorism law. See Wondwossen Demissie Kassa, ‘The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments’ (2014) 8 *Mizan Law Review* 2, 371, 392-393.

¹² Simret Zewdie Kebede, ‘Proscription of Encouragement of Terrorism in Ethiopia: Analysis of its Consistency with Freedom of Expression’ (Master’s Thesis, University of Oslo Faculty of Law, 2010); Asmelash Y. Teklu, ‘Striking the Balance between Conforming to Human Rights Standards and Enacting Anti-Terrorism Legislation: A Challenge of the 21st Century; an Ethiopian Perspective’ (PhD Thesis, University of Lincoln, 5 Sept. 2016). Shimelis Hailu, ‘Ethiopian Anti-Terrorism Law and Human Rights Nexus: An Appraisal’ (M.A. Dissertation in International Relations, School of Graduate Studies, Addis Ababa University, 2014); Molaligne Tsegaye, ‘Implications of the Anti-Terrorism Law of Ethiopia on Freedom of Expression and the Media’ (LLM Dissertation, Addis Ababa University School of Law, May 2016); Also see Melhik Abebe (n 11) 36.

¹³ Human Rights Watch, ‘An Analysis of Ethiopia’s Draft Anti-Terrorism Law’ (30 Jun. 2009); Amnesty International, ‘Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia’ (16 Dec. 2011) Article 19; Global Campaign for Free Expression, ‘Press Release on Anti-Terrorism Proclamation 2009 of Ethiopia’ (Mar. 2010) Article 19; Lewis Gordon et al., ‘Ethiopia’s Anti-Terrorism Law: A Tool to Stifle Dissent’ (2015) the Oakland Institute; Amnesty International, ‘Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia’ (Dec. 2011).

with constitutional litigation and with doctrines and analytical methods for settling constitutional disputes. While dwelling on an examination of the “vague and overbroad” formulation and its alternatives, and mostly in the context of the definition of terrorism in the 2009 law, the article extends the discussion into the 2020 law, briefly examining whether the new law overcomes or carries over the quixotic challenge.

1. Analytical Standards and Structures Applicable to Defining Terrorism

The enormity of the damage caused to human rights by counterterrorism is expressed in dramatic announcements of “the end of human rights”.¹⁴ The intensity with which counterterrorism measures have impacted the practice of human rights, and some attempts to water down legal protections such as those against torture or prisoners of war protections by the United States, do create the impression that the foundations of human rights law are shaking. However, these challenges have not brought about enduring normative changes let alone “the end” of human rights. The main institutional, normative and conceptual frameworks of human rights, and especially those connected with assessing the validity of human rights limitations by anti-terrorism laws, remain intact. Recognizing the danger that counterterrorism measures have posed to human rights, constitutional and international judicial and semi-judicial institutions have repeatedly and unequivocally emphasized that the traditional corpus and principles long recognized under international human rights law would remain in place in the fight against terrorism.

The African Commission has addressed this matter *inter alia* in its Resolution on the Protection of Human Rights and the Rule of Law in the Fight against Terrorism which requires states to “fully comply” with traditional human rights standards while fighting terrorism.¹⁵ Granting some small differences, this legal framework has been adopted specifically in the context of the definition of terrorism, by the Inter-American Commission

¹⁴ David Rieff, ‘The End of Human Rights?; Learning from the failure of the Responsibility to Protect and the International Criminal Court’ Foreign Policy (Washington DC. 9 Apr. 2018); David Luban, ‘The War on Terrorism and the End of Human Rights’ (2002) 22 Phil. & Pub. Pol’y Q. 9.

¹⁵ ACHPR, 37th Ordinary Session 21 November to 5 December 2005 ‘a Resolution on the Protection of Human Rights and the Rule of Law in the Fight against Terrorism’ (2005 Banjul); For later resolutions reiterated and reinforced this principle see for ex. ACHPR, 56th Ordinary Session 21 April to 7 May 2015 ‘Rights, Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa’ (Banjul, 2015); ACHPR, 60th Ordinary Session ‘Resolution on Implementation of the Principles and ACHPR, ‘Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa’ (Niamey, Niger, 22 May 2017) ACHPR/Res. 368.

on Human Rights,¹⁶ the Human Rights Committee,¹⁷ UN Economic and Social Council,¹⁸ the European Court of Human Rights,¹⁹ the UN General Assembly²⁰ and even by the UN Security Council.²¹ The same framework has also been emphasized by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism who has repeatedly emphasized that the human rights framework is applicable to counterterrorism laws and measures.²²

In Ethiopia, even though it is evident that the definitions of terrorist acts in the 2009 and 2020 anti-terrorism laws limit number of constitutional rights, and would therefore attract the application of the relevant human rights normative and analytical standards, the analytical structure that the courts would apply to decide whether these limitations can withstand constitutional scrutiny is not immediately apparent. A preliminary assessment of the decisions of the Cassation division of the Federal Supreme Court and that of the Council of Constitutional Inquiry reveal no consistent analytical structure or process with which constitutionality adjudicated.²³ It is not clear if Ethiopia simply lacks an established analytical system of constitutional interpretation because it has not had the opportunity to

¹⁶ Inter American Commission on Human Rights, 'Report on Terrorism and Human Rights' (2002) Inter-Am. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. Par. 53.

¹⁷ UN Human Rights Committee, , Forty-eighth session 'General Comment on the right to freedom of thought, conscience and religion' (OHCHR,1993) General Comment No 22, Article 18; UN Secretariat, UN ECOSOC, and UN Human Rights Committee, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (1994) U.N. Doc. HRI/GEN/1/Rev.1 at 35; UN Human Right Committee, 'General Comment No. 27 on Freedom of movement (Art.12)' (1999) U.N. Doc CCPR/C/21/Rev.1/Add.9 Par. 14; and UN Human Rights Committee, 'General Comment No. 34 on freedoms of opinion and expression' (2011) U.N. Doc. CCPR/C/GC/34 Par. 34.

¹⁸ UN Commission on Human Rights, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) U.N. Doc. E/CN.4/1985/4, Annex.

¹⁹ *Sunday Times v. United Kingdom*, N° 6538/74, Judgment of 26 April 1979, para. 49.

²⁰ UN General Assembly, 68th Regular Session 'Resolution on Violence against Women Migrant Workers (2013) Resolution 68/178.

²¹ UN Security Council Ministerial Level Meeting, 'a declaration calling on all states to prevent and suppress all support for terrorism' (January 2003) Resolution 1456.

²² UN Special Reporter on Terrorism, 'Preliminary note by the Special Rapporteur Martin Sheinin on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in his visit to Turkey' (2006) E/CN.4/2006/98; Kalliopi K. Koufa, 'A preliminary Draft of Principles and Guidelines Concerning Human Rights and Terrorism' (June 2005) UN Working Paper. E/CN.4/Sub.2/2005/39.

²³ Getahun Kassa, 'Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System' (2007) 20 *Afrika Focus* 75, 87-88, concluding "to date it seems that no clear set of principles of interpretation have been established to guide the process of adjudication". One is in fact drawn to agreeing with the conclusion that some of the decisions of the Council of Constitutional Inquiry are "more of political rhetoric than legal analysis", see Mustefa Nasser Hassen, 'Methods of Constitutional Interpretation in Constitutional Dispute Settlement in Ethiopia' (LL.M. Thesis, Addis Ababa University School of Law 33 Jan. 2010). Also see Mustefa (n 23) 38-44 for a brief analysis of the possibility of using the decision making model suggested in this paper.

develop one,²⁴ or is in fact not able to have such a system because it is precluded from doing so by the constitution which lacks a system of limitation clauses.²⁵

In this paper, we will assume that Ethiopian courts and its bodies of constitutional interpretation have simply not had the opportunity to develop a nuanced system and attempt to fill this gaping jurisprudential hole with Articles 9 (4) and 13 (2) of the FDRE Constitution which mandate the application of the broad framework international human rights jurisprudence including its standards and processes as developed by different human rights bodies. This broad legal framework, which will be partially expounded below and referred to here as the “international model” to distinguish it from the American one, adopts a multi-step process to evaluate the validity of human rights limitations. The African Commission and Court also indicated that this process include whether a limitation is “prescribed by law”; the legal prescription pursues a “legitimate public interest”; the limitation is “proportional” and “absolutely necessary”, “within a democratic society”.²⁶

Out of these, the Constitution contains direct reference only to “legal prescription” or the principle of legality with only sparse reference to other standards.²⁷ However, we can posit that the other tests are essential, not only because they are mandated by Article 13 (2), but

²⁴ Parliament has mandated the Council of Constitutional Inquiry and House of Federation to develop and implement “Principles for Executing Constitutional Interpretation” although no sign that these have been developed. Council of Constitutional Inquiry Proclamation, 2001, Proc. No. 250/2001, Federal Negarit Gazzeta, 7th Year No.41, Addis Ababa. Note, however, see repeal by Council of Constitutional Enquiry Proclamation No. 798/2013, and Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation, 2001, Proc. No. 251/2001, Federal Negarit Gazzeta, 7th Year No.41, Addis Ababa. Note also that there is a possibility that this mandate could lead to the development of principles of constitutional/statutory interpretation rather than a method or process of adjudication as exemplified by the studies developed by the government established (by Reg. No. 22/1997) Justice and Legal System Research Institute. See Sileshi Zeyohannes, Constitutional Law II, Justice and Legal System Research Institute Ch. 3 (2009) (interpreting the above laws to mean the development of principles of statutory interpretation) and Misker Getahun & Tafese Yirga, ‘Judgment Writing: Teaching Material’ Justice and Legal System Research Institute (2009) (containing no such interpretive procedures despite a chapter on judgment writing in constitutional and human rights cases).

²⁵ Generally, Adem Kassie Abebe, ‘Rule by Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical’ (2012) CGHR Working Paper 1. 14-15. Adem Kassie Abebe, ‘Limiting Limitations of Human Rights under the Ethiopian Constitution’ (2011) 4 Ethiopian Constitutional Law Series.

²⁶ Note that the African Commission’s jurisprudence on the specific standards is reflected in the discussion below. For the most comprehensive declaratory statement of these principles see Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan, Communication. No. 379/09 Afr. Comm’n. (ACHPR,2014) Pars. 114, 118; Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l’Homme v. Mauritania, Communication No. 242/01 Afr. (ACHPR,2010) Par. 78.

²⁷ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta, Addis Ababa, Arts. 15, 17, 18 (4), 19 (6), 20 (3), 22, 23, 26 (3), 27 (5), 29 (6) and (7), 30, 31, and 40; This cannot, however, mean that legal prescription is the only requirement in Ethiopian law because such a position would lead to the conclusion that any human rights limitation is valid as long as it is prescribed by law. In addition, not all the non-absolute rights in the constitution contain the legality requirement which would mean that some rights can be extra-legally limited.

because a case can be made for them based on the principles of democracy, constitutionalism, the rule of law and the fact that they are intrinsic to the interpretation of human rights.²⁸ In addition, this position is compelling, if not inevitable, because the analytical structure proposed in this paper is so widely received in both treaty and constitutional interpretation, that it is viewed a “global constitutional standard” and “a common language of global constitutional law.”²⁹ The fact that the Constitution does not tether these sets of standards by inscribing them directly in the Constitution may of course leave space for a more creative approach or eclecticism especially in borrowing from different models. Granting this possibility, and pointing out some examples, the paper will focus mainly on how to stabilize the current disarray in the process and method of constitutional interpretation by proposing a reliance on conceptual tools of constitutional interpretation that have been adopted in international human rights law.

In this paper we will treat the standards in the international model as a three staged analytical procedure wherein, once a *prima facie* case is made that the exercise of a right has been interfered with by a counter terrorism measure, the first stage of analysis will concern whether the violation is prescribed by law.³⁰ The second stage involves an analysis of whether the law made the limitation in pursuit of legitimate interests which are typically but not necessarily listed in the exception clauses of the constitution or treaty.³¹ The third stage involves a set of tests aggregated under “proportionality analysis” which include the suitability or effectiveness test, the necessity or the least intrusive means test, and proportionality balancing or “proportionality *stricto sensu*” test.

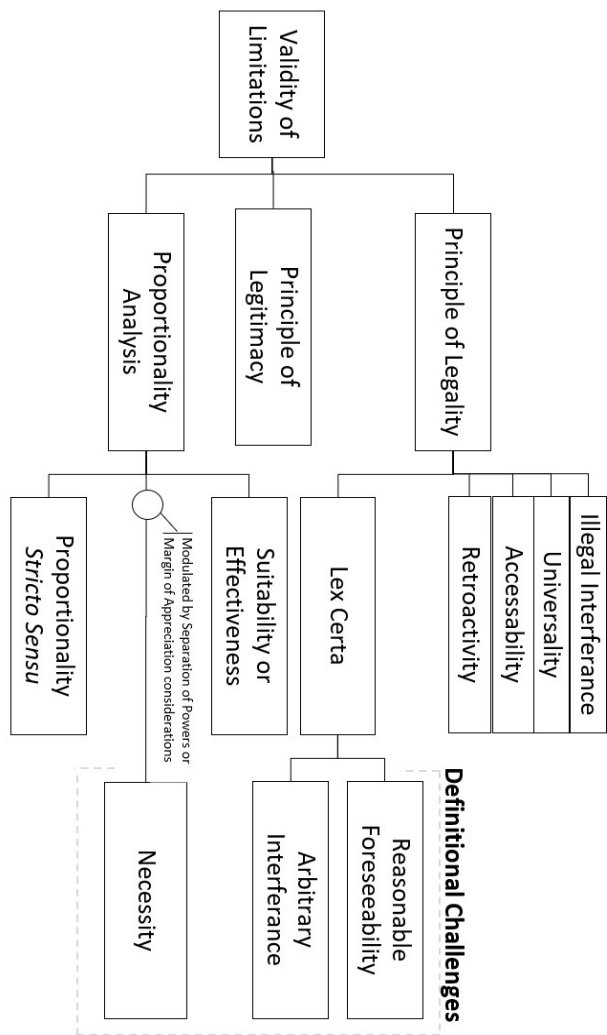
²⁸ Aharon Barak, *Proportionality; Constitutional Rights and Their Limitations*, (Cambridge Univ. Press 2012) 213-241; and Robert Alexy, ‘Constitutional Rights Balancing and Rationality’ (2003) 16 *Ratio Juris* 131.

²⁹ Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 7 *Columbia J. of Transnat. L.* 73, 80; and Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’ (2011) 59 *Am. J. Comp. L.* 463, 466; also see Barak, (n 28) 175-206.

³⁰ International Convention on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS, Articles 12, 17, 18, 19, 21, and 22.

³¹ For an excellent compilation of materials dealing with this standard see Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010).

Fig. 1 The broader international analytical framework in relation to the definition of terrorism.



The first and third stages of this analytical framework are briefly explained in the following two sub-sections as they directly pertain to the definition of terrorism, and to the topic of this paper, i.e. the “vague-and-overbroad” formulation. It should, however, be noted that these are not the only standards that are relevant to the anti-terrorism laws in general, and not even to the definition of terrorism. For example, although one could generically posit that anti-terrorism laws aim at protecting legitimate interests such as national security, public safety, public order etc., the principle of legitimacy can come into play in debates

about the entirety of both the 2009 and 2019 laws including their definitions. In fact, the case has already been made that the true objective of the 2009 law is the stifling of political and social opposition, in which case the law would not serve a legitimate aim.³² This article does not indulge in this and other debates that could fall in the international analytical framework.

1.1. The Principle of Legality and Legal Certainty (Lex Certa)

Under international model, once a *prima facie* case is made for the interference with a right, the first stage of analysis begins with whether the violation is prescribed by law.³³ The requirement of legal prescription, commonly referred to as the principle of legality or the rule of law test, has a longstanding currency in international law.³⁴ The principle has been interpreted by the African Commission to embody the notion that states can validly limit rights only through laws that are duly enacted,³⁵ universal,³⁶ non-retroactive,³⁷ accessible (published and distributed as opposed to being issued in secret),³⁸ and sufficiently clear/certain.³⁹ Given the wide recognition that the principle of legality has received, it is no surprise that it allegedly has attained the status of a customary rule of international law although it is not clear if all the specific components of the principle of legality, and in this case the *lex certa* requirement, have attained the same status.⁴⁰

³² For academic studies reaching this conclusion and, in fact, providing quite convincing evidence supporting the argument see: Wondwossen Demissie Kassa (n 2) 52-54; and Zelalem Kibret (n 3) 512-13, 520-21.

³³ FDRE Constitution (n 27) Arts. 15, 17, 19 (6), 20 (3), 22, 23, 26 (3), 27 (5), 29 (6,7), 30, 31, and 40; ICCPR, (n 30) Arts. 12, 17, 18, 19, 21, and 22.

³⁴ James R. Maxeiner 'Some Realism About Legal Certainty in the Globalization of the Rule of Law' in *THE RULE OF LAW IN COMPARATIVE PERSPECTIVE*, (Mortimer Sellers & Tadeusz Tomaszewski eds. Springer 2010); Juha Raitio, 'The Principle of Legal Certainty in EC Law' (Kluwer Acc. Pub. 2003).

³⁵ Constitutional Rights Project and another v. Nigeria, Communication No. 102/93 Afr. Comm'n (ACHPR, 1998) at Par. 42; Purohit and another v. Gambia, Comm. No. 241/2001 Afr. Comm'n (ACHPR, 2003) Par. 64.

³⁶ The African Court adopts the term "law of general applicability"; see Tanganyika Law Society et al v. Tanzania, Communication No. 1/11, 9/11 Afr. Comm'n. (ACHPR, 2013) Par.106.1. Also generally see Constitutional Rights Project and another v. Nigeria, Communication No. 102/93 Afr. Comm'n. (AFCHPR, 1998) at Par. 59; Media Rights Agenda v. Nigeria, Communication No. 105/93, 128/94, 130/94, 152/96 Afr. Comm'n (ACHPR, 1998) par 71; also, Constitutional Rights Project et al. v. Nigeria, Comm. No. 140/94, 141/94 and 145/95 Afr. Comm'n. (ACHPR, 1999) Par. 44.

³⁷ ACHPR, Art. 7 (2). Note also that a general understanding that of legality is contained in many of the Charter's provisions which provide that limitations are to be imposed in accordance with law.

³⁸ See for ex. Silver and others v. the United Kingdom, Comm. Nos. 5947/72, 6205/73, 7107/75, 7113/75 and 7136/75 (ECtHR, 1982) Par. 87, 93; Liberty and others v. the United Kingdom, Comm. No. 58243/00 (ECtHR, 2008) Par. 45.

³⁹ Amnesty International et al. v. Sudan, Comm. No. 48/90-50/91-52/91-89/93 Afr. Comm'n (ACHPR, 1999) par 59.

⁴⁰ For a detailed discussion of the evidence of state practice and opinion juris see Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 363. The ICTR certainly seems to hold this position see Barayagwiza v. Prosecutor, ICTR Appeals Chamber (Decision of 3 November 1999), Case No. ICTR- 97-19, Par. 40.

The requirement of legal certainty, as iterated by the Human Rights Committee, posits that human rights can be validly limited only by “clear and precise provisions in the law.”⁴¹ Since clarity of the law is especially important in the context of counterterrorism legislation, the African Commission has specifically provided that “[a]ny criminalization of, or other punishment for, acts of terrorism must abide by [the] Principle of Legality. In particular, States must ensure that their laws criminalizing acts of terrorism are ... defined by clear and precise provisions in the law.”⁴² In similar vein, the United Nations Counter-Terrorism Implementation Task Force, the U.N. General Assembly, the Office of the United Nations High Commissioner for Human Rights, and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism have laid out a similar standard wherein all counter-terrorism measures and the definition of terrorism must comply with established standards of legality and *lex certa*.⁴³

The two specific tests used in determining whether the *lex certa* requirement is fulfilled find an early expression in international law through the Danzig case (1935) at the Permanent Court of International Justice which looked into whether “a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence” and whether “discretionary power left to the judge is too wide.”⁴⁴ These two notions are captured by what the African Commission calls the “invalidity on grounds of vagueness” doctrine, which constitutes an analysis of the clarity (vagueness and precision) of the language of the law, and whether the stipulation brings about arbitrary interference.⁴⁵ Thus, when asking whether a law that limits a right is sufficiently clear or certain a two pronged analyses regarding the clarity of the language of the law and the effect of the language become central.

The first prong of the analyses was developed in detail by the European Court in the form of its “reasonable foreseeability” test which stipulated that a norm cannot be considered to

⁴¹ UN Human Rights Committee, ‘General Comment No. 29 on States of Emergency’ (2001) U.N. Doc. CCPR/C/21/Rev.1/Add.11.

⁴² African Commission Principles and Guidelines, *supra* note 15, at p. 27.

⁴³ UN Counter-Terrorism Implementation Task Force, ‘Basic Human Rights Reference Guide: Conformity of National Counter-Terrorism Legislation with International Human Rights Law’ (Oct. 2014) CTITF Publication Series 16-18; U.N. General Assembly, 68th Session ‘Resolution on the Protection of human rights and fundamental freedoms while countering terrorism’ (28 January 2014) Resolution 68/178 A/RES/68/178 Par. 6(m); OHCHR , ‘Human Rights, Terrorism and Counter-Terrorism’ (2008) Fact Sheet No. 32; UN Human Rights Council 16th Session from 1 January to 31 December 2011, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’ (22 Dec. 2010) A/HRC/16/51.

⁴⁴ Permanent Court of International Justice, Third to Fifth Extraordinary Session ‘Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City’ (1935) P.C.I.J. Ser. A/B No. 65. Note, however, that although this case may be a precursor of the international case law that follows, it was decided on the basis of the constitution of Dazig rather than international law proper.

⁴⁵ Open Society Justice Initiative v. Côte d’Ivoire, Comm. No. 318/06 (ACHPR, 2015) Par. 112.

be a law if it is not “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁴⁶ The citizen “must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁴⁷ As an elaboration of its reasonable foreseeability standard the Court added a little more flexibility to the rule by deciding that, in order to determine reasonable foreseeability, it ought to consider the contents of the text of the law, the technical field the law covers and the subjects to whom the law applies.⁴⁸ Thus, even if a law might be incomprehensible to the average citizen, the fact that the law applies to the telecommunication industry, radio stations, the pharmaceutical industry, or the tobacco industry can absolve it from a reproach due to complexity as long as those prosecuted are from within the industry and expected to keep up with the law with or without expert advice. The reasonable foreseeability test was adopted by the African Commission in *Amnesty International et al. v. Sudan* where found a violation because a decree “allows for individuals to be arrested for vague reasons” only “upon suspicion.”⁴⁹

The second prong, the arbitrary interference test, regards whether the law in question is too vague as to allow arbitrary exercise of state power. The African Commission’s arbitrary interference cases involve vague nationality laws that give the executive unchecked discretion in deciding who is a national and who is not.⁵⁰ Whereas the foreseeability test and the arbitrary interference test overlap in most cases, the difference is that one focuses on the relationship between the individual and the law (and the wording of the law) while the later focuses on how much discretion the law gives to authorities. In *Camilleri* the European Court found a violation based on legal certainty not due to “any ambiguity or lack of clarity” but because the law “failed to ... provide effective safeguards against arbitrary punishment” by giving the Attorney General discretion in choosing between criminal and magistrate courts which have different sentencing rules.⁵¹ Similarly, in *Kruslin and Huvig*, the

⁴⁶ *Sunday Times v. United Kingdom* No 6538/74 (ECtHR, 26th April 1979) Para. 49.

⁴⁷ *Ibid*; the court also opined that ‘law’ can mean statutory and case law, see *Sunday Times v. UK*, (n 46). Par. 47. In *Kokkinakis* the court added “assistance of [a] court’s interpretation” as part of what the individual may need in understanding the law, *Kokkinakis v. Greece* (ECtHR, 1993) Series A-260-A. Para. 40.

⁴⁸ For e.g. the “technical and complex” field of international telecommunication law and radio stations in *Groppera Radio AG v. Switzerland* App. No. 10890/84 (ECtHR, 1990) Par. 68; pharmaceutical industry and managers (and possibly pharmacists) in *Cantoni v. France* App. No. 17862/91 (ECtHR, 1996); and health laws and regulations and tobacco producers in *Delbos and Others v. France* App. No. 60819/00 (ECtHR, 2004). For more examples see European Court of Human Rights, Guide on Article 7 of the European Convention of Human Rights, Council of Europe/European Court of Human Rights (2017).

⁴⁹ *Amnesty International et al. v. Sudan*, (n 39) Pars. 59-60. While the case uses both tests it elaborates on the arbitrary interference aspect pointing out that the implementation of the impugned decree has also been applied arbitrarily, “appeal in the case of arrest lies to the body whose president orders the arrests.” and “[s]uch a remedy provides no guarantee of good administration of justice.”

⁵⁰ *Open Society Justice Initiative v. Côte d’Ivoire*, (n 45) Para. 119; *Modise v. Botswana* Comm. No. 97/93 (ACHPR, 2000) Pars. 34, 88; *Legal Resources Foundation v. Zambia*, Comm. No. 211/98 (ACHPR, 2001) 71.

⁵¹ *Camilleri v. Malta* App no 42931/10 (ECtHR, 2013) Pars. 43-44.

European Court held that a French law on wiretapping violated the arbitrary interference test for not providing adequate safeguards against abuses by giving the investigating judge full discretion on the categories of suspects and crimes susceptible to tapping, the duration of tapping, the procedure to be followed in writing summary reports of tapped phones and in erasing the contents of these reports.⁵²

1.2. Proportionality Analysis

Proportionality analysis, in its classic and most widespread iteration, can be broken down into three (four if we add the democratic society aspect and five if we pull the legitimacy test here) components.⁵³ The first component, variably referred to as the suitability, appropriateness, legitimacy, effectiveness, or the rational connection test, requires that a legal measure limiting a right must be capable of realizing the legitimate end being pursued.⁵⁴ The second component, referred to most commonly as the necessity or the least intrusive means test, and the third component referred to as the proportionality *stricto sensu* test are discussed in more detail below. While the three stages represent the international model of proportionality analysis in the most general sense, the line judicial bodies have to trade between legislative discretion and judicial review can be considered a separate doctrine that affects all three components of proportionality analysis. International bodies have a thicker level deference, not just towards legislative discretion but to the wisdom and knowledge of domestic courts in appreciating diverse local contexts and limiting legislative discretion. Following the lead of the European Court, this deference has come to be known as the margin of appreciation doctrine.⁵⁵

⁵² *Kruslin v. France* App no. 11cccc801/85 (ECtHR, 1990) Par. 35; *Huvig v. France*, App no 11105/84 (ECtHR, 1990) Par. 34.

⁵³ For detailed discussion of these stages see Barak (n 28); and Sweet & Mathews (n 29) 73; and Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11Int'l J. of Const. L. 2, 466 .

⁵⁴ For ex. the South African Constitutional Court applied this principle to nullify a legal provision that provides for a legal presumption of possession in part because there was no "logical or rational connection" between the presumption and the fact that a person happens to be in the same house or premises as the weapon, *S v Mbatha*, *S v Prinsloo* (CCT19/95, CCT35/95) Par. 22. See also Barak, (n 28) 303-04; and Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 Eur. L.J. 473-76.

⁵⁵ Gerards (n 54) 80; Note that the African Commission and Court, although giving domestic authorities ample deference in practice, have not developed a uniform doctrine of deference and have not fully adopted the margin of appreciation doctrine either. See Adem Kassie Abebe, 'Right to Stand for Elections as an Independent Candidate in the African Human Rights System: The Death of the Margin of Appreciation Doctrine?' (19 August, 2013) Africa Law; Rachel Murray, 'A Comparison between the African and European Courts of Human Rights' (2002) 2 Afr. Hum. Rts. L. J. 195; Pablo Contreras, 'National Discretion and International Deference in the Restriction of Human Rights: A Comparison between the Jurisprudence of the European and the Inter-American Court of Human Rights' 11 Nw. J. Int'l Hum. Rts. 11.28; In *Garreth Anver Prince v. South Africa*, Comm. No. 255/02 Afr. Comm'n (ACHPR, 2004) Pars. 50-53) the African Commission adopted the notion of subsidiarity and margin of appreciation but declined to

The necessity or least intrusive means test, which is the most relevant component of proportionality analysis from the point of view of this article, involves an examination of whether a law restricts a right more than what is reasonably needed to achieve its legitimate goals.⁵⁶ If a law can achieve the same results without restricting a right, or without restricting it as much as it has, it would be found to violate that right. In *Makwanyane* the South African Constitutional Court struck down a law providing for the death penalty because the state could not show that the penalty was a more effective deterrent in combating violent crime compared to least-intrusive-means such as long prison sentences coupled with effectively solving criminal investigations and dealing with deeper social causes.⁵⁷ In *Lohé Issa Konaté* the African Court on Human and Peoples' Rights held that it is the government's burden ensure that limitations meet the test of necessity,⁵⁸ which one presumes would have to be studied at the stage where the law is being drafted and not just in court. Necessity analysis is important in practice, not only because it is the stage at which most constitutionally challenged laws are invalidated, but it allows judges to explore the possibility that governments have broadened the applicability of a law in bad faith.⁵⁹

2. The Vagueness and Overbreadth Doctrines: Challenges of Applicability

The first major problem with the vague-and-overbroad formulation is that it exists as a separate doctrine – neither in the international nor American doctrinal systems. Before coming back to a discussion and critique of the definition of terrorism using the international model, let us first go over why the American model should not be adopted in

apply them to the case despite, in effect, deferring to the margin of appreciation of South Africa. The Commission also declined to entertain a margin of appreciation related argument at the local remedies stage of *Abubaker Ahmed Mohamed & 28 Others v. Federal Democratic Republic of Ethiopia*, Comm'n No. 455/13 Afr. Comm'n (ACHPR) where the applicant argued that granting the power of constitutional adjudication to the upper house of parliament contravened a "common African standard" requiring local remedies be of judicial nature.

⁵⁶ Barak (n 28)409-411. The African Commission, although not having the opportunity to define or apply it, makes the least restrictive means test part of its proportionality analysis in *Zimbabwe Lawyers for Human Rights & Associated Newspapers*, Comm. No. 284/03Afr. Comm'n (ACHPR,2009) Par. 176.

⁵⁷ *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) Pars. 107, 116-127. See also the European Court's *Ürper* case where it held that the complete shutdown of newspapers which published articles about the PKK violated the freedom of expression because less intrusive means such as confiscation of particular issues containing the offensive articles or restricting the publication of those articles could have been applied with equal effect in preventing the articles from reaching the public. Thus, the precept is that where there are less restrictive means that can achieve the same legitimate aim choosing a policy that is more restrictive necessary will lead to a violation. *Akdivar and Others v. Turkey* App Nos. 99/1995/605/693 (ECtHR, 30 Aug. 1996).

⁵⁸ *Lohé Issa Konaté v. Burkina Faso*, ActHPR, Application No.004/2013 (2014).

⁵⁹ As would be the case, for example, where a government hides a racist or Muslophobic animus in a seemingly neutral law that can in practice be used to discriminate. See, Jed Rubenfeld, 'Affirmative Action' (1997)107 *Yale Law Journal*, 427, 436-37; A. Reid Monroe-Sherida, 'Frankly Unthinkable: the Constitutional Failings of President Trump 's Proposed Muslim Registry' (2018) 70 *Maine Law Review* 2, 13-15, 20-24.

Ethiopia and how vague-and-overbroad formulation can be problematic even when conceived of within the American jurisprudential system.

Part of the challenge with the vague-and-overbroad formulation from the point of view of American jurisprudence lies in that the expression is so commonsensical and whimsical that whether, or to what extent, vagueness and over breadth are congruent or different has been debated in earlier literature. This debate has mostly taken the shape of discussions about the difference between two types of – substantive or procedural, true or spurious – uncertainty cases.⁶⁰ For the same reason, contemporary American judges are also reported to confuse the two in their reasoning.⁶¹ However, the two doctrines, that is the void-for-vagueness and void-for-overbreadth doctrines, are completely separate and independent of each other.

The void-for-vagueness doctrine is similar to the international jurisprudence on *lex certa* in most respects including in having foreseeability and arbitrariness prongs.⁶² Based on the reasoning of “fair notice” or that “[e]very man should be able to know with certainty when he is committing a crime,” this standard has been deployed to void laws that are not expressed “in language that need not deceive the common mind,”⁶³ or laws that are so vague that “men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application.”⁶⁴ In addition to the “fair notice test,”⁶⁵ the clarity and foreseeability of the law is also meant to prevent excessive discretion on the part of the executive and judiciary thereby preventing the arbitrary or discriminatory enforcement of the law (thus the “arbitrary or discriminatory enforcement test”).⁶⁶ Similar to its international counterpart,

⁶⁰ Note, the Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 76-77 (1960); Rex A. Collings Jr., ‘Unconstitutional Uncertainty - An Appraisal’ (1955) 40 Cornell L.Q. 195, 219-220. For a detailed historical account of the two tests under the void-for-vagueness doctrine see Cristina D. Lockwood, ‘Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine,’ (2010) 8 Cardozo Pub. Law, Policy & Ethics J. 255, 263-294.

⁶¹ Sarah Sparks, ‘Comment and Case note: Deteriorated vs. Deteriorating: The Void-for Vagueness Doctrine and Blight Takings Norwood v. Horney’ (2007) 75 U. Cin. L. Rev. 1771-1772; Joseph E. Bauerschmidt, ‘Mother of Mercy - Is This the End of RICO? - Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO “Pattern”’ (1989-1990) 65 Notre dame L. Rev. 1106, 1112-1113. For an early critique of this overlapping use see Rex A. Collings Jr., Unconstitutional Uncertainty - An Appraisal, 40 Cornell L.Q. 195, 219-220 (1955); also see Lockwood (n 60).

⁶² For a general depiction see Stanislaw Pomorski, ‘American Common Law and Principle Nullum crimen Sine Lege’ (PWN - Polish Sci. Pub., The Hague and Paris 1975) 85-89.

⁶³ United States v. Reese [1875] 92 U.S. 214.

⁶⁴ Connally vs. General Construction [1926] Co., 269 U.S. 385.

⁶⁵ Examples under the fair notice test include a criminal provision that provides that one should “insure that the remains of the unborn child are disposed of in a humane and sanitary manner” City of Akron v. Akron Center for Reproductive Health, Inc. [1983] U.S Supreme Court, 462 U.S. 416, 451; and a law criminalizing treating the American flag “contemptuously,” Hynes v. Mayor of Oradell [1976] 425 U.S. 610.

⁶⁶ For e.g. Kolender v. Lawson was decided under the arbitrary or discriminatory enforcement test where the court struck down a law that allows the arrest of a suspect for not producing “credible and reliable” identification without detailing the standards for determining what it constitutes such identification. The law in effect leaves the decision of what constitutes “credible and reliable” identification to the police thereby allowing the arrest of the suspect “only at the whim of any police officer”, [1983] 461 U.S.352. Another example includes Giaccio v. Pennsylvania wherein the

“arbitrary or discriminatory enforcement test” the void-for-vagueness doctrine allows for complex laws that might not be legible to the “common mind”, but that can be understood by a legal expert or an instructed jury.⁶⁷ The void-for-vagueness doctrine, once again similar to its international counterpart, allows the consideration of the right involved the technical field, and the subjects of the law.⁶⁸

Despite similarities between the two doctrines void-for-over breadth has less to do with fair notice than with preventing the laws, both vague and not, from encroaching upon acts that are protected by the constitution while legislating on acts that are not protected. For example, a law that prohibits the publication of material which “includes sexual conduct by a child” was held to be overly broad because it can limit constitutionally protected activities such as the publication of medical books with such content.⁶⁹ Although overbreadth and vagueness can overlap semantically to the extent that a legal provision can be both,⁷⁰ what distinguishes overbreadth is that it seeks to prevent the chilling effect of laws on the exercise of rights by challenging laws that are both vague and overbroad,⁷¹ overbroad but not vague,⁷²

definition of “deteriorating area” for the purpose of public expropriation was struck down because the definition, while detailed, gave city council civil servants unfettered discretion in determining what neighborhood/area is deteriorating, *Giaccio v. Pennsylvania* [1966] 382 U.S. 399. Other examples include laws and sentencing guidelines that provide juries the power to make decisions, such as “shall determine [who] shall pay the costs ...”, without any more guidance on how the amount is to be assessed. See Sarah Sparks (n 61) 1769, 1775-1779.

⁶⁷ Orin S. Kerr, ‘Vagueness Challenges to the Computer Fraud and Abuse Act’ (2010) 94 *Minnesota L. Rev.* 1561, 1573. For a critique see Robert Batey, ‘Vagueness and the Construction of Criminal Statutes – Balancing Acts’ (1997) 5 *Virginia Journal of Social Policy and the Law* 1, 4-5.

⁶⁸ For more examples and discussion see, Jennifer Lee Koh, ‘Crimmigration and the Void for Vagueness Doctrine’ (2017) *Wisconsin L. Rev.* 6, 1127, 1138-1139.

⁶⁹ *New York v. Ferber* [1982] 458 U.S. 747.

⁷⁰ For ex. in *Coates v. City of Cincinnati* the court held that the “ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct” regarding a law that criminalizes the assembly of three or more persons on sidewalks when they “conduct themselves in a manner annoying to persons passing by.” [1971] 402 U.S. 611, 614, 616.

⁷¹ For ex. in *Thornhill v. Alabama*, a case usually cited as among the first over breadth cases, the court pointed out that the law was worded in a way that made it open to discretionary abuse although it voided it because it would chill constitutionally protected expression. The challenged law prohibited picketing “for the purpose of hindering, delaying, or interfering with” and “go near to or loiter about” a business and evidence was presented showing that it was applied arbitrarily by the authorities including by prosecuting “walking slowly and peacefully back and forth on the public sidewalk” [1940] 310 U.S. 88, 91, 97-99. Thus, although the law could have been found void under the vagueness doctrine the court chose to go with over breadth. See Note, *The First Amendment Overbreadth Doctrine*, 83:4 *Harv. L. Rev.* 844 (1970).

⁷² *Ibid.* See also a comment to that effect in the concurring opinion of Justice Breyer in *City of Chicago v. Morales* [1999] 527 U.S. 41, 72.

or even semantically neither vague nor overbroad as long as it can be shown that they do or can cause overdeterrence.⁷³

While the fact that the void-for-vagueness and void-for-overbreadth doctrines are separate should show that the vague-and-overbroad formulation is doctrinally problematic, the problems of the formulation do not end there. The generalized mixing of vagueness and overbreadth is misleading from the point of view of American law itself because overbreadth analysis takes place within a complex set of tests under a “tiered” system of analysis where a judge would first have to make a number of determinations before applying the overbreadth doctrine. Putting aside the fact that there are a myriad of specific sub-categories based on the right in question the areas of law, the first broad set of decisions is whether to apply a strict, intermediate, or minimal level scrutiny on the impugned law.⁷⁴ The decision to apply minimal scrutiny quickly ends with the “rational basis” test while strict and intermediate scrutiny will result in their respective means–ends tests - compelling interest test under the strict scrutiny, and the substantiality test under intermediate scrutiny.⁷⁵ Thus, while overbreadth analysis takes place only under strict and intermediate scrutiny, the two tiers’ use of “compelling interest” and “substantial interest” makes their overbreadth analysis significantly different.

Although we will not delve into a detailed analysis of how the vagueness and overbreadth doctrines could have applied to the Ethiopian anti-terrorism legislations, in part since we are arguing that they should not be adopted in Ethiopia, it is apt to quickly exemplify how the adoption of the American doctrines either does not add value or can be harmful. Given the similarity of the void-for-vagueness doctrine to the international *lex certa* standards, it is difficult to imagine how the Ethiopian publications that use the disruptive activist scenarios (described below) could make a case for a “fair notice” argument against the 2009 definition of terrorism. The absurd conclusions borne by these scenarios show that the

⁷³ For ex. a strict liability defamation rule that is not vague and prohibits harmful (constitutionally unprotected) expressions that are false and cause reputational or financial harm were held to be overly broad, not because it prohibits protected speech as such, but because it could force journalists to be overcautious so as to avoid litigation, litigation costs and tort damages. Daniel A. Farber, ‘Free Speech without Romance: Public Choice and the First Amendment’ (1991) 105 Harv. L. Rev. 554, 568 - 570. Alan K. Chen, ‘Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose’ (2003) 38 Harvard Civil Rights-Civil Liberties Law Review 31, 40-41. Note however that in *New York Times Co. v. Sullivan* [1964] 376 U.S. 254, 277-79 the court does not mention overbreadth although fact patterns similar to the case can be seen as overbreadth cases especially since this precedent sets the applicable law delineating what is protected speech from what is not.

⁷⁴ Barak (n 28) 509-521; Roy G. Spece, Jr. & David Yokum, ‘Scrutinizing Strict Scrutiny’ (2015) 40 Vermont L. Rev. 285, 295-310.

⁷⁵ Ibid. See also E. Thomas Sullivan & Richard S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford Univ. Press, 2009) 53-61.

problem is one of over-inclusiveness, and not of vagueness, therefore leading the analysis to the overbreadth doctrine.

Similarly, the American “arbitrary or discriminatory enforcement test” is also going to lead to an analysis that is comparable to the international “arbitrary interference” test. In fact, the vague-and-overbroad formulation is predisposed to skipping a consideration of arbitrary interference as neither the vague nor the overbroad prong of this formulation capture arbitrariness by necessary implication. Therefore, one would either have to reformulate “vague-and-overbroad” to account for arbitrariness, or intentionally or accidentally supplement it by arbitrary interference considerations.

While the equivalence between the international and American standards with regards to legal certainty could lead to the conclusion that the standards from either legal system are equally adoptable to Ethiopia, for leading to similar outcomes in relation to legal certainty, two considerations ought to persuade one to prefer the international standards. First, the Ethiopian legal system and the legal training of Ethiopian lawyers, leaves them ill equipped to use common law jurisprudence. Similar to the authors of this article, most Ethiopian lawyers and judges are unlikely to easily navigate case-law and use precedent-based arguments and will be left to using academic studies to “translate” the case law into methods they are familiar with. Unless one were to start with a broader justification for the Ethiopian legal system to abandon its civil law roots and adopt the common law on a wholesale basis, there is simply no reason to incur the inconveniences, the cost and the risks involved in a venture into the common law system.

Second, the confusion created by mixing vagueness and overbreadth discussed in this section cancel out any appeal the void-for-vagueness doctrine may have. The overbreadth doctrine applies “tiers of scrutiny” which follow specific sections or amendments of the American constitution and specific history and context laden precedents. For example, in the case of the freedom of movement of the disruptive protestors discussed below, the level of protection afforded can either be “strict” or “intermediate” depending on whether their expression is characterized as political speech or commercial speech or public speaking. The freedom of movement of citizens can be protected by the “strict” standard if the movement is within the country and “minimal” if it involves international travel. If one were to assume that a case is brought alleging the discriminatory application of the anti-terrorism law to the disruptive protestors, the protection afforded to them can be strict if they are a racial or religious group, “intermediate” if they are a gender or age group, and minimal, if they are a disability, political, citizenship-based group.

While there will be occasion to use different standards of protection for different rights in the Ethiopian system, which is also the case with the international model, the American

system's peculiarities are too history and context bound to find easy application in Ethiopia. Debates regarding the standards of scrutiny applicable to the definition of terrorism when it limits the right to property or the right to bear arms, are unique to the legal history and tradition of the United States and should not be brought over to the Ethiopian legal scene unless there are compelling reasons and such borrowing. In addition, any such borrowing ought to be done only with sufficient re-contextualization. As will be shown below, borrowing from the American model can be quite useful. However, this ought to be done in a situation where such borrowing is used in a nuanced way that supplements the international model.

Given the intricacies of overbreadth analysis which comes after a complex set of categorization determinations and overbreadth can mean different things based on which tier it applies to, it is clear that the vague-and-overbroad formulation not only mixes two separate tests it misses the fact that overbreadth analysis is not a stand-alone standard but an integral part of a rigorous analytical structure and decision making procedure. The vague-and-overbroad formulation can also not be applied in the context of the international "proportionality analysis" model suggested in the previous section as "overbreadth" per se does not exist in the international model either. From the international model's perspective, applying the vague-and-overbroad formulation would result in jumping from analyzing vagueness to overbreadth without consideration to the legitimacy, the effectiveness or proportionality *stricto sensu* tests and without a consideration as to their implications to judicial deference and without utilizing their respective burden of proof requirements. From the perspective of American jurisprudence, one would skip categorization and apply overbreadth without any principled view on whether to apply the rational basis, substantial interest or compelling interest tests. Doing so, can lead to over-protection and/or under-protection of rights that is rather accidental and a reflection of doctrinal muddling than a systemic approach to the protection of rights and to jurisprudential development.

3. Applying the International Model to Ethiopia

The first question that one would start with using the international model is whether the law in question, in our case the definition of terrorism, limits a right in the Constitution. Assuming that this is answered in the affirmative, also assuming that the principle of legitimacy is not at stake, an analysis of the definition of terrorism will boil down to two possible considerations. First, the definition can be held to be in violation of one of the two tests under the *lex certa* principle. In this case, the analysis should end with a finding that the definition is wanting for violating constitutional and international human rights standards. While it is possible, or in practice more likely that courts will go on considering the validity of the law under other doctrines, the analysis should or can in principle end here.

Where no violation is found under *lex certa*, the second consideration, necessity analysis will resume with its respective test will come into play.

3.1. The Reasonable Foreseeability Test

Although both the *mens rea* and *actus reus* components of the 2009 definition have been criticized in the literature for being vague,⁷⁶ this conclusion is not that straight-forward. The 2009 and 2020 legislations provide intent and motive among the elements forming an act of terrorism. According to the 2009 definition, firstly, to constitute terrorism, the act must be committed either to coerce the government, intimidate the public, destabilize or destroy the fundamental political, constitutional, economic or social institutions of the country.⁷⁷ The definitions of specific intent are vague only to the extent that one can come up with penumbral examples that cast doubt on their meaning, but that does not make them unforeseeable. The words used in the definition of the mental element are rather intelligible and they are not uncommon in the Criminal Code⁷⁸ or the definition of terrorism globally.⁷⁹

The way the 2020 definition is structured, however, is different from the 2009 definition as far as the above *mens rea* component is concerned. With the view of limiting the limitations, the new legislation restricts the intent to “terrorize” the public or compel the national or foreign government or international organizations. Thus, the former intent requirement of intimidating the public, destabilizing or destroying the fundamental political, constitutional, economic, or social institutions of the country have not been included under the new proclamation.

The motive requirement relates to intending to advance a political, religious or ideological cause. This requirement is also reiterated under the new legislation. Although unprecedented, this requirement restricts the application of terrorism legislation to the three motives stated above. In the absence of such restrictions, the law could have been applied to any incident terrorizing the public without a need to indicate the motive. It must also be mentioned that real terrorism crimes are perpetrated with the motive of advancing political,

⁷⁶ Hiruy Wubie (n 3) 46-49; Molaligne Tsegaye, (n 12) 58; Dersolegn Yeneabat Mekonen (n 11) 60-62; Human Rights Watch, (n 13); Zelalem Kibret (n 3) 506; Sekyere & Asare, (n 11) 361-62; Tura, (n 11) 395-397.

⁷⁷ Note that due to the flaws in the English versions we are using our own translation of both versions.

⁷⁸ For example, Art. 582 of the Criminal Code of Federal Democratic Republic of Ethiopia, Proc. No.414/2004, Federal Negarit Gazette, defines coercion as the compulsion of another to do or refrain from doing something through the use of violence or threats of serious violence.

⁷⁹ Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 Journal of International Criminal Justice 933.

religious, or ideological causes. Thus, the existence of motive requirement only restricts what could have been a broad restriction to individual rights.

The physical element, however, is a little more difficult. Both the 2009 and 2020 laws sail close to the troubled waters of the reasonable foreseeability as the average person now has to be able to understand what constitutes damage or endangerment, and then distinguish the line that separates serious from non-serious damage or endangerment. Both definitions stand in stark contrast to the criminal code which, every time it seeks to proscribe crimes against public safety or public health, specifies what sorts of actions cause the risk or danger it seeks to avert.⁸⁰ Under Article 499, for example, an individual has to intend to endanger public safety and use explosives, highly inflammable substances or poisonous gases to knowingly expose the life, person or property of another to danger to deserve punishment.

While it is clear that the definitional approach of the criminal code is much clearer, one also has to concede that some level of unforeseeability is engrained in both the criminal code and the anti-terrorism laws. It is in fact the nature of law to be general and a law that is too specific can also lead to the violation of the principle of universality. Thus, reasonable foreseeability cannot be approached in such a way that it is turned into an intractable “absolute foreseeability” standard. Both the 2009 and 2020 definitions could then arguably be said to fall within reasonability as one can, at least most of the time, reasonably distinguish whether an act is captured in those definitions. Where that is not the case, one would then imagine that it would be the role of the judiciary to settle and clarify what falls under that definition including through case law.

Previous studies that have concluded that Article 3 of the 2009 law is overly vague use a combination of semantic analysis and positive exemplification to point out that it is not clear if it criminalizes what can be best described as “disruptive activist” scenarios. Examples of these scenarios include political rally that intentionally or incidentally blocks or impedes traffic as a tactic; government employees, public servants or public utility employees who organize illegal strikes; or university students who go on a rampage in a bid to improve educational standards would fall under the definition would fall under the law’s definition of terrorism.⁸¹ While these assessments are not inaccurate, they unsuccessfully try to merge the horizons of the American and international models by adopting the by the “vague and overbroad” formulation.

⁸⁰ Criminal Code (n 78) Articles 499, 501, 506, 508-509, 527 & 828.

⁸¹ See Hiruy Wubie (n 3) 43, 46-49; Dersolegn Yeneabt Mekonen (n 11) 60-62 (although not expressly making this point the arguments reflect such a disposition); Human Rights Watch, (n 13); Zelalem Kibret (n 3) 506; Sekyere & Asare (n 11) 361-62; Tura (n 11) 395-397.

If one were to avoid the conceptual confusion caused by the “vague and overbroad” formulation, the disruptive activist arguments, rather than showing that the law is not clear, actually show that it is clear but absurd. If we take the plain, ordinary, and literal meaning of Article 3 of the 2009 law, for example, there is no doubt that the activities of the disruptive activists are captured under the definition of terrorism. It is when one gets caught up with an automatic aversion of the absurd conclusions, and an impulse to come up with non-absurd purposive constructions to avoid the absurdities, that the clarity of the definition gets lost. However, if one were to simply ask whether it is foreseeable that the actions of the disruptive activists are captured by the definition in the 2009 law, the answer is yes.

One of the improvements in the definition of the 2020 law is that it avoids most of the absurd conclusions by the disruptive activist scenarios. It, among other things, explicitly excludes consideration of obstruction of public service caused by strikes, demonstrations, assemblies, and similar rights as an act of terrorism.⁸² Thus, in this regard, the new legislation shows progressive development in mitigating or even avoiding absurdity. However, both laws, while having a significant difference in breadth, have relatively clear definitions that can withstand most foreseeability challenges. The contention of this article is that questions as to whether a definition is over inclusive would not be discussed under foreseeability. Though overlap may be possible, for example where a law is both lexically unclear and broader than necessary, the problem of the “vague and overbroad” formulation is that it merges the two horizons in a way that makes it difficult to distinguish between foreseeability and the necessity of over-inclusiveness.

3.2. Arbitrary Interference Test

The distinction between *lex certa* and necessity becomes a little more difficult when it comes to the arbitrary interference test as the arbitrary interference test could potentially allow the consideration of over-inclusiveness. However, that still does not mean that the two are the same as over-inclusiveness is only one of the measures that may be considered in determining arbitrary interference. The difference between the 2009 and 2020 laws is instructive in this regard.

One can argue that the 2009 law allows or is even designed with the intent of allowing arbitrary enforcement. The 2009 law surrounds the definition of terrorism with structures that invite arbitrary power and abuse. For instance, it gives authorities the discretion to decide who falls under Article 3 and subsequently grants them broad espionage, surveillance, sudden search, covert search, and arrest and seizure powers with little or no

⁸² Anti-Terrorism Proclamation, Proc No. 1176/2020 L., Federal Negarit Gazette, 26th Year No. 20, Addis Ababa, Article 4.

judicial oversight.⁸³ This means that law enforcement officials can use extraordinary anti-terrorism investigation, search, and seizure powers against any disruptive political activist or group as long as they characterize the group's activities or intended activities as falling under the definition of terrorism. In other words, although

In order to exemplify this point, imagine a country wide campaign which involves youth activists pulling garbage into the middle of streets to advance the political cause of forcing the government to clean up cities. One would assume that their action would violate city ordinances or possibly be a petty offense⁸⁴ unless some of the protestors get carried away and burn the garbage which contains inflammable substances or block streets with bins, in which case the offense could be elevated to a crime.⁸⁵ Once intelligence and police officials are convinced that the seriousness threshold is met they can without a warrant; enter the group into their surveillance system with unchecked discretion; forcefully take blood and other bodily samples or conduct medical tests for mere suspicion; search or acquire public and private records of group-members for reasonable belief; set up road blocks and conduct "sudden searches" or arrest any suspect for reasonable suspicion.⁸⁶ Authorities also have the option of hiding any mistakes or abuses behind Article 23 (1) of the law which allows them the option of not disclosing their sources and methods.⁸⁷

This situation persists during and after a suspect is arrested as, not only would characterization under Article 3 lead to the deployment of staff and resources of powerful branches of the intelligence, the federal police and prosecutors' offices, but special anti-terrorism procedures allow extended pre-trial detention; the suspension of the right to bail once charges are brought; and the possibility of being convicted by hearsay, uncorroborated, and unverifiable information/evidence and evidence obtained illegally including through torture.⁸⁸ All the authorities need is "reasonable ground to believe", to "have reasonable suspicion", "reasonably believe" that Article 3 is being violated and they automatically have

⁸³ See Human Rights Watch (n 13).

⁸⁴ See for ex. Criminal Code, (n 78) Art. 827 regarding the "throwing at a crossing or a public place garbage, refuse, objects or things of any nature whatsoever capable of causing an appreciable risk or nuisance".

⁸⁵ Criminal Code, (n 78) Art. 499 or 506 regarding "intentionally paralyses, sabotages or endangers public transport ... at risk of causing a collision [etc.]."

⁸⁶ Anti-Terrorism Proclamation No. 652/2009, (n 1) see respectively Articles 14 (4); 22; and 16 and 19 and 21. Note that in the case of Art. 16 the "permission" of the Director General of the Federal Police is required in addition to the police's reasonable suspicion. Also note that even in situations where a warrant is required and a judge is involved, such as in the case of targeted surveillance or covert search, the determination of the standard of proof is left to the police and not the judge. See Arts. 14 (1), 17 and 18.

⁸⁷ Art. 23 (1); See Hiruy Wubie, 'The Right to Privacy in the Age of Surveillance to Counter Terrorism in Ethiopia' (2019) 18 African Human Rights Law Journal 392 (reporting that this article has been used "usually" by prosecutors when asked to show that the evidence they present were accrued without surveillance warrants). The fact that the law has been successfully used (or abused) in this way adds more evidence to the arbitrary interference argument.

⁸⁸ Anti-Terrorism Proclamation No. 652/2009, (n 1) Arts. 20 and 28-30.

access to extraordinary procedural powers which tips the balance of the justice system towards the state.⁸⁹ The problem here, one has to emphasize, is not whether the law is clear or not. Even if we assumed that the definition is clear, the authorities are given wide ranging and arbitrary powers which allow them to target those who do not qualify under the definition, and do so without much judicial oversight.

The conclusion that the 2009 law fails the arbitrary interference test is bolstered by the fact that the definition of terrorism has in fact been used arbitrarily. The uproar it has generated from a dozen African and UN human rights bodies mentioned in the introduction, all of which called on the government to stop applying the law to journalists, bloggers, peaceful political opponents, shows that there is credible evidence that the authorities have already arbitrarily applied the law. An extensive empirical work by Zelalem Kibret in which he studied nine hundred eighty five terrorism prosecutions shows that more than ninety five percent of cases were brought against the government's political opponents and dissidents who have "nothing to do with the essential understanding of terrorism or violence for that matter."⁹⁰ The authors are also familiar with cases in which individuals have spent months in detention under the 2009 law, just because they had private altercations with police officers or were found in possession of publications critical of the government.

The 2020 law avoids the charge of arbitrary interference, in part, because it introduces a more rigorous definition of terrorism. The 2020 legislation is proclaimed with the view of avoiding arbitrary enforcement. The former legislation which gives broader discretion in due course of investigation relating to surveillance, search, and seizure is amended. Thus, the current legislation does not incorporate provisions regulating how arrest, search, detention/remand, and admissibility of evidence. Under the new legislation, the above issues are left to the regulation of the Criminal Procedure Code. The only exceptional provision incorporated under the new legislation relates to special investigation techniques that allow intercepting or conducting surveillance, installing cameras, audio or video recording devices, infiltrating, and simulated communication.

Unlike the previous legislation, however, the special investigation techniques may only be applied under strictly exceptional instances. The special investigation technique may only apply with the consent of the court. To that effect, the investigators are duty-bound to show that the regular Criminal Procedure Code investigation technique is ineffective to gather evidence regarding the investigation of terrorism crime for which they are requesting the

⁸⁹ Anti-Terrorism Proclamation No. 652/2009, (n 1) Arts.13 (1), 16, 21 and 22.

⁹⁰ Zelalem Kibret, (n 3) 533.

consent of the court. Even in urgent instances, they have to get the consent of the court within 48 hours.

The new law also requires setting a period for which warrant is issued for the use of special investigation techniques and no warrant may be granted for more than 90 days with the possibility of 30 days extensions. Furthermore, it requires adducing the evidence obtained in the same form it was obtained. Thus, the intelligence report under which numerous terrorism cases are prosecuted, would not suffice. Instead, the evidence obtained must be presented in the form it was obtained. To protect individuals against abuse, the law requires a communication service provider to ensure the existence of a warrant before cooperating with the police to conduct the interception. It is important to also notice that the evidence obtained must be destroyed when they are not relevant to the ongoing investigation to protect suspects against infringement upon their right to privacy. Thus, by avoiding extraordinary discretionary investigation, search, and seizure powers, and by adopting judicial oversight, the new law makes progressive leaps that set it apart from the 2009 legislation as far as the arbitrary interference test is concerned.

3.3. Necessity: The Least Intrusive Means Test

If we are evaluating the definition of terrorism under the least intrusive means test it would have been already decided that, among other things, the law is reasonably foreseeable and does not allow arbitrary interference. The main focus of the least intrusive means test in relation to the definition of terrorism is whether alternative definitions are available to achieve the legitimate aims of the proclamation but with fewer restrictions on human rights. Although necessity analysis typically involves exemplification and showing possible legislative and non-legislative alternatives that are equally effective but less restrictive, we are partially spared this exercise by Ethiopia's pre-2009 legal regime which was least restrictive and, according to the government itself, as effective in combating terrorism.

Academic studies, and especially Wondwossen Demissie Kassa's article on the *raison d'être* of the law, show that the formal position of the Ethiopian government before the 2009 ATP was unveiled was that existing criminal laws and procedures were effective and sufficient to deal with the threat of terrorism.⁹¹ After vehemently defending this position almost every year between 2002 and 2007, citing successful terrorism prosecutions in the mid-1990s, the government suddenly reversed course in 2009 citing the same terrorist attacks as evidence of the inadequacy of its laws.⁹² In addition to confirming Wondwossen Demissie Kassa's work, separate studies of Zelalem Kibret and Asmelash Teklu show that anti-terrorism

⁹¹ Wondwossen Demissie Kassa (n 1) 52-54. Zelalem Kibret, (n 3) 512-13.

⁹² Ibid.

prosecutions and convictions, including those against peaceful opponents, were taking place without much impediment in 2009 and the preceding years.⁹³ To the extent that the government's pre-2009 arguments regarding the pre-2009 legal regime on the definition of terrorism are accurate, one can thus argue that both the 2009 and the 2020 anti-terrorism laws would face the challenge of whether the additional proscriptions and more serious penalties are necessary.

Despite their liability to this common critique however, the 2009 and the 2020 definitions of terrorism are different in one major respect. To briefly exemplify this difference, it is apt to revisit the “disruptive activists” introduced earlier and assume they have acted in ways that violate Article 3 of either law. The question here is whether the means used, the proscription the acts of the disruptive activists under this law, necessary to “prevent and control” terrorism.⁹⁴ In other words, necessity analysis of Article 3 would involve an examination of whether it is necessary for the government to go as far as including in the definition of terrorism, the acts of our disruptive activists who engage in a political rally that intentionally or incidentally blocks or impedes traffic as a tactic; government employees, public servants or public utility employees who organize illegal strikes; or university students who go on a rampage in a bid to improve educational standards.

A brief relief from a hypothetical discussion is provided by the cut-point suggested by the African Commission's Special Rapporteur on Freedom of Expression and Access to Information and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. The rapporteurs suggest that the definition of terrorism should be restricted “to violent crimes”⁹⁵ and to “conduct which is truly terrorist in nature”.⁹⁶ The UN Special Rapporteur goes farther and concludes that a definition of terrorism that goes beyond proscribing acts “intended to cause death or serious bodily injury” or “lethal or serious physical violence”, or includes acts that do not correspond to “serious crimes” in national law, “would be problematic from a human rights perspective”.⁹⁷ To the extent that these suggestions are based on comparative law one could

⁹³ Zelalem Kibret, (n 3) 512-13, 520-21; Teklu, (n 12) 101-121.

⁹⁴ See the preambles of both Anti-Terrorism Proclamation No. 652/2009, (n 1) and Anti-Terrorism Proclamation, Proc No. 1176/2020 I., Federal Negarit Gazette, 26th Year No. 20, Addis Ababa.

⁹⁵ Adeline Hulin (ed.), ‘Joint Declarations of the Representatives of Intergovernmental Bodies to Protect Free Media and Expression’ Organization for Security and Co-operation in Europe (Vienna 2013) (hereinafter “OSCE Joint Declaration”).

⁹⁶ UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, (n 43) Par. 26.

⁹⁷ UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, (n 43) Par.28.

argue that fighting terrorism can and should be done without criminalizing non-violent activities.

One could also hypothetically argue that the government can validly proscribe some of these acts as crimes or petty offenses while it is not clear if it can restrict some of them even as petty offenses as they constitute constitutionally protected forms of political expression. The inclusion of the more disruptive acts in the anti-terrorism law is also unnecessary to prevent or counter “truly terrorist” activity. In addition, it is also not necessary to apply a law as restrictive as this one to prevent disruptive political activism. The government can use the regular criminal law and procedure to combat disruptive activism and as the levels of disruption escalate it can resort to bolstering law enforcement resources like training more riot police or buying better equipment. If things really get out of hand, the government has the option of resorting time-bound, substance-bound and localized states of emergency which would be less restrictive than the 2009 ATP which had proven to be a permanent *de facto* state of emergency.

The anomaly with Article 3 of the 2009 ATP lies in that it can be interpreted, and here in the plain, ordinary, and literal sense, to restrict a wide spectrum of activities which makes it clear that it does not employ the least restrictive definition available. This is not so much a mere hypothetical argument as, in addition to Ethiopia's pre-2009 laws, the African Model Anti-Terrorism Law and the legislative practices of similarly situated countries provide abundant examples of how a law can achieve the ends of fighting terrorism with much less restrictive definitions. The African Model Anti-Terrorism Law, endorsed by the Assembly of the African Union in 2011, specifically leaves out some forms of political violence including “advocacy, protest, dissent or industrial action” that do not resort to serious violence.⁹⁸ Similarly, African⁹⁹ and Western¹⁰⁰ countries very clearly provide that protests, demonstrations and stoppages of work would be automatically excluded from the definition of terrorism. If the laws of these countries can achieve the ends of countering terrorism without restricting political rights that the 2009 ATP does, or if they can do so without

⁹⁸ The other exclusions relate to taking part in an armed conflict, which will be dealt with international humanitarian law, and violence connected with fighting “colonialism, occupation, aggression and domination by foreign forces”. See African Union General Assembly 17th Ordinary Session, ‘the African Model Anti-Terrorism Law’ (2011) Par. (4)(XL). Generally, Marta Teshome, ‘the African Anti- Terrorism Convention and its Implementation in Ethiopian Terrorism Law’ (Unpublished Dissertation Oct. 2013).

⁹⁹ See Art. 3 of the Anti-Terrorism Act, 762nd Act of the Parliament of the Republic of Ghana (10 Oct. 2008); Art 1 (3) of the Terrorism (Prevention) Act, Act No. 10 of the National Assembly of the Federal Republic of Nigeria (3 Jun. 2011); Art. 1 (3) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 of the Parliament of the Republic of South Africa (4 Feb. 2005); Art. 4 of the Tanzania Prevention of Terrorism Act, Act No. 21 of 2002 of the Parliament of the United Republic of Tanzania (14 Dec. 2002); Art. 3 of the Anti-Terrorism Act, Act No. 21 of 2007 of the Parliament of Zambia (6 Sept. 2007).

¹⁰⁰ Wondwossen Demissie, (n 11) 373-377; Patrick Griffith, ‘Ethiopia's Anti-Terrorism Proclamation and the Right to Freedom of Expression’ (Aug. 2013) Freedom Now.

restricting rights as much as Article 3 does, it then follows that the Ethiopian law is unnecessarily broad – it does not use the least intrusive means available.

The 2020 law, on the other hand, requires engendering to the life of a person or serious damage to body and property for the application of the law as its material element. In comparison to the 2009 ATP, the 2020 law restricts the definition in Art. 3 to “terrorizing” the public or “coercing” the government, as opposed to the 2009 “intimidate” the public or “put pressure on” the government as its *mens rea*. Combined with the above material and mental element, the motive of committing the crime must either be to further political, ideological, or religious causes. Furthermore, the exclusionary provision under Article 4 of the 2020 law partly adopts the African Model Anti-Terrorism Law. Accordingly, the new law specifically leaves out some forms of political violence including strike, “demonstration, assembly and similar rights” irrespective of obstruction of public service as a result of the exercise of such rights. It is different from the former legislation in terms of restricting the former broad *mens rea* requirement and material element. Thus, it can be concluded that the new legislation uses the least restrictive means as opposed to the 2009 ATP.

One exception to this conclusion, however, comes from a combined reading of Articles 2 (1) and 3 (1) (d). Using an *argumentum ad absurdum*, one could show that a person can fall under the definition of Article 3 for giving up or not exercising their incorporeal interests implied by the right or property.¹⁰¹ The question under the least intrusive means test would be whether there are less restrictive means of achieving the ends of public safety than punishing someone with rigorous imprisonment of ten to eighteen years for terminating a patent, renouncing a trademark, or waiving a copyright. While such acts can be used to support a terrorist cause in a very abstract way, most such acts have been decriminalized in the 2020 law with the abrogation of the “encouragement” provisions of the 2009 ATP. The remaining legal concept that comes close to covering such activity would be impossible attempt under Article 29 of the Criminal Code. Since a combined reading of Articles 2 (1) and 3 (1) (d) fails the least intrusive means test, it is hoped that future regulations, manuals and procedures developed to implement the 2020 law adopt purposive constructions that avoid punishing obnoxious but innocuous activity under Article 3.

¹⁰¹ Note that, under Ethiopian law, the only way one can technically damage one’s own incorporeal property is by giving up or not exercising incorporeal interests. For example, the only way one can “destroy” a patent is through the intentional “termination” or “surrender” of the patent. Similarly, one could “destroy” copyrights through the “waiver of moral rights” and “non-use of economic rights” and trademarks through their “renunciation” and “non-use”. See Arts. 34 and 35 of the Proclamation Concerning Inventions, Minor Inventions and Industrial Designs, Proclamation No. 123/1995, Negarit Gazeta (10 May 1995); Arts. 8 and 25 of the Copyright and Neighboring Rights Protection Proclamation, Proclamation No. 410/2004, Federal Negarit (19 Jul 2004) and Arts. 34 and 35 of the Trademark Registration and Protection Proclamation, Proclamation No. 501/2006, Federal Negarit Gazeta (7 Jul. 2006).

4. The Diffusion of Overbreadth to Ethiopia: A Challenge or an Opportunity?

Even though the international and American models play similar roles within their respective legal systems, they are distinct enough that they can and do result in different results – even when applied properly – because of doctrinal and methodological differences.¹⁰² Therefore, any inter-permeation between the two has to be a deliberate effort. Although this deliberateness lacks in the vague-and-overbroad formulation, the diffusion¹⁰³ of “overbreadth” language from U.S. constitutional law seems to have resulted in this formulation both in Ethiopia and other places as well. Unfortunately, however, the unnecessary blending certainty/vagueness, proportionality and overbreadth, is not unique to the analysis of the 2009 ATP. One can see that the courts of Kenya, Zimbabwe and South Africa have also struggled with the same problem.¹⁰⁴

The South African Constitutional Court seems to have caught on to the problem addressed in this paper by adhering to international model¹⁰⁵ and applying overbreadth analysis within proportionality analysis.¹⁰⁶ The difficulty inhering in the confusion between vagueness and overbreadth has, however, resulted in lower courts continuing to use overbreadth as part of their determination of legal certainty by either blending their analysis of legal certainty, proportionality and overbreadth,¹⁰⁷ or using overbreadth as a part of their legal certainty analysis.¹⁰⁸ Recognizing this confusion, the Constitutional Court explicitly addressed the matter in *South African National Defence Union v Minister of Defence* where Justice Kate O'Regan, speaking for a unanimous court, opined:

¹⁰² In addition to Section III above see Barak, (n 28) 509-521; Alec Stone Sweet and Jud Mathews, ‘All Things in Proportion? American Rights Doctrine and the Problem of Balancing’ (2011) 60 Emory L. J. 797, 106-117.

¹⁰³ We are using “diffusion” in the general sense as used by Twining who defines it to include “reception, transplants, spread, expansion, transfer, exports and imports, imposition, circulation, transmigration, transposition, and trans-frontier mobility of law.” See William Twining, *General Jurisprudence Understanding Law from a Global Perspective* (Cambridge Univ. Press 2008) 271.

¹⁰⁴ See Geoffrey Andare v. Kenya [2015] Petition 149; Coalition for Reform and Democracy (CORD) and others v. Kenya [2014] Petition 628; AIDS Law Project v. Attorney General and 3 Others [2011] eKLR, Petition No. 97 of 2010; and Chavunduka and others v Minister of Home Affairs and another [2000] JOL 6540 (ZS).

¹⁰⁵ Stuart Woolman & Henk Botha, ‘Limitations in Constitutional Law in South Africa’ (Stuart Woolman et al. eds. Cape Town; Juta 2nd ed. 2012) 34 47 – 53, 85.

¹⁰⁶ Woolman & Botha, (n 105) 34-85; Niels Petersen, ‘Proportionality and the Incommensurability Challenge; Some Lessons from the South African Constitutional Court’ (2013) New York University Public Law and Legal Theory Working Papers 1. Also see how the Court uses overbreadth in its “less restrictive means” analysis of the proportionality test in *Coetzee v. Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [22 September 1995] (CCT19/94, CCT22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631, Pars. 12-13.

¹⁰⁷ See *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and others* [2003] 1 SACR 448 (W) Par. 86.

¹⁰⁸ See *South African National Defence Union v Minister of Defence* [1999] CCT27/98) ZACC 7; [1999] (4) SA 469; [26 May 1999] 1999 (6) BCLR 615.

[The High Court] found that the scope of the prohibition on public protest was extremely broad. ... [It] held that ... the provision was overbroad and unconstitutional and that no consideration of the limitations analysis was therefore necessary.

In my view, this approach is not correct. The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well-tailored to that purpose. At both stages, the use of the term “overbreadth” can be confusing, particularly as the phrase has different connotations in different constitutional contexts. ... In this case, the provisions ... are unconstitutional because they constitute an unjustifiable limitation upon the right to freedom of expression of uniformed members of the Defence Force.¹⁰⁹

While Ethiopian courts, which have yet to develop a coherent analytical structure in deciding constitutional cases, can elect to adopt either the international or the American model,¹¹⁰ it is our opinion that they should follow suit with the South African Constitutional Court at least in the beginning. Not only is this something that Ethiopia has to contend with because the constitution mandates such a move,¹¹¹ this approach has the advantages of using a standard that is widely applied in constitutional and international litigation outside of the U.S.¹¹² Additionally, the American model, developed the way it did because of specific reasons connected with legal tradition and constitutional history, it is laden with

¹⁰⁹ South African National Defence Union v Minister of Defence, (n 108) Pars. 17-18. In fn.12. The Court further explains why overbreadth is confusing “In the USA, overbreadth is, effectively, a doctrine of standing. It permits litigants whose own constitutional rights are not affected by a legislative provision, to rely on that provision’s infringement of the rights of others. On the other hand, in Canada, the term “overbreadth” is a matter which applies at the limitations stage of constitutional analysis to determine primarily whether a legislative provision has an appropriate fit between means and ends, what the Canadian Supreme Court has referred to as “the minimal impairment” leg of the limitations analysis.” The Court, it seems, believes that the South African model is more akin to the Canadian rather than the U.S. one. For a broader discussion of the influence of the Canadian model in South Africa’s proportionality analysis see IM Rautenbach, ‘Proportionality and the limitation clauses of the South African Bill of Rights’ 17 PotchefstroomseElektronieseRegsblad6. 2229 (2014); also see Woolman & Botha, (n 105) 34-X to 34-Y. For a comparison of the U.S. and Canadian jurisprudence see generally Elisabeth Zoller, ‘Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?’ (2003) 78 Indiana Law Journal 567.

¹¹⁰ For a discussion of the different possible alternatives and their advantages and disadvantages see Vol. 14:8 of the German Law Journal. Especially relevant is Niels Petersen’s contribution to the volume starting at p.1387.

¹¹¹ FDRE Constitution, (n 27) Arts. 9 (4) & 13 (2).

¹¹² This includes almost all civil law, common law, and mixed countries including Canada, South Africa, Israel, and the United Kingdom, New Zealand, Australia, Israel; Asian countries such as Hong Kong, South Korea, India; South American countries such as Colombia, Peru, Mexico, Chile, and Argentina, and Brazil; the European Court of Human Rights; the European Court of Justice and even the World Trade Organization’s dispute settlement mechanisms. See Sweet & Mathews, (n 29); and Barak, (n 28) at 175-206

complexities such as the mixing of balancing and categorization¹¹³ and the elaborate “tiers” of scrutiny¹¹⁴ and the confusion between proportionality and overbreadth that U.S. courts and jurists have struggled with.¹¹⁵

This does not, however, necessarily require the abandonment of the contributions of U.S. jurisprudence. To the contrary, Ethiopian courts can borrow tests applied in First Amendment cases and especially the “chilling effect” standard and use it within their least intrusive means analysis. This seems to have been the approach followed by the Inter-American¹¹⁶ and the European Courts,¹¹⁷ in addition to the African Commission,¹¹⁸ where the “chilling effect” is incorporated into the proportionality analysis in relation to the

¹¹³ For criticisms of the inconsistent and application of these rules generally see: Spece, Jr. & Yokum, (n 74) 295-96, 313-39; Sweet & Mathews (n 102); T. Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1997) 96 Yale L.J. 943, 964; Suzanne B. Goldberg, ‘Equality Without Tiers’ (2004) 77 S. Cal. L. Rev. 481, 484-91.

¹¹⁴ Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality* (Greenwood Publishing Group, 2001) 81-84 (indicating that in addition to the three tiers discussed above there can be “minimal scrutiny with bite” tier and “quasi-suspect” tier which can complicate the model); Calvin Massey, ‘The New Formalism: Requiem for Tiered Scrutiny?’ (2004) 6 U. Pa. J. Const. L. 945 (concluding that with new decisions “The flaccidity of the strict scrutiny ... coupled with the robust skepticism of the minimal scrutiny [in the case law] ... suggests that the neat compartments of tiered scrutiny are beginning to collapse.”); Eugene Volokh, ‘Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny’ (1997) 144 U. Pennsylvania L. Rev. 2417, 2450 (commenting on the possibility of the “quasi-intermediate” tier); Also generally, Kathleen M. Sullivan, ‘Post-Liberal Judging: The Roles of Categorization and Balancing’ (1992) 63 U. Colo. L. Rev. 293, 297; Jeffrey D. Jackson, ‘Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment’ (2011) 45 U. Rich. L. Rev. 491, 493, 507-08, 511-13.

¹¹⁵ Sparks, (n 61) 1771-1772; Bauerschmidt, (n 61) 1112-1113; and Collings Jr., (n 60).

¹¹⁶ *Herrera-Ulloa v. Costa Rica*, (Inter-Am. Ct. H.R. 2004) Series C No. 107, 133; Special Rapporteurship for Freedom of Expression, Chapter V - “Desacato” Laws and Criminal Defamation, available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=310>. Also see *Kawas-Fernández v. Honduras*, Merits, Reparations, and Costs, (Inter-Am. Ct. H.R. 3 Apr. 2009) Series C No. 196, at para. 140. (referring to an “intimidating effect”).

¹¹⁷ See *Christine Goodwin v. United Kingdom* App. No. 28957/95 (ECtHR, 2002) Par. 39; *Cumpana and Mazare v. Romania* App. No. 33348/96 (ECtHR 2005) Pars. 114-116; *Mahmudov and Agazade v. Azerbaijan* App. No. 35877/04 (ECtHR, 2008); *Eon v France* App. No. 26118/10 (ECtHR 2013) Pars. 60-61. Also, generally, Research division of the European Court of Human Rights, ‘Internet: Case-Law of the European Court of Human Rights’ (June 2015). For a comparison of European Court and the U.S. Supreme Court jurisprudence on the freedom of expression and the chilling effect see: Erik Bleich, ‘Freedom of Expression versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe’ (2014) 40 *Journal of Ethnic and Migration Studies* 2. 283; Roger Kiska, ‘Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence’ (2012) 25 *Regent University Law Review* 107; and Bruce E.H. Johnson & Kyu Ho Youm, ‘Commercial Speech and Free Expression: The United States and Europe Compared’ (2009) 2 *J. Int'l Media & Ent. L.* 159.

¹¹⁸ OSCE Joint Declaration, (n 95); UN Human Rights Committee, General Comment No. 34, (2011), CCPR/C/GC/34, Par. 47

freedom of expression and the media.¹¹⁹ However, such an approach¹²⁰ is not warranted in analyzing Art. 3 of the ATP as it fails both *lex certa* tests and, even hypothetically assuming it does not, it will still not pass muster under the least intrusive means test.

Conclusions: Whence the End of Quixote's Adventures?

Although both the international and American systems have come up with different doctrines that play mostly similar functions, we hope we have made a good case for the broader conclusion that Ethiopia should continue using the international model. Not only is the international model already closer to the Ethiopian system, not least because the Constitution makes international law part of the law of the land, but the peculiarities of the American model do not present it as an attractive alternative. However, we have also argued that, including following the cue of international human rights bodies, American jurisprudence can also be utilized within the broader framework on the international model.

Whatever the merits or otherwise of these arguments, one thing that comes out very clearly is that the “vague-and-overbroad” formulation is not workable especially from a legal point of view. Fortunately, probably because of the fear of courts to exercise judicial review rather than jurisprudential prudence, we did not see any evidence to suggest that this formulation has found its way into judicial decisions or was adopted by Ethiopian courts. However, we did find numerous instances of its use in the literature where it is utilized more like a conceptual crutch rather than a cohesive doctrine. We recommend that it may be better to use “vague and disproportionate” as a heuristic but legally sound formulation, despite the later lacking the zing of “vague-and-overbroad”.

The fact that the concern underpinning this article is not just merely theoretical is reflected by how courts of other African jurisdictions, including in Kenya, South Africa and Zimbabwe, seem to have struggled with (dis)entangling the doctrines enmeshed by the vague-and-overbroad formulation with varying levels of success. Given the unpreparedness of the Ethiopian legal profession for sophisticated constitutional disputes, we hope that the continued lack of jurisprudential standardization does not lead to unnecessary jurisprudential confusion and inconsistent application of legal standards. We hope we have

¹¹⁹ It is also worth noting that that Ethiopian judges and academics might find some utility in exploring tiered review in analyzing conflicts between different rights in the Constitution which suggests its own hierarchy of rights. Generally, Abadir Mohamed, ‘The Human Rights Provision of the FDRE Constitution in Light of the Theoretical Foundations of Human Rights’ (2008) Ethiopian Human Rights Law Series Ch. 3; Aberra Dagafa, ‘The Scope of Rights of National Minorities under the Constitution of the FDRE Democratic Republic of Ethiopia’ (2008) Ethiopian Human Rights Law Series 54.

¹²⁰ See for ex., Gedion Timothewos, ‘Freedom of Expression in Ethiopia: The Jurisprudential Dearth’ (2010) 4 Mizan L. Rev. 201, 222.

contributed by at least putting the continued use of the vague-and-overbroad formulation to rest. What is clear however is that the legal system and the legal community in general need to take leaps and bounds in developing a deliberate and well-thought-out doctrinal and analytical structure for if they are to contribute to Ethiopia's transition to a stable, democratic, and federal polity based on true constitutionalism and the respect for human dignity.

The lack of preparedness of the judiciary, and the legal profession in general, for jurisprudentially complex cases will probably persist for a little while after the structural causes change. That the vague-and-overbroad formulation is deployed so readily in the dissertation and published literature is an indicator of the need for legal education institutions to take the lead in tackling the problem. Setting best practices on jurisprudential styles and methods, for example by setting up conferences on the topic and incorporating the same in their constitutional law, legal reasoning, and human rights law curricula, may be a good starting point. In this process the legal profession will have ample opportunity to join Don-Quixote in additional adventures which academics both loathe and enjoy.

The Principle of Presumption of Innocence as a ‘Postulate’ in the Draft Criminal Procedure and Evidence Code

Simeneh Kiros Assefa*

Abstract

The 1961 Criminal Procedure Code has been in operation for so long with its significant gaps and vagueness. The lack of properly enshrined guiding principles both in the law and the practice made the fairness of the criminal justice administration doubtful. The 2021 Draft Criminal Procedure and Evidence Code is intended to make positive changes to the rules of procedure in order to ensure fairness of the process. Such changes are guided by fundamental principles, the presumption of innocence being the first principle, provided for in the section covering fundamental principles in the criminal procedure.

Both the substantive and procedural aspects of the principle of presumption of innocence are incorporated into the Draft Code. Thus, while there are express rules requiring the public prosecutor to prove the facts of his case, there are also rules that require the accused (and the suspect) to be treated with dignity and respect befitting a person presumed innocent. Those subjects specifically discussed here are the right to liberty, burden and standard of proof.

Introduction

The 1961 Criminal Procedure Code contains a patchy procedure with several gaps and ambiguities. The need to revise the Code has been felt since long ago. Over the years, practices evolved that make the criminal process not compatible with the values enshrined in the Constitution of the Federal Democratic Republic of Ethiopia (‘FDRE Constitution’) and the international bill of rights to which Ethiopia became a party in the 1990s. Those values include the presumption of innocence which is a subject under consideration.

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Often, the criminal process is portrayed as a forum where the interests of the public, to be protected from crime, and the rights of the individual, to be protected from intrusive state action, are considered in constant collision.¹ This is a misconception, often promoted by politicians, regarding the criminal process.² However, while the criminal law defines 'the social' positive morality, the criminal process is meant to enforce that morality. In the process, several rights of the individual are implicated. The protection of those rights of the individual is, therefore, equally a matter of public interest.³

The Draft Criminal Procedure and Evidence Code⁴ ('Draft CPEC') provides for the principle of presumption of innocence as a postulate in the interpretation and application of the entire Draft Code. It incorporates both the substantive and formal aspects of the presumption. The public prosecutor is required to prove all the ingredients constituting the crime beyond a reasonable doubt. The process is also designed to enable the court to accord the accused or the suspect a treatment that is befitting a person presumed innocent throughout the process.

The Draft CPEC further puts matters in context both in structure and arrangement of the provisions. In the preamble, the Draft Code makes it clear that the purpose of the law is not to grant unlimited power to the state but to enable implement those limited powers granted by the Constitution. The arrangement of the provisions is made to conform to the desired process which is believed to help both law enforcement and the court comply with the requirements of presumption of innocence.

This article attempts, first, to depict the fundamental and inherently unfair nature of any criminal process. The various protections afforded to the individual passing through the criminal process are an effort to introduce some semblance of fairness. One of those fundamental guarantees is the presumption of innocence. It, thus, examines how the presumption of innocence inspires the whole criminal process aspiring to maintain a fair

¹ Those two models of the criminal process discussed by Herbert L Packer in his 'Two Models of the Criminal Process' (1966) 113 U of Penn L Rev 1, are reflected both in the law and the judgements of the court but with varying political content. Simeneh Kiros Assefa 'The Principle of Presumption of Innocence and Its Challenges in the Ethiopian Criminal Process' (2012) 6 Mizan LR 273. Simeneh Kiros Assefa and Cherinet Wordofa Wetere "'Over-Criminalisation': A Review of the 'Special' Penal Legislation and Penal Provisions' (2018) 29 J Eth L 49. *Special Prosecutor v Mulugeta Girma* (8 December 1982, Crim File No 15/74, Special First Instance Court).

² See for instance, William J Stuntz 'The Pathological Politics of Criminal Law' 100 Michigan L Rev 505, discussing the perversion of the criminal justice in the American system.

³ John Griffiths 'Ideology in criminal Procedure: A Third 'Model' in the Criminal Process' (1970) 79 Yale L J 359.

⁴ This article was originally written based on the Draft Criminal Procedure and Evidence Code (2019) submitted to the Advisory Council established by the Federal Attorney General. There were significant changes made to it before it was submitted to the Council of Ministers. At the time of writing, it was in the House of Peoples' Representatives' Law, Democracy and Administrative Affairs Standing Committee, with another set of changes yet in early 2021. It is hoped their content would remain the same. It is for that reason the relevant provisions are reproduced as much as possible. The discussion is made adjusted to the provisions as the Draft stood in early 2021.

and dignified treatment of the arrested or accused person from the moment the individual becomes a suspect all the way to the passing of a final judgement.

The Constitution recognises the individual's right to liberty that cannot be arbitrarily limited by the state. The substantive aspect of the presumption of innocence is discussed from the perspective of how it promotes rights, such as the right to liberty. In this context, the right to liberty is discussed in a continuum – as a prohibition of arbitrary arrest and by the possibility of granting bail. The discussion is based on the comparison between the existing law and practice, and a particular aspect of the rules of revised procedure. This is an examination of fundamental structure of the Draft CPEC taking the principle of presumption of innocence as a legal postulate.⁵

Section one puts the general context of any criminal process and the special context in which the Draft CPEC is drawn up. Section two attempts to put the operative context of the presumption of innocence and how it is included as one of the objectives of the Draft CPEC. It justifies how the presumption of innocence is placed as a fundamental guiding principle in the criminal process and how it is incorporated into the Draft CPEC having both procedural and substantive aspects. Section three explains the inclusion of the principle of presumption of innocence as a postulate. Section four discusses the substantive aspect of the presumption of innocence, how the suspect or the accused is treated in the process by focusing on the protection and maintenance of the right to liberty, how arrest power is limited and how freedom on bail opportunities are expanded. Section five dwells on the procedural aspect of the presumption of innocence. It depicts the changes made in order to give effect to such understanding of the presumption of innocence. As member of the drafting committee, the author discusses based on the matters and aspirations that transpired during discussions in the drafting process.

1. Context of Reform on the Criminal Process

In this section, I will discuss some fundamental beliefs inspiring the drawing up of the Draft Criminal Procedure and Evidence Code.⁶ An assignment of such magnitude, reforming the criminal process, requires a proper understanding of the circumstances of the object of the reform and the role of the subject sought to be reformed. The revision of the Criminal

⁵ For in-depth discussion of how rights are treated as postulates, see Simeneh Kiros Assefa 'Limiting the Criminalizing Power of the State in Ethiopia' (PhD Dissertation submitted to the Addis Ababa University Law School, 2020 unpublished) 100 ff. Humberto Ávila, *Theory of Legal Principles* (Springer 2007) 84 ff. Simeneh Kiros Assefa 'Methods and Manners of Interpretation of Criminal Norms' (2017) 11 Mizan LR 88, 101 ff.

⁶ Some of the arguments in this article are those that transpired at the drafting of the Code influencing the content of a particular provision.

Procedure Code was meant to positively reform the criminal process. There are political and other undercurrents that are not subject to discussion. However, there are also primordial truths that are not subject to open discussion too. The latter relate to the inherent predicament of the criminal process, forming a foundation of the view regarding the criminal process which should not be ignored.

1.1. Inherent Predicaments of any Criminal Process

The criminal justice system is meant to prevent crime so that the social existence of the individual is possible.⁷ That is the reason the state is given monopoly of coercive power.⁸ However, those crimes that made the headlines are not the ones meant for the prevention of crime for the common good; it is rather crimes designed for the protection of government interest that are making the headlines. In such situations, the process is skewed against the accused.⁹

Discussions relating to exercise of such most intrusive state power through the criminal process frequently use the phrases, such as 'criminal justice', 'justice administration', 'rule of law', 'fair process', 'equality of arms', and 'due process of the law', as manifestations of institutionalised platitude. Those phrases are also used in this article merely for better

⁷ Simeneh 'Limiting Criminalisation' (n 5).

⁸ David A Reidy and Walter J Riker 'Introduction' in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 6; Burton M Leiser 'On Coercion' in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 37; Scott A Anderson 'How Did There Come to Be Two Kinds of Coercion?' in David A Reidy and Walter J Riker (eds), *Coercion and the State* (Springer 2008) 22; Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (Springer 2007) 9; Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Cambridge UP 1949) 21; Simeneh Kiros Assefa 'Sovereignty, Legitimacy, and Fundamental Rights as Limitation to Criminalisation Power of the State' (2018) 12 Mizan LR 127.

⁹ There are several piecemeal amendments to the Criminal Procedure Code and all of them are related to special crimes. The content of those amendments is limiting the rights of the suspect/accused. See for instance, *Special Criminal Procedure Code Proclamation No 9 of 1975, Criminal Procedure Code Amendment Regulation, Legal Notice No 17 of 1975, Special Courts-Martial Establishment, Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 21 of 1975, Special Courts-Martial Establishment and Special Criminal Procedure Code Proclamations Amendment Proclamation No 38 of 1975, Criminal Procedure and the Civil Procedure Code (Amendment) Proclamation No 51 of 1975, Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 236/2001, Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005 The Vagrancy Control Proclamation No 384/2004, Anti-Terrorism Proclamation No 652/2009*. The instrumental nature of the criminal law is discussed by criminologists. See for example Geoffrey R Skoll, *Contemporary Criminology and Criminal Justice Theory: Evaluating Justice Systems in Capitalist Societies* (Palgrave Macmillan 2009). Alan Norrie 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2009).

communication and for lack of alternative phrases and words to describe the state of affairs.¹⁰

The naked truth is that the criminal process is a 'civil' way of using 'authoritarian power' in less dramatic and less barbaric public display of power instilling fear and obedience to a positive morality of the government expressed in 'criminal law'.¹¹ However, the use of such sophisticated state structure as a consequence of expanded population, territory and impersonal social relations only makes authoritarianism less visible.¹²

The semblance of stability under a strong and heavy handed criminal process is only a manifestation of the social and political prejudice.¹³ Society believes it is protected by criminal law, the motive society subscribes to such a system adopting laws for its sustenance, including creating an intellectual enterprise how to make the criminal process 'civil'. Because society lacks trust in human nature, it requires the intervention of a 'benevolent' government which is meant to protect us from ourselves while sustaining the 'government' over us.¹⁴

Therefore, when a person in uniform handcuffs a neighbour, society is trained to think that the former is enforcing 'the law' and the latter is 'a suspect'. This symbolic representation creates a distance between the public and the individual¹⁵ which results in public oblivion of the circumstances of the suspect. In such social consciousness, this distance puts the suspect under the category of 'the other', a reason society tolerates 'unjustified' coercive state actions against the individual put under the label 'suspect' or 'accused' or 'defendant'. These words are reifications of otherness which is an embodiment of a difference in colour, race, religion, language, geography, culture, neighbourhood, or mere different physical appearance. It appears to be a natural consequence that because the public has so used to it, it cannot live without a dominion exercised through the criminal law.

The government conveniently uses this machinery for the maintenance of power and other self-serving ends beyond its 'legitimate ends', so described conventionally. Thus, as a merchant makes profit by hiring others, so is those in power use the resources in the state

¹⁰ Simeneh Kiros Assefa 'What is the Jail Man Doing?' (2018) 12 Mizan LR 226. Torture had once been a legitimate investigative technique. James C Welling 'The Law of Torture: A Study in The Evolution of Law' (1892) 5 Am Anthropologist 193.

¹¹ Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Springer 2015) 227 ff. Norrie (n 9) 28 ff.

¹² Norrie (n 9) 25 – 33.

¹³ Ibid.

¹⁴ Although this does not make Hobbes theory on the nature of man 'correct', the need for a leviathan appears to be a necessity.

¹⁵ Graver (n 11) 242.

machinery to achieve those ends of maintenance of political power.¹⁶ For the government, otherness is manifested in a value difference – competing for political power, or putting alternatives that put the incumbent government in bad light. In comparison, the individual or group of individuals not in power are the weakest, when faced with the administration of the criminal process, however big such person may be socially. Ethiopia had Prime Ministers and Ministers,¹⁷ high ranking army officers,¹⁸ heads of regional states,¹⁹ all of whom were arrested, convicted, and served jail sentences on politically trumped charges for mere suspicion of having a different political opinion than that is upheld by the group in power. Some of them even underwent torture and different forms of humiliating practices.²⁰

Likewise, short of contesting for political power, every 'little' officer enforces his own morality which he attaches to the positive public morality. The suspect is therefore a person who finds himself in an unfortunate and sad situation, with no power but portrayed as 'public enemy'.²¹

In such society whose only experience is dominion, and whose consciousness is fear of a person next to him labelled as 'the other', a society trained to accept those systematic and organised oppressions as 'good' and 'orderly', and even those who lament against such sorry state of affairs of the criminal process are made to accept it as 'fate', the argument against

¹⁶ The unity of the Government and the single party would be expressly provided for in the *Constitution of the People's Democratic Republic of Ethiopia (Proclamation No 1, 1987)*, art 6. Such confusion between the organisation and functioning of the ruling party, EPRDF, and that of the Government continued even when the Government claims to have established constitutional government.

¹⁷ The Imperial period Prime Minister Aklilu Habtewold was executed along other 59 high ranking officials including a short time Chairman of the PMAC, Lt. General Aman Andom Michael. 'Serious Decision Taken by the Provisional Military Administrative Council' *Addis Zemen* 26 November 1974 (Addis Ababa) 1, 7, 8. Former EPRDF era Prime Minister Tamirat Layine was charged and convicted for politically motivated charges of corruption. *Federal Public Prosecutor v Tamirat Layine, et al* (2000, Criminal File No 1/89, Federal Supreme Court).

¹⁸ *Public Prosecutor v Brigadier General Tefera Mammo Cherkos, et al, (46 defendants)* (22 December 2009, File No 81406, Federal High Court).

¹⁹ Abate Kisho, the former President of Southern Nations, Nationalities and Regional State was charged and convicted for politically motivated crimes of corruption. *FEACC v Abate Kisho, et al* (2002, Criminal File No 260/94, Federal High Court).

²⁰ The author once witnessed a former president of the Gambella Regional State pleading with the Federal High Court to take measures against prison officials who kept him in dark isolation room for 41 days and being tortured on the order of individuals he would name in court to which the court turned an elephant ear. The inhuman condition of the Provisional Military Administrative Council underwent by the Imperial regime officials is partially recounted by Dr Abera Jembere. Abera Jembere, *Agony in the Grand Palace: 1974 - 1982* (Shama Books 1991, in Amharic)

²¹ Skoll (n 9) 10. ENA 'Opposing the Motto 'Ethiopia Tikidem' Tantamount to Opposing the Ethiopian People' *Addis Zemen*, 11 October 1974 (in Amharic) at 1. 'Serious Decision' (n 17) 1, 7, 8. This is translated into judicial decisions. See for instance, *Special Prosecutor v Assefa Aynalem Mehanzel* (7 June 1982, Crim File No 14/74, Special First Instance Court); *Special Prosecutor v Mulugeta Girma* (8 December 1982, Crim File No 15/74, Special First Instance Court) discussed in Simeneh Kiros Assefa 'Non-Positivist 'Higher Norms' and 'Formal' Positivism: Interpretation of the Ethiopian Criminal Law' (2020) 14 *Mizan L R* 51, text for note 114.

the criminal process is a heresy, at least among those whose livelihood depends on it; they are big in number and powerful.²² In these scenarios, we can only think of soothing the pain of the ailing criminal process.

1.2. The State of Affairs of the Ethiopian Criminal Process

Engaging in reform, the Government needs to have a baseline research to identify if there is a need for reform and the nature and extent of such reform. There is limited focused research regarding the activities that require reform.²³ However, the serious predicaments of the criminal process are matters of common knowledge – it is afflicted with normative, institutional and methodological predicaments.²⁴ The state adopts laws in excess of its power in a manner that gives impression that its power is unbounded; and such over-use of criminal law is intended to achieve both legitimate and illegitimate ends.²⁵

The Court, like any other government institution, has been recreated several times in order to meet the political demands of the government of the day, and its jurisdiction has been constantly changing.²⁶ The prosecution office was recreated and restructured several times assuming different responsibilities including prosecuting political issues.²⁷ The police was also recreated and restructure; its accountability constantly changing.²⁸

²² For instance, in the 2008 budget hearing, the police in different cities in California was not cut, unlike other basic public services including food stamps, because the police is powerful; the California Department of Corrections ('CDC') is powerful to influence a Governor of its preference elected. Those governors elected on the shoulder of the CDC cannot act against the interest of the CDC. In Ethiopia, such connection is presumably manifested in a different form. If the police, used as an institution of oppression, is made accountable in peace time, it would not be there to help quell public protest.

²³ FDRE Ministry of Capacity Building, *FDR Ethiopia Comprehensive Justice System Reform Program Baseline Study Report* (Primavera Quit 2005).

²⁴ Simeneh Kiros Assefa 'The Normative, Institutional and Practical Challenges in the Administration of Criminal Justice in Ethiopia' (2010) 3 Ethiopian Human Rights Law 1. Simeneh Kiros Assefa 'Conspicuous Absence of the Judiciary and 'Apolitical' Nature of Courts in Modern Ethiopia' (forthcoming); Simeneh 'Non-Positivist 'Higher' Norms" (n 21).

²⁵ Simeneh 'Limiting Criminalisation' (n 5); Simeneh and Cherinet 'Over-Criminalisation' (n 1).

²⁶ Simeneh 'Conspicuous Absence' (n 24).

²⁷ There were different organs with prosecution power, such as, the Ethiopian Revenue and Customs Authority, Federal Ethics and Anti-Corruption Commission, and Trade Competition and Consumer Protection Authority, in addition to the Federal Public Prosecution office. Many of the investigation were being conducted by a special investigation unit and some of the crimes were non-bailable. Those prosecution powers were brought under the Federal Attorney General as per the *Federal Attorney General Establishment Proclamation No 943/2016*, art 25(6).

²⁸ The accountability of the police has been changing several times. The Federal Police, under *Federal Police Proclamation No 207/2000*, had been made accountable to the Ministry of Justice. Later, under *Federal Police Commission Proclamation No 313/2003*, it was made accountable to Ministry of Federal Affairs. Currently, it is

Consequently, working in an authoritarian regime, the court adopts interpretative methods that meet the demands of the political system, that even under a liberal constitution it is not up to the task.²⁹ The overall image of the criminal justice system is anything but fair. Such normative, institutional and methodological drawbacks left excesses in the exercise of state coercive power, including violations of human rights, unaccountable.³⁰

One may argue that there has never been a proper check and balance in the three branches of the state because there has never been a judiciary with such power to hold the government accountable.³¹ In the Imperial period, because the Governors were also presidents of their respective Governorates, the courts were dominant.³² In the Military Government, as an essential part of the 'civil service', the prosecutor was dominant and the court was under the Ministry of Justice.³³

In the EPRDF Government, in order to give freehand to the police in the oppression of the public, the police were not accountable for crossing the line;³⁴ yet, having its back covered by the former National Information and Intelligence Service, the police dominated the criminal process to the extent, at times, determining what charges were to be drawn up. The aggressive offensive acts of the police was displayed in different fora refusing to accept future instructions by the public prosecutor regarding their investigative activities, creating some confrontation with the authorities in the Attorney General's Office.³⁵ In fact, prosecutions were conducted by fragmented institutions having different political objectives negatively affecting the quality of justice.³⁶ However, the systematic purge of important and experienced prosecutors who refused to prosecute the opposition political party members in the aftermath of the 2005 election brought the Ministry of Justice to the brinks.

Under such scenarios, when the state bent on reforming the criminal process, it is acceptable both for the ordinary citizenry and for the professionals. There were several wholesale

accountable to the Ministry of Peace, *Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No 1097/2018*.

²⁹ Simeneh 'Non-Positivist 'Higher Norms'' (n 21) 63 – 76.

³⁰ In one meeting a supreme court judge raised a rhetoric question regarding the source of his power to address matters where a detained person alleges violations of his rights. By mere coincidence, the author observed same judge failing to address such issue where a detained person accompanied by the police appeared in blood stained bandage on his elbow and limping leg.

³¹ Simeneh 'Conspicuous Absence' (n 24).

³² Ibid.

³³ Ibid.

³⁴ For instance, see how the serious accountability procedure that was put in place in the *Federal Police Proclamation No 207/2000* was made milder in *Federal Police Commission Proclamation No 313/2003*.

³⁵ Police heads and high ranking representatives attending discussion sessions on the Draft CPEC sternly objected to essential provisions of the Draft Code strengthening police accountability.

³⁶ See (n 27).

reform attempts – reforming the rules, institutions and their operations – each of them failed to deliver.³⁷ When the criminal process is intended to be reformed, the question one would raise is ‘what is to be reformed and what is the objective of such reform?’ – that is the unstated instruction. That is because, in the past regimes those concepts, such as justice and rule of law were already perverted.

There were studies conducted showing that the institutions were lacking in human and material resources, the necessary skill, etc.³⁸ The most important they lack is their institutional and professional independence.³⁹ The weight of the demand for reform in the criminal justice administration itself creates enormous challenges to overcome. A criminal process under such stressful predicaments, cannot be mend by merely revising the Criminal Procedure Code. However, if effectively revised, the criminal procedure law can influence an array of issues without going beyond the realm of the procedure – responsibilities and cultures of those institutions, their theories of law and methods in the interpretation of the criminal law and other laws, such as the Constitution. The Draft CPEC provides for institutional responsibilities and application of rules guided by those principles identified to be fundamental.⁴⁰

Whether in sincere attempt to address such serious legal gaps or mere window dressing, there were several attempts to reform the criminal process. There had been a draft drawn up in 1983 inspired by ‘socialist legality’.⁴¹ The present draft was drawn up several times since 1998 by the Ministry of Justice. There was another drawn up by the Justice and Legal System Research Institute both of which were submitted to the House of Peoples’ Representatives which resulted in a third draft taking elements from both. The draft was drawn up along with the 2004 Criminal Code; however, while the Criminal Code was adopted into law, the Draft Criminal Procedure Code remained a draft.

Those drafts on Criminal Procedure contained only procedural rules because there were also separate efforts to draft a complete evidence code. However, despite such efforts, because the evidence code did not appear to come forth, and members of the drafting committee

³⁷ In Simeneh ‘Conspicuous Absence’ (n 24), it is discussed how the courts are re-established several times allegedly to maintain rule of law and we have always been far from realising it. One rather would inquire the standards of the respective attempts of reform. For recent efforts of the failed reforms, see Elias N Stebek ‘Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements – versus – Promise Fatigue’ (2015) 9 Mizan LR 215.

³⁸ Baseline Research (n 23) 58 ff.

³⁹ Ibid. Janelle Plummer (ed), *Diagnosing Corruption In Ethiopia: Perceptions, Realities, and the Way Forward for Key Sectors* (IBRD 2012) 208 ff.

⁴⁰ Draft CPEC arts 18 – 23 provide for duties and responsibilities of justice institutions.

⁴¹ The notion of ‘socialist legality’ would also be incorporated into the subsequently adopted proclamations establishing the respective courts. *Supreme Court Establishment Proclamation No 9/1987*, art 3; *High Courts and Awraja Courts Establishment Proclamation No 24/1988*, art 4.

believed it would not come forth anyway, the current Draft CPEC contains criminal evidence rules made an indispensable part of the trial process.

It should be noted that the drafting process took a long time. However, there are major changes made as a result of the recent political changes after PM Abiy Ahmed took office. The four fundamental changes in the draft relate to – limiting arrest, making bail universal, requiring beyond reasonable doubt standard of proof, and preclusion of suspects' confession to the police as admission. They are all inspired by the presumption of innocence and the discussion here is limited to those fundamental procedural principles but they are succinctly discussed to show the glamour of the Draft CPEC.

2. Putting the Guiding Principles of the Criminal Process First

The modern criminal process, evolving since the Enlightenment, is based on rationalist tradition. In this tradition, as maintained by Jeremy Bentham, the purpose of adjective law is 'rectitude of decision'.⁴² Rectitude of decision is correct application of the law, which is based on certain fundamental assumptions, i.e., the positive law is 'correct' and 'truth is the foundation of justice, truth is universal, and knowledge is objective and it is achieved through a rational process'.⁴³ This is the rationalist model of adjudication. However, this is just only part of the story; what makes the process 'fair' is that it also has a value to pursue.⁴⁴ The process is a value to be complied with for its own good, but it also helps achieve good results.⁴⁵

Some attempt to portray two polarised positions – the due process model and the crime control model where either individual right or the maintenance of law and order is given

⁴² Michael Bayles 'Principles of Legal Procedure' in DJ Galligan (ed), *Procedure* (Dartmouth 1992) 34, 39 – 40.

⁴³ William Twining, *Rethinking Evidence: Exploratory Essays*, Second Edition (Cambridge UP 2006) 35 ff. Terence Anderson, David Schum, and William Twining, *Analysis of Evidence*, Second Edition (Cambridge UP 2005) 78 ff. Gerald J Postema 'Fact, Fictions and Law: Bentham on the Foundation of Evidence' in William Twining and Alex Stein (eds) *Evidence and Proof* (Dartmouth 1992) 25 ff.

⁴⁴ Summers argue that process is good in two ways – 'as a means to good results' and 'as a means to implementing or serving process values'. The first one is utilitarian while the second is deontological, the process values as ends themselves. Robert S Summers 'Evaluating and Improving Legal Process: A Plea for Process-Value' (1974) 60 Cornell LR 1, 4. Also see, Bayles (n 42) 50 – 57.

⁴⁵ Jeremy Waldron 'Principles of Legislation' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitution State* (Cambridge UP 2006). Luc J Wintgens 'Legisprudence as a New Theory of Legislation' in Luc J Wintgens, *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005) 22. Simenah 'Limiting Criminalisation' (n 5) 74 ff.

preference.⁴⁶ That appears to be the reason the Ethiopian criminal process appeared to have been obsessed with 'the truth'. However, the criminal justice is required to balance the two values. The criminal process, the foundation of which is laid down in the Constitution, is meant to help both the manifestation of 'truth' as well as 'protection of the individual'.⁴⁷ Thus, the law enforcement agencies are bound to apply those balanced values as incorporated in the procedural rules, and the court is also duty bound to see to it that they are complied with by those agencies.

However, the practice has been dominated by almost complete neglect of those procedural rights of the individual. This is driven not only by the authoritarian nature of the Government, but also by limited investigative skills of the police.⁴⁸ The court ignored claims based on constitutional rights on the guise that the power to interpret the constitution is reserved to the House of Federation.⁴⁹ Those factors call for a totally different approach to the already existing procedural code to enable the court to act in ways that enforce the rights of the individual.

Further, a rule, however clear it is made, practice has shown that it can be interpreted and applied to address a totally different purpose than it was originally intended to. In order to help the proper interpretation and application of a given rule, it is appropriate to put it in proper context. A rule may be interpreted with the assistance of postulates that are found in the other branches of the law, such as the Constitution, and some of them may not even be written, but abstracted from the purpose and nature of the law, including legal theory and method.

Thus, it is found to be absolutely necessary to put in place fundamental principles that will help both law enforcement agencies to comply with the rules, and the court in the interpretation and application of the relevant rules. Several of them are taken from the

⁴⁶ Packer (n 1). Both in personal conversation with the author and in public hearings on the Draft Code, law enforcement officers see the system that way. Also see 'Explanatory Memorandum on Vagrancy Control Draft Bill' (later adopted into law as *The Vagrancy Control Proclamation No 384/2004*).

⁴⁷ Griffiths (n 4). The argument that manifestation of the truth is essential for law enforcement agencies to obtain conviction and protect the public in unbounded procedure misses the point that to the extent that those apparently little missteps at every stage of the process ultimately nullifies the need for a constitutional limitation on the power of the government.

⁴⁸ In a need assessment being conducted in May 1, 2019 by the European Union to help in criminal justice reform, once Chief of the Addis Ababa Police replied how investigators are selected and trained, said those who have legible handwriting would be selected to be investigators.

⁴⁹ See, Getachew Assefa 'All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 J Eth L 139; Assefa Fiseha 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)' (2007) 1 Mizan LR 1; Yonatan Tesfaye Fesseha 'Whose Power is It Anyway: The Courts and Constitutional Interpretation in Ethiopia' (2008) 22 J Eth L 128.

Constitution and it is a deliberate action. It has been alluded to earlier that the court is consistent in its practice disregarding the Constitution on the ground that the power to interpret the Constitution is reserved to the House of Federation thereby rendering arguments based on those constitutional provisions unhelpful.⁵⁰ Therefore, when those provisions form part of the Criminal Procedure and Evidence Code, the court cannot avoid but determine the content of those provisions and develop a certain jurisprudence. Those principles constitute postulates defining the content and application of each provision of the Code.

2.1. Two 'Super-Principles' in the Criminal Process

The criminal process is the principal manifestation of the state's coercive power which is not unlimited. It is captioned by, at least, two super-principles – the rule of law and the right to a fair process.⁵¹ The selection of those two super-principles is arbitrary that it does not exclude other principles. However, they are applicable throughout the process in the interpretation and application of each provision, that limit rights of the individual.

2.1.1. The Rule of Law

The Constitution is meant to establish 'a political community founded on *the rule of law*'.⁵² It further provides that the establishment of 'State administration that best advances self-government, a democratic order based on *the rule of law*' is one of the 'powers and functions' of the regional states.⁵³ Although the content of the doctrine of rule of law does not acquire its glamour through jurisprudence of the courts, the Constitution embodies substantive rule of law.⁵⁴ The doctrine of the rule of law adopted in the Constitution is not mere application

⁵⁰ See (n 49). The author, as a practicing attorney, argued based on article 25 of the Constitution against discriminatory prosecution. However, the court did not address the issue at all. See, for instance, *Public Prosecutor v. Ali Aduros, et al.* (11 December 2014, Crim File No 134044, Federal High Court).

⁵¹ Humberto Ávila refers to the principle of rule of law 'superprinciple' because it superpose all other principles. Ávila (n 5) 56, 81, 92.

⁵² (emphasis added) FDRE Const, preamble para 1.

⁵³ (emphasis added) Ibid art 52(2)(a).

⁵⁴ The rule of law is classified into 'thin' or 'formal' and 'thick' or 'substantive' rule of law. P.P. Craig 'Formal and Substantive Conception of Rule of Law: An Analytical Framework' (1997) PUBLIC LAW 466; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge UP 2004). The substantive rule of law is that the coercive action of the state should be based on law that is adopted in a democratic process, complying with the bill of rights incorporated in the Constitution.

of valid positive law; it goes beyond the positive law – the law must be adopted in a democratic process and it must comply with fundamental rights.⁵⁵

The rule of law is thus both the foundation of the Ethiopian legal system and the guiding principle in the interpretation and application of the Constitution or exercise of any state coercive power, the criminal process being at the centre.⁵⁶

2.1.2. The Right to a Fair Trial

There is no mention of fair trial in the FDRE Constitution.⁵⁷ Because the right to a fair trial has not been expressly stated in the law, there is no record the author is aware of, that it has ever been a ground for a claim litigated before the courts. However, the right to fair trial is a bundle of rights which are meant to maintain the fairness of the process, working at each stage. The doctrine includes rights, such as equality of arms, trial before an independent and impartial court, access to prosecution evidence, the right to counsel, and similar guarantees. This is understandable from the point of view of the long distance “fair trial” travelled from conviction based on flimsy evidence, haphazard process, etc.⁵⁸

The administration of the criminal justice needs to comply with the fundamental requirements of the rule of law. Application of the rule of law in the criminal process can only be understood in the context of a fair trial. Like the presumption of innocence, the doctrine of fair trial has a broad range of application, including both the trial and process that come before the trial. For some, this intuitive understanding and practical interpretation of the doctrine of fair trial, helps the legitimacy of the process.

2.2. Objectives of the Draft Criminal Procedure and Evidence Code

The Ethiopian criminal process, as much political instrument of oppression it has ever been, focuses on the manifestation of truth with little inclination for respect of human dignity. As

⁵⁵ Simeneh Kiros Assefa and Cherinet Wordofa Wetere ‘Governing Using Criminal Law: Historicising the Instrumentality of Criminal Law in Ethiopian Political Power’ (forthcoming in 31 J Eth L); Adem Abebe ‘Rule By Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical’ CGHR WORKING PAPER 1, CAMBRIDGE: UNIVERSITY OF CAMBRIDGE CENTRE OF GOVERNANCE AND HUMAN RIGHTS 2011). Elias (n 37) 225 ff.

⁵⁶ Ávila (n 5).

⁵⁷ The ICCPR article 14 provides for different guarantees in the criminal process, but there is no express provision regarding the content of the fair trial.

⁵⁸ Elio Monachesi ‘Pioneers in Criminology. IX. Cesare Beccaria (1738-1794)’ (1955) in 46 The J of Crim Law, Criminology and Police Science 439, 441, 447. Patricia Margaret Warthon ‘The Humanitarian Movement in European History’ (1983) 48 Il Politico 693, 700, 708. Welling (n 10).

alluded to earlier, the balancing of the two apparently conflicting interests – truth and justice – is found to be difficult by law enforcement agencies. Thus, it is boldly stated at the beginning that the objective of the criminal procedure law is to balance the two. Further, the provisions of article 3 are carefully crafted to bring issue of human rights in the criminal process to the forefront. Thus, sub-article (1) provides that the objective of the Draft CPEC is ‘to respect and ensure the respect of the constitutionally guaranteed human rights in the process of criminal investigation, prosecution, trial and execution of judgment.’ Sub-article (2) provides that the other equally important objective of criminal procedure is to ensure ‘the criminal justice system uncovers the truth, and is fair and effective.’⁵⁹ In order to give perspective to those objectives, sub-article (3) states the overarching objective of the criminal process is to ‘ensure rule of law by limiting the coercive power of the state over its citizens in the criminal justice system’. This is probably the only explicit statement in the law that the power of the state is not unlimited.

Within the context of such objective of the criminal procedure and the criminal process in general, there are other principles incorporated in the first part of the Draft CPEC that sustain this value. Article 4 provides that the interpretation and application of the Code should be guided by those principles. Several of those provisions are taken from the Constitution; thus, their interpretation is also required to comply with the Constitution.⁶⁰ The objectives are embodied in the two pursuits.

2.2.1. Manifestation of the Truth

Investigation is meant to find the truth. It is not necessarily looking for incriminatory evidence, but it is also meant to find exculpatory evidence. It involves a broad range establishment of the facts and their circumstances. This is particularly inspired by the enlightenment thinking that truth is objective and that knowledge of the past is possible through the rational process.

However, in order to reinforce the traditional focus of the criminal process, article 16 provides that ‘[e]very investigation, prosecution and trial shall be guided by the principle of truth-finding’. Still sub-article (2) provides that ‘[t]he process of search for the truth shall be grounded on the principle that no guilty [person] escapes punishment and no innocent

⁵⁹ It should be noted that the objective of the Criminal Code and that of the Criminal Procedure Code are entirely different. However, in both cases the limited nature of the coercive power of the state needs to be read.

⁶⁰ Sub-art (1) provides that ‘The implementation of this Code shall be guided by the fundamental principles set out under this Section’. Sub-art (2) further provides that those principles ‘set out under this Section shall be interpreted in a manner conforming to the Constitution, Universal Declaration of Human rights, international human rights agreements which Ethiopia has ratified and international principles’.

[person] is caught up and [made] accountable'. In order to avoid anyone's weary for abuse of power in the criminal process, article 16 provides for legality of actions. It provides that decisions relating to criminal matters shall be made within the parameters of 'the Constitution, the Criminal Code and this Code'. Each process shall be undertaken only by 'those organs authorised by this Code'; and their power 'shall be guided by the principle of the rule of law'.

2.2.2. Protection of the Rights of the Suspect/Accused Person

The criminal process fundamentally limits the rights of the person. The person may be detained, he may be questioned, his property and possessions may be searched, etc. The state does not have unlimited power to engage in any of those activities. Thus, the FDRE Constitution grants only limited power balancing both the interests of the individual and the rights of the victim. The balancing is not between the rights of the individual and the public interest in the administration of criminal justice; the balance is between the rights of the individual who is suspected or charged with a crime and the individual victim.⁶¹

Therefore, the individual has the right to liberty, i.e. to be free from arrest. The protection is not freedom from all forms of restriction of individual liberty; it is rather a protection against unlawful and arbitrary arrest. Likewise, the person cannot be coerced to make admissions and confessions. His property and possessions may not be searched but only if it is helpful in the investigation process and, save in exceptional circumstances, it is to be undertaken under court supervision.

The criminal justice administration needs to balance between the objective of manifestation of the truth both in investigation and trial, and protection of the dignity of the person undergoing the process. The Draft CPEC expressly provides that the two interests need to be balanced in all the criminal process.⁶² However, such balancing is a delicate process, it requires a proper guidance of the law so that both the court and law enforcement agencies can read each other. This is one of the reasons that the fundamental principles of the administration of criminal justice are brought forward.

⁶¹ See Simeneh 'Limiting Criminalisation' (n 5) 87, 88. Some authorities refer to 'victimless crimes'. If crime is a prohibition of conduct that would affect the social existence of the individual, then despite the tenuous relation, with the particular conduct, there is always a victim in every crime.

⁶² This is clearly stated under art 3 providing for objective of the Draft CPEC. Further, the two principles, manifestation of the truth and protection of the dignity of the suspect/accused are provided for under separate provisions – arts 15 and 5, respectively.

2.3. Justifications for Bringing those Principles to the Fore

The fundamentals of the criminal procedure are provided for in the FDRE Constitution. It provides for the rights of the arrested and the accused person, among others. However, criminal litigation are not guided by those constitutional rules on the pretext that the power to interpret the Constitution is reserved to the House of Federation (or the Council of Constitutional Inquiry).⁶³ The courts are busy interpreting the sub-constitutional norms. It appears if those constitutional provisions are contained in sub-constitutional norms the courts would have excuses to apply the contents thereof, albeit indirectly. However, it is not possible to bring the contents of the provisions of the Constitution without contradicting constitutional provisions relating to the power to make the Constitution. Therefore, there has to be a way to go about this scenario.

The court is applying those sub-constitution rules and principles a set of facts. The application of those rules and principles is guided by meta-norms referred to as postulates. Those postulates are not directly applied to any fact situation but they govern how those rules and principles are understood, interpreted and applied to such fact situation. When those constitutional norms are incorporated to the Draft CPEC, they are incorporated as meta-norms or postulates.⁶⁴ They are not given direct effect, but they help in the understanding, interpretation and application of those sub-constitutional norms.

The constitutional provisions provide for fundamental rights; they make the value preference – respect for the rights and dignity of the person undergoing the criminal process while they are also meant to help in the correct application of the law in criminal justice administration.⁶⁵

The criminal process has its own doctrines that guide and inspire the application of the provisions of the criminal procedure. It is for this reason that those principles are provided for, in order to give context to the provisions that come after. Any given rule in the Draft CPEC may not be seen in isolation; it has to be seen in several layers of value preferences. It

⁶³ In an opening speech for a workshop on the role of courts in the interpretation of the Constitution, former President of the Federal Supreme Court and the Chairman of the Council of Constitutional Inquiry stated that 'it is obvious to anyone [] that courts to not have the power to interpret the Constitution as this power resided in the House of the Federation'. He would go on to state that '[i]t still remains to be asked, even though the courts do not have the power to interpret the words of the Constitution itself, is there any role left for them to enforce it?' Opening Speech by Kemal Bedri, President of the Federal Supreme Court and Chairman of the Council of Constitutional Inquiry 'Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution' (ECSC 2000). After two decades, the view remains the same. See (n 49). The author has personal experience that several constitutional issues raised in order to resolve objections to charges as well as subsequent procedural matters have been disregarded by the court.

⁶⁴ Simeneh 'Methods and Manners of Interpretation' (n 6) 101 ff. Simeneh 'Limiting Criminalisation' (n 5) 100 ff.

⁶⁵ Bayles (n 42).

is through such prism that rules are transformed into norms. It is for this reason that rules of interpretation are assisted by principles and postulates. Those postulates may be seen as setting the *modus operandi* of the criminal procedure and of the operations of each institution.

3. Presumption of Innocence as a Postulate

Several rights of the individual, such as the right to liberty, personal security, and the right to access to prosecution evidence are implicated by the criminal process; but the rights are embodied in and given effect through one major principle that is the hallmark of the criminal process - presumption of innocence.

The principle of presumption of innocence under article 20 of the Constitution provides for the rights of the arrested person. Sub-article (3) provides that '[d]uring proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.'⁶⁶ This is incorporated into article 5 sub-article (1) of the Draft CPEC containing both the substantive and the procedural aspects.⁶⁷

The substantive aspect of the presumption of innocence relates to the treatment of the suspect or the accused person respecting his dignity as he undergoes the process. The formal or procedural aspect of the presumption of innocence requires the public prosecutor to prove the charges beyond a reasonable doubt. In order to further elaborate the formal aspect of the right, therefore, sub-article (2) of the Draft CPEC provides that '[t]he prosecutor shall assume the burden of proving the charges. The accused has the right to defend himself.'⁶⁸

When the presumption of innocence is brought forward, it is intended to be a postulate guiding how the state's coercive decision are made, such as how a person may be arrested,

⁶⁶ This provision of the Constitution appears to be taken from ICCPR and UDHR with minor modification. UDHR art 11(1) provides that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'. ICCPR art 14(2) provides that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. The Explanatory Memorandum to the Constitution lacks clarity, it covers all the treatment by the police, the public prosecutor and the court. 'Brief Explanatory Memorandum to the Draft Constitution Certified by Council of Representatives 28 October 1994' (in Amharic) 39, 40.

⁶⁷ It provides that '[e]veryone has the right to be presumed innocent until proven guilty of a crime he is suspected or accused of by a court of law. He shall not be compelled to testify against himself.'

⁶⁸ Thus, both General Comment No 13 and No 32 on ICCPR art 14(2) relate the presumption of innocence not to 'prejudge' the accused before the prosecutor proves guilt 'beyond reasonable doubt'. General Comment No 13: Equality before the Courts and the Rights to a Fair and Public Hearing by an Independent Court Established by law (art 14) para 7; General Comment No 32 Article 14: Right to Equality before Courts and Tribunals and to a fair trial (CCPR/C/GC/32) para 30.

and how bail is determined. Presumption of innocence is given a prominent place in the Draft CPEC to afford the arrestee or the accused person a treatment befitting a person presumed innocent, as the bedrock of the criminal process. When the court determines whether to grant an arrest warrant or not, it should bear in mind that the suspect is presumed innocent. It is for this reason that police summons has always been made a voluntary process. Likewise, when the court determines whether to grant and the amount of bail, it is balancing the integrity of the process against the rights of the arrestee because the latter is presumed to be innocent.

4. Substantive Presumption of Innocence - The Right to Liberty

4.1. Content of the Right

The substantive aspect of the presumption of innocence relates to the protection of the dignity of the suspect or the accused undergoing the criminal process. The two essential rights relating to the fair treatment of the accused are the right to liberty and personal security. The Constitution recognizes the right to liberty and security of person as 'rights emanating from human nature [as...] inviolable and inalienable'.⁶⁹

The right to liberty protects a wide range of personal freedom including protection from 'arbitrary and unlawful arrest' including bail rights of the arrestee.⁷⁰ The other side of the coin is right to personal security, protecting the person against a broad range of state coercive actions including, protection against inhumane, cruel, degrading treatment. Those rights relating to the criminal process, work in a continuum with some degree of overlap so that there would be no gap in the protection of the rights of individuals undergoing the process.

The Draft CPEC provides for substantive and procedural protection to the right to liberty. Arrest is a true manifestation of state dominion over the individual. It is a matter of common knowledge that as soon as accusation or complaint is filed before the police, the latter routinely, albeit wrongly, begins with arresting the suspect. Unfortunately, it is a professional hazard of sorts that the police feel they are serving the 'public' when they arrest suspects. Therefore, every effort is made to limit this power of the state, without unnecessarily compromising the investigation. Thus, arrest may be effected only in strictly regulated condition. In order to further limit such power, the procedural requirements are

⁶⁹ FDRE Const arts 10, 14, 15, 16, 17.

⁷⁰ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd revised ed, NP Engel 2005) 211.

made clear and, as part of the investigative activities, arrest is provided for as a last state action.

4.2. Prohibition of Arbitrary Arrest

The substantive protection of the right to liberty is the prohibition of arbitrary and unlawful arrest. There is also an effort to reduce the punishment to what is believed to be 'reasonable' or 'proportional'. The Constitution under article 17 sub-article (2) provides that a 'person may [not] be subject to arbitrary arrest, [nor may he...] be detained without a charge or a conviction against him.' In an effort to reduce the arbitrariness of the arrest, and in conformity with the requirements set in ICCPR,⁷¹ the Constitution provides for substantive and procedural principle of legality. Article 17 sub-article (1) provides that a person cannot 'be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law.' The substantive requirement is that the conduct the suspect alleged to have committed must be one prohibited by the criminal law and entails a jail time. If the substantive requirement is met, the procedural requirement is what is provided for in the Procedure Code for the manner of arrest.

Arbitrariness is thus not only unlawful, but it is beyond unlawfulness.⁷² The arrest must be 'unjust' or 'incompatible with the principle of justice or with the dignity of the human person'.⁷³ This is enquiring into the justness of the law on the basis of which the suspect is arrested. There are both substantive and procedural laws that are justifications. In this study, we are looking at the procedural aspect, not the substantive law.

Arrest is a negation of the right to liberty. Thus, the restriction to such a right must be one that is appropriate, necessary, and proportional *stricto sensu*. The purpose of the arrest is to facilitate investigation. The two methods of investigation that are alleged to justify the arrest of the suspect are interrogating the suspect and gathering other evidence while he is under detention so that he may not tamper with the investigation. There are two factors that need to be further considered. Regarding interrogation, the suspect has the privilege against self-incrimination or the right to remain silent.⁷⁴ Regarding the other methods of investigation, the investigating police officer should indicate already identified evidence to be gathered

⁷¹ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge UP 2002) 373.

⁷² Nowak (n 70) 223 ff.

⁷³ Jayawickrama (n 71) 376 – 76.

⁷⁴ The provisions of art 110(2) particularly provide that before the interrogation begins 'the investigating police officer shall inform [the suspect...] that he shall not be compelled to answer, he has the right to remain silent and that any statement he may make may be used in evidence in court.' Therefore, if a person has such information and has the power to exercise it, arrest of such person may not be effective method of investigation.

which the suspect is likely to tamper with or potential witness to be threatened by the suspect.

The next question is then, if we allow arrest, how can we make it fair? The Draft CPEC expands the procedural requirements with a view to limit the arresting power of the state and while it also elaborates the structural limits to such power.

4.2.1. The Procedural Protection of the Right to Liberty

It is indicated earlier that the Constitution recognises the right to liberty as a natural right of the individual. However, it also recognises the possibility of restriction based on justifications provided for in the criminal law and in accordance with the procedural law. The justification is that, the criminal law alleged to have been violated must provide for a punishment of imprisonment or death and there is a procedure for that.

The central justification for arrest in the criminal process is investigation of an alleged crime. Whether the investigation can justify arrest is to be assessed as per the provision of the Draft CPEC. Thus, the process is augmented in a manner that meet the necessities of the investigation. Warrantless arrest is the rule as provided for in the 1961 Criminal Procedure Code, article 51(1)(a).⁷⁵ The Draft CPEC is intended to reverse that and rather attempts to make arrest a judicially supervised state action based on the needs of the investigation.

Normatively, protection of the right to liberty of the suspect is made possible by creating sufficient distance between the police and the suspect. Thus, the investigating police officer may arrest a person 'only in accordance with the provision of' the article dealing with arrest and bail.⁷⁶ The first requirement is that investigation should be 'conducted without arresting the suspect'; it is only when the 'investigation makes the arrest of the suspect necessary' that the investigating police officer may seek the arrest of the suspect.⁷⁷ Such arrest may be made on summons, on arrest warrant, and in selected flagrant offences.⁷⁸

⁷⁵ The 1961 Criminal Procedure Code, art 51(1)(a) provides that '[a]ny member of the police may arrest without warrant any person: [] whom he reasonably suspects of having committed or being about to commit an offence punishable with imprisonment for not less than one year'. Substantial part of the crimes provided for both in the Criminal Code and elsewhere are punishable by more than one year imprisonment.

⁷⁶ Draft CPEC art 102(1).

⁷⁷ Ibid art 102(2).

⁷⁸ Ibid arts 103, 104 and 105, and 106, respectively. The minor modification is that in complaint offences, the suspect may not be arrested for flagrant offence without the complaint of a complainant. Art 106(2).

4.2.1.1. Arrest on Police Summons

Summons has always been a voluntary process; a suspect who receives police summons may appear before the investigating police officer at his discretion. The Draft Code intends to reinforce this practice.⁷⁹ However, the police may send such summons only if it has 'reason to believe' the suspect has committed a crime, which is the content of article 25 of the 1961 Criminal Procedure Code. In order to indicate that summons may not be sent out arbitrarily, it is provided for under article 103(1) that such suspicion of the police should be 'evidence based'. To reinforce the fact that compliance with police summons is a voluntary process, it is provided that where the summoned suspect fails to appear before the investigating police officer, the latter may arrest the suspect only upon court warrant.⁸⁰ Yet, in order to encourage the police to seek court warrant, article 104(1) provides that '[a] suspect may only be arrested on a court warrant'.

4.2.1.2. Arrest on Warrant

Arrest on warrant means judicially supervised compulsory process. The court is given wider latitude in the process of supervision of arrest and it is required to balance presumption of innocence of the accused and the healthy progress of the investigation at hand. In order to enable the court to discharge such responsibility, the purpose of warrant is redefined. First, the Draft CPEC makes arrest on warrant as a coercive measure a rule rather than an exception. Therefore, article 104(1) provides that a person 'may only be arrested on a court warrant'. Also to facilitate the investigation process, the requirements for the issues of arrest warrant are redefined. Thus sub-article (3) provides that a court may issue an arrest warrant 'where the attendance of the suspect could not be obtained otherwise and his attendance is necessary for the investigation'.

The logical interpretation is that, first, the police may have issued summons which is not heeded by the suspect and the latter cannot be arrested without warrant. The second requirement is made rather loose. The attendance of the suspect before the police can never be necessary for the investigation process for the simple reason, the police is required to conduct the investigation without arresting the suspect and the latter has the right to remain silent, a right to be exercised by the suspect irrespective of the manner of arrest.

⁷⁹ Ibid art 103(3). Art 26 of the 1961 Criminal Procedure Code is vague. However, it is used as a justification for sending a second summons which is made a compulsory process rendering the court process useless. Simeneh Kiros Assefa, *Criminal Procedure Law: Principles, Rules and Practices* (Xlibris, 2010) 150 – 54.

⁸⁰ This is made clear from the provisions of Draft CPEC arts 103(3) and 104(1). Article 103(3) provides that where the suspect summoned fails to appear 'the investigating police officer may arrest such person by obtaining an arrest warrant'.

The court, in granting or denying the arrest warrant, needs to consider if there is any investigation that is in progress and the investigating police officer has already made substantial progress. The court should also answer affirmatively whether the arrest of the suspect would help facilitate the investigation. Those justifications could be prevention of potential tampering of evidence, which the investigating police officer should identify and take only such time necessary to conduct such investigation. The taking of statements from the suspect is a weak justification to request for an arrest warrant.

4.2.1.3. Arrest without Warrant

Because the application of arrest without warrant in the 1961 Code is very broad, it can be argued arrest without warrant is made the rule.⁸¹ The Draft CPEC desires to limit that, and arrest without warrant is limited to selected flagrant offences.⁸²

4.2.2. The Structural 'Protection' of the Right to Liberty

The principle of presumption of innocence requires that arrest is made to be the last state action in the investigation process. Another principle that comes next to the principle of presumption of innocence relates to arrest. It provides that '[n]o one shall be subject to arrest unless there is evidence-based reasonable suspicion that he has committed a crime.'

The structure of the provisions governing investigation should reflect such state of facts. Therefore, investigation begins with article 56. Article 59 deals with recording of the accusation or complaint. Article 64 deals with preliminary screening of the alleged crime before investigation begins. The activities of investigation are provided for under article 69. The nature of the evidence is dictated by the facts under investigation. However, in order to maintain the distance between the suspect and the police, the order of the investigative activities are put in a manner that the police should first take statements from witnesses (articles 71 – 74), then conducts search for evidence (articles 75 – 86), investigating crime scene (articles 87 – 93), including, where appropriate, using special investigation techniques (articles 94 – 101). Arrest and interrogation of the suspect then starts at article 102 and continues through the proceeding provisions.

In order to put in place accountability procedures, in the investigation process, the public prosecutor is fully authorized to be in charge of both the investigation and prosecution. For instance, article 56(1) provides that criminal investigation 'shall be carried out by investigating police officer'. However, '[i]t is the responsibility of the public prosecutor to

⁸¹ See (n 77).

⁸² Draft CPEC art 106.

direct and supervise the investigation'.⁸³ Where the prosecutor finds it necessary, he is authorized to conduct the investigation itself.⁸⁴

4.3. Release on Bail Bond and Other Post Arrest Guarantees

In order to guarantee the personal security of the arrestee, there are two important changes made to the law and the practice regarding post arrest procedures. First, in order to make the arrestee traceable, the investigating police officer is required to report to the public prosecutor such arrest, irrespective of the manner of arrest.⁸⁵ Related to this is that the person may be arrested only in legally designated places.⁸⁶ The manner of designation of places of detention is left for the Government but the public should be notified of such place. The second major introduction made relates to the conditions of the detainee. Where the court, on first appearance, (or in any subsequent appearances for that matter) finds or suspects violations rights of the individual, it may take measures that it deems appropriate under the circumstances.⁸⁷

The other major change introduced relates to bail. Bail is a mechanism by which the liberty of the arrested person is regained. The Constitution under article 19(6) provides an arrested person has 'the right to be released on bail.' This general statement is supplemented by an exception that 'the court may deny bail or demand adequate guarantee for the conditional release of the arrested person'. There are two interpretation to the exception. The first interpretation that is adopted in the drafting of the provisions of the Criminal Procedure Code is that the Constitution allows bail in general. The law gives discretion to the court and the court exercising such discretion, considering the attending circumstances of the case, may grant or deny bail to the arrested person. The natural consequence is that the arrested

⁸³ This is also provided for in other areas in order to clear any confusion, despite the resistance from the police as displayed in several meetings. For instance, art 47(1) provides that '[t]he federal prosecutor shall have the power to lead the investigation of and conduct the prosecution of offences falling under the jurisdiction of federal courts.' Sub-art (2) provides that '[t]he federal police shall have the power to investigate offences falling under the jurisdiction of federal courts.' Also see art 19 – powers and Responsibilities of the Police and art 20 – Powers and Duties of the Public Prosecutor.

⁸⁴ Draft CPEC art 20(1).

⁸⁵ It is to be noted that the role of the public prosecutor is beefed up in that he is supposed to supervise the investigation process and makes any decision that he deems appropriate. His accountability is intended to be without the structure of the prosecution office.

⁸⁶ Draft CPEC art 2(12).

⁸⁷ Draft CPEC art 112(2).

person may not be denied bail *a priori* by the law; and such rule does preclude the court from considering facts that might otherwise justify bail.⁸⁸

4.3.1. Bail by the Court

The provisions of article 112 of the Draft CPEC are the counterpart of article 59 of the 1961 Code. In demanding remand of the arrestee, the investigating police office shall prove to the court that there is an ongoing investigation and the continued detention of the arrestee is important for the investigation process. Such remand is strictly regulated under article 113.

Where the arrestee is produced before the court within 48 hours, instead of cross-referencing the provisions, the Draft CPEC contains clear provisions. The court is required to ascertain the arrest procedures are complied with and the rights of the arrested person are respected. Where the court finds certain violations, it is authorized to take any 'necessary measure to enforce the rights of the suspect'.⁸⁹ Further, in order to enforce the constitutional right of the arrestee to be released on bail, the court should consider bail on its own motion even if the person does not ask for it.⁹⁰ The investigating police officer also has the obligation to show to the court that the initial arrest was legitimate and the continued detention is justified by the investigation.⁹¹

Where the court finds that the continued detention of the arrestee does not help the investigation, or the crime under investigation is a minor one, the court shall release the arrestee on bail. However, where the court finds that it is doubtful the alleged crime is committed at all, or that it is doubtful the arrestee committed such crime, the court may release such person 'unconditionally'.⁹²

The nature of bail bond ordered by the court in the 1961 Code is either money deposit or producing a guarantor. The Draft CPEC contains unconditional release for some categories

⁸⁸ The other version of the interpretation validates the existing practice that the lawmaker may deny bail by law.

⁸⁹ The provisions of art 112(2) provide that '[t]he court before which the person arrested appears shall ensure the rights of the arrested person and the provisions of this Code are respected. Where the court finds human rights violations or where such petitions are made, the court shall such necessary measures to enforce the rights of the suspect.'

⁹⁰ Sub-article (4) of art 112 provides that '[w]here the court believes the continued detention of the arrested person does not help the investigation or the alleged offence is a minor offence, the court shall release the arrested person on bail. However, where it is doubtful the alleged crime is committed or that it is committed by the arrested person, the court may release the arrested person unconditionally.'

⁹¹ Draft CPEC art 112(3) provides that '[t]he investigating police officer shall prove to the court that there is evidence based reason to believe that the person arrested has committed an offence and his arrest is necessary for the investigation.'

⁹² Ibid art 112(4).

of offences on the discretion of the court.⁹³ In other instances, the Draft CPEC contains possible own recognisance.⁹⁴ These provisions are included with a view to make bail available equally to those who are detained, so that they may not be denied bail because they may not have the means or the connection.

The suspect is arrested as part of the investigation process not as a punishment, because he is still presumed innocent. Should the suspect, later in the process, gets convicted, the court routinely deducts the time the convict spent in detention including those in pretrial detention. This has a negative impact on the purpose of punishment because he was detained as a suspect, not as a person censored by society. Therefore, effort is made to minimize pre-trial detention.

4.3.2. Bail May be Granted by the Investigating Police Officer

Whether the suspect appears before the investigating police officer voluntarily or as a result of a compulsory process, the investigating police officer should consider bail as soon as he is completed questioning the suspect. The Draft CPEC made a few but significant changes. First, the circumstances of bail are made broad. The investigating police officer may release the arrestee on bail in his own discretion in minor crimes. Such bail may be granted by the police even when there is evidence that the arrested person has committed the crime but it is a minor offence and there is no risk of him fleeing away. Likewise, the investigating police officer may release such person where it is doubtful whether alleged crime is committed at all or that it is doubtful the crime is committed by the arrestee. When the police grants bail, it may grant bail on own recognisance of the arrestee, with or without sureties. In the determination of the bail, the police is required to follow the procedure regarding court bail - consider the seriousness of the crime and the means of the arrestee⁹⁵ - because such bail is made applicable throughout the process.⁹⁶

Where such crime is not a minor offence and there is strong evidence showing the arrested person has probably committed the alleged crime, the investigating police officer may not release such person, but should produce him to court within 48 hours. In other cases, the police may release such suspect on surety or own recognizance if there is doubt the crime is

⁹³ Ibid.

⁹⁴ Ibid arts 111, 136(3), 138.

⁹⁵ Ibid art 111.

⁹⁶ The practice is that the police may grant bail. If charge is brought, the accused is required to enter another bail. Even when the arrestee is released on court bail, when a charge is brought, the court of rendition requires another bail. The Draft wants to avoid this repeated demand for bail which in practice becomes unreasonable because every accused bears two bails at a particular moment until the first bail is refunded to him.

committed at all, or it is doubtful that the crime is committed by the suspect. The investigating police officer may refuse bail to the arrestee for various reasons. In such situation, as in non-minor crimes, the investigating police officer produces the arrestee before the nearest court within 48 hours.

5. Procedural Presumption of Innocence - Burden and Standard of Proof

The traditional and core manifestation of the principle of presumption of innocence is placing the burden of proof of the facts constituting the alleged crime on the prosecutor. The accused is presumed innocent until the prosecutor proves his case beyond a reasonable doubt. The principle of presumption of innocence makes sense in the continental system in that the trial, although a continuous process, both parties are not presenting their evidence at once, as in the jury system. Thus, the public prosecutor needs to make his case to the required standard of proof in order for the court to order the accused to enter his defence. However, both the law and the practice of the court regarding the burden and standard of proof has been a murky one for so long. The burden and standard of proof is made clear.

5.1. Burden of Proof of Facts Constituting the Alleged Crime

The public prosecutor has the burden of proving all the elements of the crime as alleged in the charge. Burden and standard of proof may be seen only in light of the substantive and procedural criminal law. A crime is constituted of three fundamental elements. The principle of legality requires that the prohibited conduct must be clearly provided for in the law. The charge should allege that defendant committed an act contrary to such prohibition, and she acted with the required moral element. These facts need to be alleged in the charge, article 111 and 112, the 1961 Code, now the Draft CPEC contains a rather detailed requirement. Those are more or less taken over to the Draft CPEC with additional clear statements. The prosecutor shall prove the content of the charge in order to obtain conviction.

The burden of proof has two aspects – the burden of production of evidence and of persuasion. The public prosecutor, thus, both produces the evidence and shows the court that the evidence supports the facts as alleged in the charges. The logical consequence is that, where the public prosecutor fails to prove his case, the accused will be acquitted.

However, there are circumstances where the law provides that proof of certain facts are presumed by the law. Such provisions are meant to facilitate conviction and are manifestations of the authoritarian nature of the Government. The Imperial Government

presumes certain facts regarding crimes committed through the media.⁹⁷ In the military regime, the government introduced presumption of intent in corruption crimes that continued to date.⁹⁸ The provisions make matters clear and liberate the court from providing justifications for its decisions regarding those crucial subjects.

5.2. Preclusion of Police Statement as an Admission

It is part of the core content of the presumption of innocence that the public prosecutor proves all the ingredients constituting the alleged crime. It is also provided both in the Constitution and the ICCPR that the accused is not obliged to make statements or to admit evidence. It is well documented in this country that the single most important cause of all abuse against the arrestee is the desire to obtain evidence from the suspect. The Draft CPEC does not preclude interrogation of the suspect. However, in order to avoid the risk of abuse of the suspect, the Draft CPEC under article 149(3) provides that the suspect's 'statement given to the police during interrogation is not admission'. Therefore, the public prosecutor should prove all the elements constituting the alleged crime by evidence, including those admitted facts during police interrogation.⁹⁹ This is only halfway through for the protection the individual against state violence but that is still good enough.

5.3. The Standard of Proof

Essential part of the burden of proof is the standard of proof. The standard of proof has not clearly and expressly been provided for in the law and has been a source of confusion. However, clear indications regarding the higher standard of proof in criminal matters may be abstracted from three separate provisions of different branches of laws. This is a relative statement to civil litigations. Regarding determination of tort liability, article 2149 of the Civil Code provides that the court is not 'bound by an acquittal or discharge by a criminal court'. Likewise, regarding the determination of liability in civil claims filed along with

⁹⁷ Crim C, art 43 is taken from combination of arts 42 and 43 of the 1957 Penal Code.

⁹⁸ *Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976*. This has been maintained both by the provisions of Criminal Code art 403 and later by the provisions of art 3 of *Corruption Crimes Proclamation No 881/2015*. The interpretation is reflected in judicial decisions. See for instance *Special Prosecutor v Deputy Commander Yihe'alem Mezgebu and Petty Officer Zenebe Shiferaw* (15 April 1983, Crim File No 24/75, Special First Instance Court); *Special Prosecutor v Oukube'ezgi Teklemariam* (29 November 1983, Crim File No 50/75, Special First Instance Court); *Special Prosecutor v Let. Goshime Wondimtegegn* (26 March 1983, Crim File No 7/75, Special First Instance Court).

⁹⁹ The general practice is that admission made by the suspect/accused is treated as admission. It is for this reason the interrogation turns into confrontation between the police and the arrestee. The purpose of this provision is making extra-judicial admission truly evidentiary admission because admission is waiver of proof.

criminal charges, article 158 of the 1961 Criminal Procedure Code provides that '[w]here the accused is acquitted or discharged, the [criminal] court shall not adjudicate on the question of compensation and shall inform the injured party that he may file a claim against the accused in the civil court having jurisdiction'. Further, regarding civil recovery proceedings, the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005 article 33 provides that '[t]he standard of proof required to determine any question arising as to whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings'.

The 2011 Criminal Justice Administration Policy, however, distorts the application of this higher standard of proof by requiring 'sufficient proof' for conviction. Thus, courts routinely make easy ruling under article 141 of the 1961 Code requiring defendant to enter his defence. This is further manifested by the fact that when judgements are written, the court reasons 'defendant did not refute the prosecution evidence' which is contrary to the presumption of innocence.

In order to put matters relating to the standard of proof to rest, the Draft CPEC expressly provides that the public prosecutor should prove the charges beyond reasonable doubt standard. This includes proving all the elements constituting the alleged crime. The natural consequence is that where the prosecutor proves his case, defendant is required to create only a reasonable doubt in order to obtain acquittal because, the court cannot convict defendant in the absence of proof beyond reasonable doubt. However, where the accused raises affirmative defence of justification and excuses, such as irresponsibility and legitimate defence, he shall prove his allegations by preponderance of the evidence. This is because the underlying facts are admitted but a new fact is affirmed; thus, it is this new fact that is to be proved.¹⁰⁰

Evaluation of evidence – the provision relating to evidence are designed to dictate that evidence would be evaluated in respect of each fact separately, as alleged in the charge.¹⁰¹ If the charge relates to crime of theft and theft is constituted of four category of facts, each of the four facts has to be proved separately in order to determine guilt. Only after a positive determination that each fact is separately proved to the required standard of proof that the court may enter conviction for the alleged crime. This is part of the principle of legality that where any of the alleged facts constituting a crime is not proved, there is no crime. Thus, the

¹⁰⁰ We have borrowed this from the common law practice. For in-depth discussion, see Simeneh 'Presumption of Innocence' (n 1).

¹⁰¹ Inspired by Wigmorean analysis of evidence Anderson, Schum, and Twining (n 43) presented such judicial analysis of evidence.

Draft CPEC deliberately precludes evaluating the totality of the evidence regarding all the alleged facts at once, in order to make determination regarding the fact at issue.

Conclusion

The criminal justice process has been in want of a serious reform for a while. Thus, the revision of the Code comes late, yet at the right time. There were several attempts to revise the criminal procedure code that were intended to operate in a certain regime. Despite the Draft CPEC being in the pipeline for a long time, the present shape and content is achieved after the political landscape changed in 2018 as a sign of the promised change in the administration of the criminal justice. Such reform is imperative on the face of reports of unimaginable human rights violations in the name of administration of the criminal justice.

The Code is, thus, intended to limit the power of the state by creating significant distance between the individual and the state. It is also intended to put in place mechanisms of accountability. Where there are actual restrictions on rights, the Code intends to afford avenues for securing the liberty of the individual. However, the application of the Code is intended to be guided by those fundamental principles, which are a part of the Constitution which is believed to address major normative, institutional, and methodological issues. Among those principles, the principle of presumption of innocence is of immense significance in maintaining fairness in the process. The presumption of innocence is included as a postulate augmenting understanding, interpretation, and application of the provision of draft CPEC. It is particularly imperative to be taken into account where the decision of the court (or the police) implicate the rights of the individual.

Both the substantive and procedural aspect of the principle of presumption of innocence are incorporated in the CPEC. The traditional understanding of the doctrine, that the public prosecutor ought to prove his charge beyond a reasonable doubt, is provided for clearly. The person who is the subject of the criminal justice system should be treated with dignity befitting a person presumed innocent. Such treatment covers broad range of coercive state actions throughout the entire criminal process.

Justiciability of Administrative Actions in Ethiopia: Appraisal of the Federal Administrative Procedure Proclamation in Light of the Right to Access to Justice

Abduletif Kedir* & Minilik Assefa**

Abstract

Apart from being a fundamental right protected under various legal systems, access to justice is an intrinsic component of the concept of human rights and its operationalization. Judicial review of administrative actions is an element of the broader concept of access to justice which has a significant role in the realization of administrative justice and addressing human rights violations emanating from government regulatory framework. Owing to the confusion regarding the role of the judiciary in the enforcement of constitutional rights and a lack of a meaningful jurisprudence on the separation of powers among others, the absence of judicial review of administrative acts has been a thorn in the Ethiopian human rights system. Yet, the newly adopted Federal Administrative Procedure Proclamation (FAPP) No. 1183/2020 has introduced the judicial review of administrative actions in the legal system. This study analyses how the justiciability of certain administrative actions could serve as a remedy for and protection against violations of human rights by federal administrative agencies. It also highlights the jurisprudence of judicial review before FAPP and describes the scope, fundamental principles and implications of the system of judicial review under FAPP.

Introduction

Access to justice, apart from being guaranteed as a fundamental right under the FDRE constitution on its own, respect for, protection, and fulfillment of human rights, in general, can be guaranteed only by the availability of effective judicial remedies. Owing to the confusion regarding the role of the judiciary in the enforcement of constitutional rights and a lack of a meaningful jurisprudence on the separation of powers among others, the near absence of judicial review of administrative acts has been a thorn in the Ethiopian human rights system. Despite the existence of several pieces of legislation that allowed judicial

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oversight of certain administrative acts, it is the newly adopted Federal Administrative Procedure Proclamation No. 1183/2020 ("FAPP") that introduces a general framework that has the potential to allow citizens to file petitions against a range of actions by federal administrative agencies before a court of law. This is a groundbreaking move by the Ethiopian legislature that introduces a proper framework of Judicial Review of administrative actions in the legal system.

However, the realization of such a legal framework took more than a decade-long effort by government entities such as the Office of the Attorney General ("OAG"), the Institution of the Ombudsman ("IO") and the Justice and Legal System Research Institute ("JLSRI"), as well as other international development partners of the Ethiopian Government. Nevertheless, the adoption of the proclamation was accelerated after the decision of the Legal and Justice Affairs Advisory Council to organize a dedicated working group to revitalize the adoption of an Administrative Procedure Proclamation. Deciding on the best policy or legislative options that suit the Ethiopian reality and the complex nature of its bureaucracy was the most important part of the drafting process that took over ten months to complete, even with preexisting draft proclamations that was prepared by OAG/IO, and JLSRI. The two draft proclamations prepared by OAG/IO and JLSRI were simultaneously assessed to come up with appropriate standards and legislative alternatives, along with experiences of other jurisdictions that have a well-developed jurisprudence on administrative law and judicial review.

Justiciability of administrative actions is closely related to government accountability, good governance, transparency, and other overarching human rights and democratization principles. At the same time, the executive, through administrative agencies, needs a level of discretion and flexibility to deliver on its policy promises without being second-guessed by the judiciary at every turn. Now that certain administrative actions are proclaimed to be justiciable through a court proceeding, it is important to analyze the grounds, procedures, and remedies attendant to judicial review with a view to outlining its transformative potential for judicial enforcement of human rights in Ethiopia along with challenges anticipated in such a paradigm shift. To this end, this piece aims at sketching the process leading up to the adoption of the proclamation, major problems identified and solutions adopted as well as implications for human rights protection.

Despite being the principal objective of the FAPP and its counterparts in other jurisdictions, the issue of administrative justice will not be the focus of this article. Furthermore, regardless of their inherent relations, the article will not aspire to dwell upon the crosscutting issues of constitutional review and judicial review in Ethiopia. The discussion of this article is limited to evaluation of the judicial review provisions of the FAPP in light of its relevance in the realization of the right to access to justice. The first two sections discuss the theoretical and

practical relationship between the right to access to justice and the system of judicial review. The remaining three sections respectively focus on the legal and practical status of judicial review in Ethiopia prior to the adoption of FAPP, the changes that FAPP has introduced and their implication in the Ethiopian legal system, particularly for human rights.

1. Access to Justice and Human Rights

Owing to the tremendous amount of diversity among legal systems and traditions across the world, as well as the variance of underlying legal philosophies informing these legal systems and corresponding legal scholarship, the concept of access to justice is not easily defined. Its scope ranges from the minimalist conception of access to judicial institutions for dispute resolution to the broader substantive conception of access to justice as a mechanism of ensuring that “legal and judicial outcomes are just and equitable”.¹ In the former conception, it’s a shorthand for everything from legal and physical access to courts, access to legal representation, the right to a fair hearing, adequate redress, and timely resolution of disputes. This can manifest itself in the form of easing procedures, allowing for the operation of informal or alternative justice systems, institutionalizing a mechanism of legal aid for the poor, etc.²

The later formulation is developed more recently and taken up by many influential actors in the global norm-setting arena such as the UN and the World Bank. Here, the mere normative and practical guarantee of procedural aspects of access is not good enough unless and otherwise the substantive laws are geared towards an equitable outcome and more importantly (unless?) they comply with the standards of the many generations of fundamental human rights.³ For the purpose of this contribution though, we are focusing on the narrower and the most basic sense, i.e. the possibility of an individual to bring a legal claim and have the court adjudicate the case and provide remedies.

When it comes to the relationship of access to justice and human rights, we find that they are inextricably linked. On the one hand, access to justice is a fundamental human right on its own recognized in both global, regional, and national human rights systems. On the

¹ Valesca Lima and Miriam gomez, *Access to Justice: Promoting the Legal System as a Human Right* (1st edn, Springer Publishing 2020) 2

² Kokebe Jemaneh, *Reconsidering Access to Justice in Ethiopia: Towards a Human Rights Based Approach*. in Geraghty and others (eds), *Access to Justice in Ethiopia: Towards an Inventory of Issues* (Addis Ababa University Center for Human Rights 2014) 13.

³ UNDP, *Access to Justice Practice Note*, Available at: https://www.undp.org/content/undp/en/home/librarypage/democraticgovernance/access_to_justiceandruleoflaw/access-to-justice-practice-note.html Accessed on 02.6.2020. 2015.

other hand, in the absence of effective judicial remedies, a meaningful respect for and protection of human rights cannot be imagined.

The Universal Declaration of Human Rights guarantees the “right to an effective remedy by a competent national tribunal” in the event that an individual becoming a victim of a violation of her fundamental human rights protected not only under the declaration but also the Constitution or any other law of the state concerned.⁴ Though the International Covenant on Civil and Political Rights does not contain a direct reference to justice, it requires state parties to ensure that civil and criminal matters are determined through “...a fair and public hearing by a competent, independent and impartial tribunal established by law”.⁵ Closer to home, the Banjul Charter provides for a more direct protection of the right of access to justice. It guarantees access for any justiciable cause an individual may need to assert through litigation as well as in the possible scenario of one's rights recognized by domestic laws, conventions and even customs in force being violated.⁶

Under Article 37, the FDRE Constitution tackled the issue head-on by heading the provision with the right of access to justice. It goes on to stipulate that every individual “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 powers.”⁷ Though some of the phrases such as “other competent body with judicial powers” or “justiciable matter” are open for some interpretation, (more on this later), the Constitution is very clear in guaranteeing the right of access to justice. Moreover, it stipulates that should there arise a need to interpret the fundamental rights, the preceding international instruments we discussed shall be used to determine which way the interpretation should go.⁸

Apart from being a fundamental right protected under both domestic and international law, access to justice is a fundamental component of human rights at the philosophical level. The very concept of rights is defined as “claims, enforceable by state power, that others act in a certain manner in relation to the right holder”⁹. If a person does not, at least theoretically, have the possibility to call upon the sovereign power of the state against private actors or

⁴ Universal Declaration of Human Rights (UDHR), 1948, Article 8.

⁵ The International Covenant on Civil and Political Rights, 1966, Article 14. See also, UN Human Rights Committee, General Comment No 32, 2007. Which partially states “... judicial procedures aimed at determining rights and obligations pertaining to ... notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits, or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property”.

⁶ African Charter on Human and Peoples' Rights (ACHPR), 1982, Art 7.

⁷ Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 37 (1).

⁸ Ibid, Article 13 (2).

⁹ Joseph William Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' [1982] 1982(6) Wisconsin Law Review 986.

state agents to protect a particular interest, he/she cannot be said to have a right to such an interest. Without a mechanism to ascertain the very existence of such an entitlement and the corresponding duties owed to such a person by the rest of society, as well as an instrument of redress where such duties have been breached, such interests are mere interest and not rights.¹⁰ In the prevailing liberal theory of social relations, rights are meant to be a mechanism of managing the contradictions between liberty and security by providing a guideline as to where one's liberty ends and becomes a concern for the security of the other/s.¹¹ The broader definition of rights and social interaction on these parameters requires a continuous appraisal of specific collective as well as individual actions to restore the balance. Hence the existence of a process to conduct such routine reviews is integral to the very idea of human rights.

Another indicator of the inseparability of human rights and access to justice can be seen from the proliferation of new rights. The second half of the Christian century, dubbed the human rights era¹² by many witnessed pressure for recognition of new human rights from the very absurd sounding 'right to sleep', to the more ordinary the right to transparency.¹³ The appeal of judicial enforceability i.e. access to justice is identified as one of the primary reasons for the proliferation of such fundamentality status claims.¹⁴ Moreover, one identifying marker among the various generations of human rights has been the nature and availability of judicial remedies.¹⁵ It is so important that within the mainstream liberal rights theory, the categorization of human rights into the civil and political or socio-economic or collective rights is partly claimed to be based on the degree of judicial enforceability and the possibilities for individual judicial redress.

At the practical level, Samuel P. Baumgartner identifies several ways in which access to justice may lead to better human rights protection in a country.¹⁶ First, if the litigation process proves to be an effective and viable way of redressing human rights violations, it will lead to a greater number of violations corrected as more and more individuals will engage the system for remedies. Second, a finding by the judicial tribunal in favor of the applicant will have an encouraging effect on the particular respondent as well as other public or private

¹⁰ Ibid.

¹¹ Ibid 981.

¹² Upendra Baxi, *The Future of Human Rights* (2nd edn, Oxford University Press 2006) 1.

¹³ Philip Alston, 'Conjuring Up New Human Rights: A Proposal For Quality Control' [2017] 78(3) *American Journal of International Law* 610.

¹⁴ JohnG Merrills, *Environmental Rights*. in Bodansky and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 667.

¹⁵ This is not to assert the truth of this claim. The fact that all rights are ultimately indivisible and interlinked with one another almost goes without saying.

¹⁶ Samuel P. Baumgartner, *Does Access to Justice Improve Compliance with Human Rights Norms - An Empirical Study* [2011] 44(3) *Cornell International Law Journal* 455.

actors to comply with the human rights standards established through the litigation process.¹⁷ Thirdly, the increased visibility that attends the litigation process may encourage monitoring activities by various actors leading to better protection and redress for violations. Finally, “*increasing access to justice allows individuals and groups to espouse public-interest claims as their own, thus multiplying enforcement actions and undermining the gate keeping capacity of states to control what norms are enforced and how*”.¹⁸

However, the constitutionalization and by extension juridification of certain sociopolitical claims in the name of human rights and subjecting some of these essentially political questions to the judicial process is not without its critiques. While activist courts and tribunals in South Africa, India, and some Latin American countries have been widely hailed for advancing normative standards for the enforcement of second and third generation rights, some have questioned the net benefit that comes as a result of the judiciary playing a greater role for the very segment of the populations that are purported to have benefited.¹⁹

Ran Hirschl:

*Whereas judicial empowerment through constitutionalization has a limited impact on advancing progressive notions of distributive justice, it has a transformative effect on political discourse. The global trend toward juristocracy..., is part of a broader process whereby political and economic elites, while they profess support for democracy and sustained development, attempt to insulate policymaking from the vicissitudes of democratic politics*²⁰ (Emphasis added).

Whatever value we attach to these criticisms, they become less relevant at the administrative level because at least in theory there is very little room for policy choices, and agencies are expected to implement policy choices made by elected bodies. Here, judicial review is just a mechanism of ensuring that agencies implement policies as loyally as possible to the intention of the legislator and without violating certain fundamental principles such as

¹⁷ Ibid.

¹⁸ Ibid, 442. Baumgartner had demonstrated that given other conditions such as the quality of democracy and independence of the judiciary, countries who have ensured access to court have done better to comply with international human rights obligations.

¹⁹ For an excellent empirically grounded analysis of underlying structural motivations and actual impact of the increasing juridification of rights issues See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 2007. See also Julia Eckert and others (eds), *Law Against the State: Ethnographic Forays into Law's Transformations* (Cambridge University Press 2012).

²⁰ Quoted in Alessandro Pecorario, *Thailand's dangerous Coup and Asian Democracy: Involution or Evolution?* In Tania Groppi, and others (eds), *Asian Constitutionalism in Transition: A Comparative Perspective*, (University of Siena 2008) 229.

equality and non-discrimination, and respecting the right of persons to be heard, without unduly abusing their discretion delegated to them for practical considerations and etc.

2. Judicial Review of Administrative Acts as a Mechanism of Ensuring Access to Justice: Theoretical Debate and Institutional Models

Irrespective of their ideological inclination regarding the role of government in society, modern states are characterized by the expansion of the administrative/executive branch of government. Long gone are days of the minimalist law and order state and administrative authorities have mushroomed. Even the most market-oriented political economies have recognized the role of the state in everything from regulating the marketplace to minimize distortions to the provision of some basic public goods however few those might be.²¹ This has meant that administrative agencies are not just limited to ordinary execution of law in the traditional sense, but rather they are also routinely engaged in both rule-making and “adjudication of cases”.

In Ethiopia, in addition to the twenty ministries, the latest executive organs reorganization proclamation that was adopted in November 2018 provides a non-exhaustive list of more than 150 agencies at the federal level, variously made accountable to the parliament, the Prime Minister’s office and ministries.²² As public actors exercising the sovereign authority of the state with the most immediate relation with individual persons, all these have the potential to affect the fundamental rights of citizens as well as determine their legal positions for better or worse.

Broadly taken, judicial review is the power of a court to pass judgment on the legality of actions taken in other branches of government. Owing to its origin in the American constitutional system, it is most usually related with determining the constitutionality of legislation enacted by representative legislatures.²³ For our purpose though, we mean the power of the judiciary to test the actions of the executive branch and by extension,

²¹ See Tanzi, Vito, *The Changing Role of the State in the Economy: A Historical Perspective*, IMF Working Paper No. 97/114, 1997, Available at <<https://ssrn.com/abstract=882647>>

²² Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1097/2018, Federal Negarit Gazette No. 8, 29th November 2018; Non-exhaustive list for two reasons. First the same law under Article 34 authorizes the Council of Ministers to “reorganize the Federal executive organs by issuing regulations for the closure, merger or division of an existing executive organ... for the establishment of a new one” should it determine such a measure to be necessary. Secondly, the provision listing the institutions implies there might be agencies that are not included in the list under Article 33 (1).

²³ Tom Clark, *Judicial Review*, in Lee Epstein and Stefanie A. Lindquis (eds), *The Oxford Handbook of U.S. Judicial Behavior*, (Oxford University Press 2017) 227.

administrative agencies against the standards set by law, be it constitutional law, acts of parliament, or even duly enacted subsidiary legislations such as regulations and directives.

Though they are usually confused, at a conceptual level there are several significant and crucial distinctions between judicial review and appeal. First, the very purpose of appeal is to determine if a decision of a lower-body is correct or incorrect, whereas in the case of judicial review what is in question is whether the decision is legal or not. As such, the grounds of review are limited to issues such as whether the body making the decision has the power to make such a decision or not, whether it followed the proper procedures in making such decisions, and whether or not the agency decision meets such fundamental principles of reasonableness, proportionality, etc. In making this later determination the court is expected to give a wide margin of appreciation for the position of the agency and reverse decisions only in case of manifest shortcomings.

Secondly, an appeal by definition is taken from a decision of a tribunal with full or quasi-judicial structure and capacity, and as such its scope is limited. Judicial review on the other hand can be requested from any type of agency decision, be it a quasi-legislative, adjudicative, or ordinary exercise of agency discretion.²⁴ Thirdly remedies the court can offer in the case of a judicial review procedure are quite limited should it find in favor of the applicant. In the case of an appeal, the court can quash the decision of the administrative body and replace a decision which it deems correct. But in judicial review, should the court find against the agency, it is required to remand the case to the agency for proper consideration and the best the court can do in this scenario is state the principles the agency must follow and declare the rights of the parties that must be taken into consideration in the eventual decision to be made if the agency wishes to.²⁵

More importantly, the sources of these two judicial powers are different. For a court to take up an appeal from a decision of a lower judicial body there is a need for clear legislative authorization and procedural stipulations whose decision is to be appealed to which division and which level of court. Here, the court is statutorily authorized to admit appeals to the decisions of administrative agencies and adjudicate the case based on an established set of rules governing the subject matter of the case in question provided mostly by the same statute. When it comes to judicial review it is mostly assumed to emanate from the inherent power of the judiciary as part of the constitutional allocation of powers or coming from a

²⁴ William Wade and Christopher Forsyth, *Administrative Law*, (9th edn, Oxford University Press 2008) 34; In the British system of administrative law, the terms used to refer these category of subject matters is "merits review" instead of appeal.

²⁵ *Ibid.*

statutory stipulation establishing the courts or providing plenary power.²⁶ In this context, the court is expected to review, based on a limited number of standards, the lawfulness of the decision/directive per se and the decision/rule-making process rather than adjudicate the case based on substantive provisions governing the subject matter or the merits of the case.

2.1. Normative Debate

Though the significance of keeping the executive and the legislative in check is appreciated, grounded on the principle of separation of powers, judicial review is a controversial subject especially when it comes to reviewing of elected bodies because of its anti-democratic potential. The broader debate is however beyond the scope of our topic and in this section, we will limit ourselves to presenting the theoretical arguments about the purpose and nature of judicial review of administrative actions and the institutional models from a comparative perspective. More importantly, the complexity of modern administration coupled with the lack of technical expertise and time at the political level necessitates delegation of some discretionary power to the administrative branch of government. It goes without saying that such “discretionary power should be used reasonably, impartially, and avoiding unnecessary injury”²⁷. Without having recourse to judicial remedy against perceived or real infractions by administrative authorities, it is difficult to imagine the respect of the right to access to justice.

Regarding the nature and purpose of judicial review of administrative actions, roughly corresponding to the ideological positions about the role of government in society from right to left on the spectrum of political ideologies, the red light and green light theories represent those who advocate for a minimalist and the interventionist state respectively. At the level of constitutional theory, it depends on what the primary purpose of the principle of separation of powers is. If one is inclined to believe that the purpose of separation of powers is to instill a wall of separation between the various branches of government with the aim of constraining their power, in the classic formulation of Montesquieu by prohibiting one branch from usurping all power, then one is likely to consider the possibility of the judiciary venturing to evaluate the conducts of either the legislature or the executive as an act of stepping out of their bound and grabbing power. Here a judicial review of the

²⁶ Law Commission, ADMINISTRATIVE LAW: JUDICIAL REVIEW AND STATUTORY APPEALS, (LAW COM report No.226, October 1994) Paragraphs, 6:15 and 8:12.

²⁷ Gunter Frankenberg, *Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares*, in *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar Publishing 2019) 9; This probably is an embedded self-preservation mechanism for constitutional democracy and the protection of rights, as it can be anti-democratic in favor of technocratic expertise.

executive will be perceived as an interference in the latter's turf. However, if the value one wants to achieve through the separation of power is mutual checks and balances between the branches of government, then judicial review becomes an indispensable tool.

Focusing on judicial review of administrative actions we find that two contending normative positions dominate the literature. On the one hand, we have what is usually referred to as the red-light theory, which holds that external review mechanisms, be it by regular courts or specialized tribunals, should predominantly be geared towards the protection of the individual against undue interference from the state.²⁸ For this reason, it advocates for a very restrictive interpretation of administrative powers and narrowing down their discretion to the minimum possible. To this end, the focus should be placed on the procedure followed by public authorities and not the substance of their decision.²⁹ Rooted in the classical liberal political philosophy, it can be exemplified by the traffic stoplight at every intersection where judicial review is intended to verify that public authorities have the requisite power to make a particular decision and whether or not they have followed the appropriate procedures.

At the other end of the spectrum, we have the green light theory which places a greater level of trust in government in general and holds that the principal goal of administrative law, should be facilitating the delivery of government programs. For these sets of authors, the conflict that administrative law tries to govern is not that between the state and the individual but rather it focuses on the multitude of the state organs. Accordingly, green lighters favor the least amount of judicial interference and in the few instances the judiciary engages, the aim should be to facilitate the effective implementation of policies and programs.³⁰ Of course, they also privilege substantive outcomes as opposed to process a particular administrative action and for this reason opt for both internal and external political control in lieu of a formal legal one.³¹

As diametrically contrasting these two theoretical positions are, no reality is simple enough to be captured by a single theory and for that reason, the practice of legal systems are to be found everywhere in between the spectrum described above. Cane argues:

... the difference between the two positions is only one of degree. The typical green-lighter does not advocate the abolition of judicial review of the exercise of public power any more than the typical red-lighter denies the value of non-judicial review mechanisms and the need for judicial restraint in the exercise of the review jurisdiction. More importantly, whether

²⁸ Peter Cane, Review of Executive Action, in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies*, (Oxford University Press 2005) 149

²⁹ Carol Harlow, "Public" and "Private" Law: Definition without Distinction', [1980] 43(3), *Modern Law Review*, 251.

³⁰ Peter Cane (n 28) 49.

³¹ *Ibid.*

*any particular scholar espouses red-light or green-light views is likely to depend to some extent at least on his or her personal ideology.*³²

2.2. Institutional Models

There are three broad categories of institutional types to provide judicial remedies for complaints against administrative authorities. The first model is where there is no distinction between administrative/public matters and civil/private matters where the regular courts handle cases irrespective of the nature of the claims or the identity of the parties.³³ This is more prevalent in common law countries. For example, in the United States of America, both at the state and federal levels, decisions of administrative agencies, whether they be general standard setting in the form of administrative rulemaking or a specific decision affecting an individual person, as the lasting legacy of the landmark decision in *Marbury vs Madison*, regular courts are empowered to determine the legality of the executive's action. However, through time, countries in this category have incorporated a system of specialized administrative tribunals for various specialized subject matters such as taxation whereby the final decision on matters of law is still reserved to the courts.

The second model is typified by the French administrative system where a parallel court system is structured with the exclusive authority to entertain matters involving authorities including but not limited to administrative employment, administrative liability, even administrative contracts. Such courts also have separate procedures.³⁴ This is a model that takes the principle of separation of powers more seriously and considers the involvement of the ordinary courts in administrative matters to be a violation of such a cardinal principle. The revolutionaries famously declared:

Judges may not, under pain of forfeiture of their offices, concern themselves in any manner whatsoever with the operation of the administration, nor shall they summon before them administrators on account of their official duties.³⁵

Sometimes the French model is mischaracterized as a tribunal model. However, on account of institutional and operational independence, the existence of elaborate procedures in deciding cases the administrative courts are courts for all intents and purposes.

³² Ibid.

³³ John S. Bell, Comparative Administrative Law, in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, (Oxford University Press 2012) 1280.

³⁴ Ibid.

³⁵ The French Judicial Establishment Decree of August 1790, Quoted in Gerhard Casper, *Separating Power: Essays on the Founding Period*, 1997, 135.

The third broad category of countries are somewhere in between the two earlier models where there is a distinct branch of the ordinary judiciary which deals with litigation against the administration. These countries include Germany and Spain. The judges engaged in this work are thus specialists and they also follow a distinct procedural law from that of the civil matters.³⁶ For example in Germany, the administrative branch of the judiciary is itself internally sub categorized into general administrative, social, and fiscal courts.³⁷ From the above discussion, it's clear that the civil law legal tradition envisages a more restricted role for judicial review than the common law family of legal systems.

As is often the case in the exercise of categorization this is quite a broad brush and through time the distinctions have become more and more blurred. The harmonizing effects of multilateral international legal orders mean that some of the separate courts have been found to lack the requisite level of independence for example by the European human rights court. More and more, the need for specialized tribunals has been recognized in common law legal systems. The bottom line is, however, at least on questions of law, an independent judicial organ needs to have a say to guarantee access to justice and fulfill the objective of inter-branch checks and balances.³⁸ However, restraint must be exercised by the judiciary not to usurp the power of policymaking and defer to, as much as possible, the agency's interpretation of law and fact.³⁹

3. Judicial Review of Administrative Acts in Ethiopia: Abdication of Power by the Judiciary?

Much of judicial review scholarship and policy debate in Ethiopia since the rather unique mode of constitutional adjudication was adopted under the FDRE constitution, has been primarily focused on an aspect of the whole enterprise, i.e. constitutional review. Therefore, the question that enjoyed much exploration is whether or not the courts had any role in determining the validity of decisions by either the legislative or executive organs of the state in consideration of the spirit and letters of the Constitution. While some argued that it is only the final say that is reserved for the House of Federation and as such the judiciary can

³⁶ German Administrative Act, the wording is as last promulgated on January 23rd 2003 (Federal Law Gazette I p. 102), as amended by Article 1, of the Fourth Administrative Law Amendment Act (Viertes Gesetz zur Änderung) of December 11th 2008 (Federal Law Gazette I p. 2418. Available at: <https://germanlawarchive.iuscomp.org/?p=289>

³⁷ European Union, 'Specialised courts - Germany' (The European e-Justice Portal, 24/01/2020) <https://e-justice.europa.eu/content_specialised_courts-19-de-maximizeMS-en.do?member=1> accessed 21 March 2021

³⁸ Bell, *supra* note 32 at p. 1281.

³⁹ Susan Rose-Ackerman, The Regulatory State, in Michel Rosenfeld and Andrés Sajó Eds. The Oxford Handbook of Comparative Constitutional Law, (Oxford University Press 2012), 683.

apply the constitutionality test to specific cases without venturing to declare acts of parliament or policy of the executive unconstitutional in their entirety.

Others, including much of the judiciary, seem to believe that every time the constitution is posited to support a claim in a dispute before the courts, a referral of the case to the Council of Constitutional Inquiry and the House of Federation is a must.⁴⁰

For the purpose of this article, we are adopting the narrower definition of judicial review that encompasses the examination of the legality of administrative actions, based, on a parliamentary act or subsidiary legislation such as Regulation of the Council of Ministers or Directives issued by the relevant authorities. In this context, where the courts are petitioned with requests for judicial review of administrative action based on rules originating from material sources other than the Constitution; there is no credible argument that can be presented to deny their role and the courts are routinely engaged in it.

The more controversial question however is whether or not this function is inherent or statutory? In other words, do the courts have an inherent power derived from the Constitution as part of the principle of separation of powers and the apportioning of all judicial powers to them, or do they need specific statutory authorization to assume jurisdiction in cases submitted to review the legality of administrative actions? If the former be the case, then anyone who is aggrieved by a final decision of an administrative authority may bring such matter for review before the judiciary.

Two prominent cases represent the sentiment of the highest judicial organ on this particular question where the Supreme Court used an identical sequence of words to state its understanding of judicial power when it comes to a review of administrative actions. In *Wolday Zeru and Others v Ethiopian Revenue and Customs' Authority*; and *Addis Ababa City Administration Land Management Authority and Another v Dink Sira PLC*, the Federal Supreme Courts Cassation Division held that:

Courts can entertain a petition and give decisions, only where the matter before them is not allocated to other bodies by law. Because ordinary courts do not have jurisdiction over cases identified by law to be resolved through an administrative decision, on matters that have been decided upon by administrative bodies in accordance with the law, or that should be

⁴⁰ Gedion Hessebon and Abduletif Idris, 'The Supreme Court of Ethiopia: Federalism's bystander,' in *Courts in Federal Countries: Federalists or Unitarists?* In Nicholas Aroney and John Kincaid (eds.) (University of Toronto Press, 2017). See also, Adem Kassie Abebe, *Umpiring Federalism in Africa: Institutional Mosaic and Innovations*, [2013] 13(4) *African Studies Quarterly* 65–7; and Assefa Fiseha, *Separation of Powers and Its Implications for the Judiciary in Ethiopia*, [2011] 5(4) *Journal of Eastern African Studies* 706.

*submitted to the administration, courts can neither entertain nor conduct a trial and provide judgment on them.*⁴¹

Several reasons may be presented to explain this rather extreme level of judicial conservatism. Given the manifestly authoritarian governance environment that prevailed in Ethiopia for several decades, the willingness to nurture a meaningfully independent judiciary that can hold the other branches in check did not seem to be in the cards for successive regimes. But close scrutiny of the arguments by the cassation court suggests an unwitting or deliberate conflation between judicial review and appeal. As we have argued in section two, while there is a need for a direct legal authority to exercise merit review or appeal from a decision of an administrative decision, the limited instances of judicial review do not require special authorization but rather emanate from a plenary power inherent to the judiciary. Despite the rather strong rejection of inherent power, there have been instances where lower courts exercised judicial review powers and the cassation bench has tacitly approved the procedural appropriateness in assuming jurisdiction.⁴²

Leaving the controversial question of constitutional review aside, if we limit the scope of judicial review to standards set by statutory and other subsidiary legislations, the question of whether or not the courts have an inherent power of judicial review becomes easy to answer. The FDRE constitution recognizes the independence of the judiciary and unequivocally asserts that all judicial powers both at federal and state levels are vested in the ordinary courts.⁴³ Even though judicial organs outside the ordinary judicatory are envisaged as a mechanism of access to justice under Article 37, any administrative decision-making organ has to fulfill the requirements of Article 78(4) to successfully become a bar on the jurisdiction of the courts. The constitutional condition of following legally prescribed procedures by organs exercising judicial powers should only be construed in the spirit of upholding the all-important principle of due process of law. The phrase “duly established” should also be understood as requiring such institutions to have meaningful institutional and operational independence from the ordinary administration or executive officials and functions.

⁴¹ Wolday Zeru and Others v Ethiopian Revenue and Customs Authority, Federal Supreme Court, Cassation Division, File Number 51790 (16 May 2003 E.C). See also Binyam Alemayehu vs Kotebe Teachers Education College, Cassation File No. 26480. Volume 5, Page 372. The fact that the court used the imperial era civil procedure code to decline jurisdiction in the former case is also problematic. These provisions should be interpreted in line with the idea of limited government constitutionalism envisages and the principle of accountability stated in the fundamental principles chapter of the constitution under Article 12.

⁴² See Ethiopian National Bank Vs. 1. Hibret Insurance Company 2.Mr. Eyesuswork Zafu 3. Mr. Workeshet Bekele Demisie Cassation File Number 44226.

⁴³ FDRE Constitution, Art.78 (1) and Art.79 (1).

Another disturbing trend for judicial control of administrative action has been the ubiquity of problematic ouster clauses. While jurisdictional limitations placed on the judiciary by the legislative through primary legislation in a constitutional democracy where such allocation of competence is expected to be handled by the basic law, we have had at least one instance of the executive introducing such constraint through subsidiary legislation. Unfortunately, the House of Federation, a final constitutional arbitrator with the advice of the Council Constitutional Inquiry similarly held that jurisdiction ouster clauses were not incompatible with the Constitution, notwithstanding that the petitioners' challenge was against an executive regulation which denied employees of the Revenue and Customs Authority from exercising judicial review in cases of civil service employment termination without justification or explanation.⁴⁴ This is apparently because the Council held that in a parliamentary democracy, legislation can curb judicial powers. This line of reasoning does not only run counter to the supremacy clause of the constitution but also introduces a dangerous slippery slope of a doctrine whereby the fundamental right of access to justice or any other right for that matter can be abridged with a stroke of an executive pen.⁴⁵

4. Judicial Review under FAPP

Judicial review of administrative actions, other than being a fundamental constitutional principle, it forms the core of modern administrative law and its basic principles.⁴⁶ Explicit constitutional empowerment of the judiciary or concrete application of constitutional principles through judicial activism are the original sources of the power of judicial review. Nevertheless, administrative procedure legislations do also serve as the main textual and authoritative source of the judicial review in most legal systems. In the Ethiopian legal system, there were several initiatives taken in the past to enact an administrative procedure proclamation with the aim of installing basic guarantees to administrative due process and the system of judicial review. These initiatives date back to 1967 when the Imperial regime drafted the first administrative procedure law in Ethiopia but failed to adopt it.⁴⁷ Similarly, drafts prepared in 2001 and 2008 were not adopted after they were presented before the

⁴⁴ Adem Kassie Abebe, Access to Constitutional Justice in Ethiopia, in Geraghty and others (eds), Access to Justice in Ethiopia: Towards an Inventory of Issues (Addis Ababa University Center for Human Rights 2014) 63

⁴⁵ For a detailed discussion of the constitutionality of the ouster clause in Council of Ministers Regulation No. 155/2008 on the administration of the Authority's employees and its human rights implications, See Aron Degol and Abdulatif Kedir, Administrative Rulemaking in Ethiopia: Normative and Institutional Framework, *Mizan Law Review*, Vol. 7. No. 1. September 2013.

⁴⁶ David Stott and Alexandra Felix, *Principles of Administrative Law* (Cavendish Publishing Limited 1997) 43

⁴⁷ Justice and Legal System Research Institute, Pre-Drafting Research for Drafting an Administrative Procedure Law, Conference Paper, September 2008, p. 9.

Council of Ministers.⁴⁸ Yet, the FDRE Office of the Attorney General finalized the preparation of another draft administrative procedure proclamation in February 2017. This draft was not also presented before the parliament for promulgation.⁴⁹

The establishment of the Legal and Justice Affairs Advisory Council led to the revitalization of the above initiatives for the legislation of an administrative procedure proclamation. The Advisory Council was established under the OAG as an independent body with a mandate to advise the government in its effort to undertake a comprehensive legal and justice system reform in the country.⁵⁰ The Council established, among others, the Law-Making Process and Administrative Law Working Group (hereinafter the Working Group) with a responsibility to lead the legal reform agenda in relation to the country's law-making process and administrative justice. The Working Group was mandated to undertake diagnostic studies on these thematic issues and provide draft recommendations and laws to address the problems identified through the studies.⁵¹ The Working Group, which the authors closely worked with in various capacities, is composed of prominent legal scholars and practitioners who have served as senior legal experts in several administrative agencies as well as participated in the drafting process of the country's major legislations.

At the outset, pursuant to the operating procedure the Council adopted, the Working Group was instructed to conduct a diagnostic study of the major problems in the dedicated thematic areas and present its findings along with suggested reform ideas including legislative interventions. After a plan of action to conduct a comprehensive study of the legislative and administrative processes was prepared and submitted by the Working Group to the Council, the need for a comprehensive administrative procedure law and the problems associated with its absence was judged to be sufficiently established. Moreover, the existence of numerous drafts including the one by the Office of the Attorney General was considered to be a low hanging fruit that can be acted upon in a relatively shorter time period and with much less effort. Accordingly, the Working Group was instructed "to prioritize administrative procedure proclamation and enhance the quality of the latest draft by the OAG with a view of having it submitted for adoption within a few weeks". After assessing existing researches, the subject of administrative procedure law and conducting extensive scrutiny of preexisting draft administrative proclamations were made an initial draft of the federal Administrative Procedure Proclamation was prepared. Though the Working Group

⁴⁸ Tigist Assefa, *Judicial Review of Administrative Actions: A Comparative Analysis*, Addis Ababa University, January 2010, p. 93, Unpublished LLM thesis Available at:

<http://etd.aau.edu.et/bitstream/handle/123456789/17885/Tigist%20Assefa.pdf?sequence=1&isAllowed=y>

⁴⁹ The FDRE Ombudsman Institution also worked to prepare a draft for several years culminating in a draft quite similar in content and structure with the one by the Attorney General, (copy available with authors).

⁵⁰ Federal Attorney General Legal and Justice Affairs Advisory Council Establishment Directive, Directive No. 24/2010.

⁵¹ Legal and Justice Affairs Advisory Council, *Term of Reference for Member of the Working Groups Established by the Legal and Justice Affairs Advisory Council*, p. 2.

accepted the draft by the OAG as good enough to start with, it determined that extensive redrafting was needed. Undeniably, many provisions and sections of previous draft proclamations were taken into the first draft of the federal administrative procedure proclamation.

Once an initial draft was formulated, it was presented before members of the Advisory Council, and their feedback was incorporated before it was presented for stakeholder consultations. The first consultation was attended by legal advisors of many of the federal administrative agencies, including the line ministries, as well as other agencies and authorities which were established under such ministries and the Office of the Prime Minister. Legal advisors to the Mayor of Addis Ababa and representatives of the Dire Dawa City Administration have also attended some of the consultations. The copy of the draft was widely circulated with the aim of soliciting written comments with little success.

The second consultation, in addition to the aforementioned federal agencies, had the participation of political parties, civil society organizations and media organizations. Both consultations didn't bring much substantive inputs for the draft at hand, particularly on provisions related with judicial review. This is mainly attributed to the fact that administrative law is a new body of law in the Ethiopian legal system and many of the stakeholders were not familiar with the concepts embodied in it.

With due consideration of the inputs received from the consultation to further develop the first draft, a final draft of the Federal Administrative Procedure Proclamation was prepared and was submitted before the Council. The Council approved the draft presented before it and sent it to the Office of the Federal Attorney General. The draft has also 'enjoyed' a few modifications under the OAG.⁵² It then passed through the Council of Ministers and the House of Peoples Representative's parliamentary procedures, including further stakeholder and public consultations. On the 13th of February 2020, the House of Peoples Representatives adopted FAPP, as Proclamation No. 1183 /2020 and it entered into force on 7 April 2020.

FAPP has three major sections, of which the first two deal with procedures and principles governing administrative rule and decision making. The third major section of the Proclamation stipulates the system of judicial review of administrative actions. Even at the initial stages of the drafting process, judicial oversight over directives issued and decisions made by federal administrative agencies was conceived by the Working Group, as forming

⁵² Such changes include the stipulation of a hearing procedure for administrative decision making and inclusion of the Federal Attorney General under the scope of application of the Proclamation. Except for issues governed by the Criminal Procedure Law, functions of the police and the attorney general are made subject to the proclamation.

one of the substantive parts of the draft administrative procedure proclamation.⁵³ Accordingly, Judicial Review is one of the pioneering embellishments of FAPP. Chapter four of the Proclamation provides for the explicit recognition of judicial review of administrative actions as well as the grounds, procedures, and outcomes of the review process.

Nevertheless, the system of judicial review instituted under FAPP is limited to the review of administrative directives and decisions. This is because the scope of FAPP itself is limited to regulating decisions and rulemaking power of administrative agencies. Accordingly, judicial review under FAPP doesn't include the review of Proclamations enacted by the parliament and Council of Ministers' regulations. Regulation and decision of the upper executive, the Council of Ministers, are not subject to the scrutiny of the judiciary as established through FAPP. This was determined to be an important reform but beyond the scope of the federal administrative procedure proclamation, and it was deemed better done through a more comprehensive law-making process review that the Working Group expected to undertake subsequently.⁵⁴

4.1. Scope, Institutional Model and *Locus Standi*

The scope of FAPP is limited to federal administrative agencies and doesn't bind administrative agencies of regional governments.⁵⁵ This is for the simple reason of the constitutional division of power between states and the federal government. In the absence of an explicit provision empowering the federal government to legislate an administrative procedure law that is applicable at both tiers of government, it was believed that states has the power to enact their own administrative procedure law as part of their residual power.⁵⁶ Therefore the system of judicial review established by FAPP will only concern federal administrative agencies and individuals cannot bring judicial review cases against the actions of regional administrative agencies. However, it has been suggested that, as is a trend in other proclamations, regional states may take FAPP as a starting point to enact regional administrative procedure proclamations.⁵⁷

⁵³ Brief Explanatory Note on the Draft Federal Administrative Procedure Proclamation, Available at <https://www.hopr.gov.et/web/guest/participate/-/message_boards/view_message/107604#_19_message_116896>

⁵⁴ Law-making and Administrative Justice Working Group, LJAAC, Minute No. 11, (2019, Unpublished), p. 3.; Law-making and Administrative Justice Working Group, LJAAC, Minute No. 12, (2019, Unpublished), p. 2.

⁵⁵ The Federal Administrative Procedure Proclamation, 2020, Art 2(1), Proc. No. 1183 /2020, Negarit Gazette, Year 26, no. 32. Hereinafter FAPP.

⁵⁶ This can also be justified as part of their power "to establish a state administration that advances ... a democratic order" etc under Article 52 of the FDRE constitution.

⁵⁷ Law-making and Administrative Justice Working Group, LJAAC, Minute No. 12, (2019, Unpublished), p. 2

According to FAPP, the power to review directives or decisions of federal administrative agencies is vested in the Admirative Affairs Bench of the Federal High Court.⁵⁸ According to the Explanatory Note prepared by the Working Group, establishing a separate Administrative Court distinct from the regular judiciary with the power of judicial review might be challenged on the ground of unconstitutionality.⁵⁹ Accordingly, the Federal High Court is bestowed with original jurisdiction to adjudicate the review of administrative actions.⁶⁰

The objective behind designating the Federal High Court as the suitable judicial hierarchy to entertain judicial review, as an original jurisdiction is entrenched in the level of interpretative/adjudicative skills that are necessary for the review of government's executive/regulatory power as well as the intensity of judicial power and relative independence that is needed to deal with powerful executive organs of the government.⁶¹ The decision of the High Court with regard to the review of decisions of administrative agencies is final, while the decision of the court concerning the review of directives issued by federal administrative agencies is appealable to the Federal Supreme Court.⁶²

Article 48 of FAPP provides that any interested person may file a petition requesting a judicial review of a directive while only those persons whose interests have been adversely affected by an administrative decision may file a petition for the reviews of such administrative decisions. The issue of *locus standi* in judicial review cases is one of the issues that had ignited the hottest debate in the Working Group during the drafting process. Initial discussions under the Working Group were inclined towards adopting a more liberal standard of locus-standi where anyone was considered eligible to file a petition for judicial review of any directives or decisions of administrative agencies.⁶³

At the later stages of the drafting process, the Working Group had adopted a distinct standard of *locus standi* for the review of directives and administrative decisions. Accordingly, the final version of the proclamation adopted a more qualified standard of *locus standi* for the review of directives by applying the term 'any interested person'. This was made because of the general applicability of administrative directives thereby affecting

⁵⁸ The Federal Administrative Procedure Proclamation, 2020, Art 49(1), Proc. No. 1183 /2020, Negarit Gazette, Year 26, no. 32. Hereinafter FAPP.

⁵⁹ Legal and Justice Affairs Advisory Council (LJAAC), Law-making and Administrative Justice Working Group, Minute No. 8, (2019, Unpublished), p. 3.

⁶⁰ FAAP, Art. 49(1).

⁶¹ Law-making and Administrative Justice Working Group, LJAAC, Minute No. 21, (2019, Unpublished), p. 3.

⁶² FAPP, Art. 49(2); The possibility of appealing to the Federal Supreme Court, against the decision of the Federal High Court concerning the review of a directive, is introduced by the OAG and it wasn't in the original draft prepared by the Working Group.

⁶³ Law making and Administrative Justice Working Group, LJAAC, Minute No. 21, (2019, Unpublished), p. 3.

a broader public than a specific individual. On the other hand, the draft made it clear that only persons whose interests have been adversely affected by administrative decisions will be eligible to bring judicial review cases against such decisions.

4.2. Grounds of Judicial Review under FAPP

As has been argued above, the conventional role of the court in the context of judicial review is one of review rather than appeal.⁶⁴ The system of judicial review has its own set of accepted grounds that the courts will base their review of administrative actions. In general, substantive and procedural ultra-virus as well as abuse of power are the three most accepted grounds of judicial review in most jurisdictions.⁶⁵ An alternative classification of grounds of review provided by Lord Diplock, a British judge, includes illegality, irrationality, procedural impropriety and proportionality.⁶⁶ While illegality and procedural impropriety could be respectively equated with substantive and procedural ultra-virus, irrationality and proportionality could be cumulatively paralleled with abuse of power.

Substantive ultra-virus refers to a situation where an agency's actions are beyond the scope of its authority. Procedural ultra-virus refers to failure of an administrative agency to follow a required procedure. Abuse of power, on the other hand, is a tricky concept in which despite passing the test of legality (substantive and procedural ultra-virus), administrative actions might fail short of fairness or justice. The discretionary nature of regulatory power provides agencies with the power to choose between several policy alternatives on a specific subject matter which may be lawful in terms of the agency's scope of authority and compliance with prescribed procedure. However, such exercise of discretionary powers is prone to abuse either by extraneous motive of bureaucrats or unfair policy choices of the government. This is why some jurisdictions have established 'abuse of power' to be an additional test for judicial review of administrative actions.⁶⁷

Evaluating whether an administrative action has involved an abuse of power might be tricky. Thus, 'abuse of power' is usually expressed in terms of unreasonableness or irrationality.⁶⁸ In England, Lord Greene MR identified narrow and broad unreasonableness in a case commonly referred to as 'the *Wednesbury case*'.⁶⁹ Narrow unreasonableness, is a term describing an administrative action, which is manifestly unreasonable that no reasonable body could possibly have reached at it. On the other hand, broad unreasonableness includes

⁶⁴ David Stott and Alexandra Felix, *Principles of Administrative Law* (Cavendish Publishing Limited 1997), 21.

⁶⁵ *Ibid*, 81.

⁶⁶ *Council of Civil Service Unions v Minister for the Civil Service* (1985) in *Principles of Administrative Law*, p. 44.

⁶⁷ Stott and Felix, (n 64) 86.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*; *Associated Provincial Picture Houses v Wednesbury Corporation* (1948).

non-compliance with the objective of the law, failure to consider relevant considerations, or the taking into account of irrelevant considerations.⁷⁰

The grounds for judicial review of administrative directives and administrative decisions under FAPP are brief. FAPP provides three conditions, which enable the review of administrative directives by the Federal High Court.⁷¹ Procedural irregularity, ultra-virus, and illegality have been recognized as enabling the review of administrative directives. Procedural impropriety or the non-compliance with the procedural rules provided in the Proclamation for the adoption of a directive is the first ground for the judicial review of administrative directives. Transparency of the directive making process, the undertaking of genuine public consultation, filing and online publication of a directive are some of the major procedures federal administrative agencies are bound to observe during the adoption of a directive.⁷² A directive, which is adopted without complying with these procedures, is prone to be revoked by the Court. This could be understood as forming the procedural ultra-virus as recognized under other jurisdictions.

The second ground of judicial review recognized by FAPP, in the context of administrative directives, is ultra-virus. A close reading of the Amharic version of Article 50/1/b reveals that ultra-virus in this particular context is meant to describe a situation where an agency adopts a directive beyond its scope of authority. The 1995 FDRE Constitution provides that the Council of Ministers is authorized to enact regulations pursuant to powers vested in it by the House of Peoples' Representatives.⁷³ However, there is no clear constitutional provision as to the power of each administrative agency to enact directives. Yet, the House of People's Representatives has authorized administrative agencies to enact directives on specific issues that they exercise regulatory power. According to FAPP, the Court could revoke a directive enacted by an administrative agency with no explicit statutory authorization or without the requisite delegation of legislative authority.

The third ground that enables the judicial review of administrative directives is legality. The Court could revoke a directive that is or has provisions that are contrary to laws placed in a higher hierarchy in the Ethiopian legal system. In other words, the Federal High Court is recognized as having the power to review a directive on the basis of its compliance with other regulations and proclamations in the legal system. This also forms part of the concept of substantive ultra-virus that dictates the illegality of subordinate/subsidiary laws that contradict superior laws. However, owing to Ethiopia's unique system of constitutional review, the review power of the Higher Court may not extend to the review of directives on

⁷⁰ Stott and Felix, (n 64) 117.

⁷¹ FAPP, Art. 50/1.

⁷² FAPP, Section two (Art. 4 – 19).

⁷³ Art. 77(13) of the FDRE Constitution of 1995.

the basis of constitutionality. Yet, as noted earlier, it is possible to argue that except for not having a final say that is reserved for the House of the Federation, the Federal High Court can apply the constitutionality test to directives.

The last two grounds of judicial review of administrative directives under FAPP could cumulatively form part of the concept which is usually referred to as substantive ultra-virus. However, despite duly stipulating substantive and procedural ultra-virus as grounds of judicial review of administrative directives, FAPP has not recognized 'abuse of power' as a third ground for the judicial review of administrative directives. The Working Group noted that authorizing the court to review administrative directives on the ground of unreasonableness will deprive the executive of its inherent discretionary power to choose between several policy alternatives.⁷⁴

Furthermore, the Working Group has noted that introducing the reasonableness test for judicial review of directives might have the impact of indirectly empowering the judiciary to interfere in administrative affairs and make policy choices and enact directives of its preference.⁷⁵ Besides, determining the reasonableness of directives is deemed problematic given the lack of expertise that the judiciary currently possess owing to the novelty of the system of judicial review in the legal system.⁷⁶ However, the Working Group has been of the view that it will be ideal to introduce the reasonableness test on the judicial review of administrative directives in future amendments of the proclamation.⁷⁷

The ground of judicial review of administrative decisions is articulated in a very broad manner. According to Article 50 of FAPP, an administrative decision may be revoked if it is made in violation of the principles provided under chapter three of the Proclamation. Chapter three of FAPP provides for procedures and substantive principles applicable to administrative decision making under federal administrative agencies. Substantive principles in this regard include the principle of Equality, Professionalism, Transparency, Predictability, Balancing of Public and Individual Interest, Avoiding Irrelevant Matters and Interests, Good faith, Reasonableness, Avoiding Conflict of Interest.⁷⁸ The right to be heard

⁷⁴ Law making and Administrative Justice Working Group, LJAAC, Minute No. 24, (2019, Unpublished), p. 2.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Subsection two of section three of the FAPP provides for substantive and procedural principles to be observed during administrative decision-making Articles 23 – 35.

and receive a timely decision as well as some other due process guarantees are also part of the administrative decision-making process that is envisaged by FAPP.⁷⁹

4.3. Procedures and Remedies

FAPP does not provide detailed provisions regulating the procedures to be followed during judicial review of administrative actions. Instead, it calls for the proceedings of judicial review to be subject to relevant provisions of the Civil Procedure Code of Ethiopia. However, there are still few provisions governing the procedural aspects of judicial review including the requirement of exhaustion of remedies and observance period of limitations on the petition for the judicial review of administrative actions. Judicial review of administrative decisions may only be sought against a final decision of an agency.⁸⁰ According to Article 46 of FAPP, a decision of an agency is final where the initial decision of the Agency has been re-examined by the grievance handling body of an administrative agency and has been approved by the Head of the Agency or an officer duly authorized by the Head of the Agency.

A petitioner for Judicial Review is also required to exhaust all remedies available within the Agency before petitioning the court for judicial review.⁸¹ However, where there is an undue delay on the part of the agency to provide remedies, the obligation to exhaust remedies will not apply.⁸²

According to FAPP, a petition for the review of an administrative decision is expected to be made within 30 days after the petitioner was notified of the decision.⁸³ This follows the well-accepted justifications of a period of limitations that are aimed at ensuring legal certainty and finality as well as the protection of defendants (in this case government agencies) from potential old claims that might be difficult to counter because of the passage of time.⁸⁴

A petition for the review of a directive on grounds of ultra-virus and illegality can be submitted at any time.⁸⁵ It is deemed necessary that a directive enacted beyond the scope of authority of an agency or which contradicts with higher laws should be annulled anytime, upon the request of any interested person. However, a petition for the review of a directive

⁷⁹ Subsection three and four of section three of FAPP provide for additional procedures and procedural principles for administrative decision making.

⁸⁰ FAPP, Art. 51.

⁸¹ FAPP, Art. 52/1.

⁸² FAPP, Art. 52/2.

⁸³ FAPP, Art. 53/3.

⁸⁴ Tyler T. Ochoa and Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, [1997] 28 *Pacific Law Journal*, 454. Available at:

<<http://digitalcommons.law.scu.edu/facpubs/81>><http://digitalcommons.law.scu.edu/facpubs/81>>

⁸⁵ FAPP, Art. 53/2.

on grounds of procedural irregularity will have to be submitted within 90 days after the adoption of the Directive. This is meant to avoid nullification of a substantively valid directive for the mere reason of procedural impropriety.⁸⁶

The procedures stipulated under FAPP for the enactment of directives are meant to ensure fairness and justice in administrative decision/policy making through democratic participation of citizens in the exercise of executive power. There are possibilities in which a directive that is enacted without following the prescribed procedures under FAPP will be within the scope of authority of the agency and with no contradiction with higher laws. Nevertheless, this might not be the case always. There are scenarios where agencies, through directives, will have to choose between several policy-alternatives within the bounds of higher laws and the scope of their authority. In such instances, ensuring transparency and public participation will have an impact on the fairness and legitimacy of the policy choices that the agencies will make in their directives. Accordingly, citizens must be entitled to petition the judicial review of a directive on grounds of procedural impropriety within a limited period of time.

In the proceedings of judicial review of administrative actions, the court may order the agency in question to submit a written response with 15 days.⁸⁷ The court may also order the agency to submit records relating to the directive or administrative decision under consideration.⁸⁸ After the completion of the investigation of the case with possible hearing procedures, the court has the power to confirm or reverse the administrative action submitted for review.⁸⁹ This means the power of the court is limited to reviewing the propriety of the administrative action in light of the above-mentioned grounds to confirm or reverse the administrative action. Otherwise, the court cannot come up with its own decision which will be interference on executive power.⁹⁰

The judgment of the Court to confirm or invalidate a directive or an administrative decision is expected to be executed immediately.⁹¹ Therefore, the decision of the court to invalidate an administrative action shall immediately revoke the legality of such directive or decision, fully or partly.⁹² However, the administrative decisions made on the basis of a revoked directive, yet prior to the ruling of the court, will stay valid.⁹³ Where the court invalidates an

⁸⁶ Explanatory Note on Draft Federal Administrative Procedure Proclamation (unpublished, draft available with authors).

⁸⁷ FAPP, Art. 54.

⁸⁸ FAPP, Art. 55.

⁸⁹ FAPP, Art. 56 (2 & 3).

⁹⁰ Law Making and Administrative Justice Working Group, LJAAC, Minute No. 23, (2019, Unpublished), p. 3.

⁹¹ FAPP, Art. 56/1.

⁹² FAPP, Art. 57(2&3).

⁹³ FAPP, Art. 57/4.

administrative action, in part or wholly, it also has the power to order the administrative agency to revise action by rectifying the shortcomings identified on the court's decision.⁹⁴ Thus, the court can order administrative agencies to observe the procedural and substantive principles enshrined under FAPP to rectify their directives or decisions.⁹⁵

Furthermore, individuals are entitled to seek compensation from an administrative agency whose fault has brought damage to them.⁹⁶ However, this mode of compensation is envisaged to be dealt with in accordance with other relevant laws, and FAPP doesn't provide for special rules on defining an administrative fault as well as mode and extent of compensation.⁹⁷ Accordingly, the provisions of the Ethiopian Civil Code governing extra contractual Liability will apply to the wrongdoings of administrative agencies.⁹⁸ It seems FAPP is trying to link civil law canons of abuse of power⁹⁹ and infringement of the law¹⁰⁰ with principles of abuse of power and accountability under administrative law.

5. Implications of Introduction of Judicial Review for Human Rights in Ethiopia

The primary relevance of the establishment of judicial review in Ethiopia is the realization of an individual's right to access to justice. In its broader sense, the right of access to justice could be understood as a right that "enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings".¹⁰¹ In the context of judicial review, however, access to justice could be better conceived in terms of individual ability to protect their rights or interests against inappropriate regulatory interventions and to holding power accountable. This by itself, serves as the formal/systemic recognition of an element of an individual's right to access to justice as enshrined under the Constitution. Judicial review of administrative actions and existing appeal procedures tied to certain administrative agencies will guaranty the respect of individuals' right to access to justice in the context of administrative wrongs. However, the significance of establishing the system of judicial

⁹⁴ FAPP, Art. 57/2.

⁹⁵ Ibid.

⁹⁶ FAPP, Art. 59.

⁹⁷ Ibid.

⁹⁸ Explanatory note on Draft Federal Administrative Procedure Proclamation (unpublished, draft available with authors).

⁹⁹ The Civil Code of Ethiopia, Art. 2033.

¹⁰⁰ Ibid, Art. 2035.

¹⁰¹ European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to access to justice, 2016, p. 16 (Hereinafter Handbook on access to justice).

review is more than its direct service to the respect of the individual's right to access to justice.

5.1. Limiting the Limitation on Human Rights

The regulatory power of the government inherently limits the enjoyment of human rights by individuals. For instance, the Commercial Code, Commercial Registration and Business Licensing Proclamation, as well as their respective subsidiary legislations, stipulate several restrictions against the right to work of citizens or their rights to freely engage in economic activities. Requirements of business license, certain qualifications and standards are obvious limitations to an individual's right to "freely engage" in economic activities. Similarly, traffic and transport regulations will affect an individual's freedom of movement.

However, such government regulatory frameworks are acceptable both under constitutional and human rights law, if they adhere to certain accepted standards. International standards and jurisprudence of international human rights courts/institutions provide that actions of the government that limit human rights can only be imposed exceptionally, in the pursuance of legitimate objectives, through formal legislation and in strict proportion to what is required by the objective.¹⁰² However, except for providing right-specific limitation clauses over certain rights, the FDRE constitution does not stipulate the general limitation clause. Accordingly, several regulatory frameworks of the government, that limit the enjoyment of certain human rights, may not be in line with the commonly accepted standards that are applicable for the limitation of human rights. In such instances, the system of judicial review can enable individuals to protect their interests from inappropriate administrative decisions or secondary legislation.

For instance, the system of judicial review established under FAPP has specified illegality as one of the grounds for judicial review of administrative actions. This could serve as a reinforcement of the condition of legality for the limitation of human rights, which states that limitation on the exercise of human rights should only be made through formal legislation.¹⁰³ According to FAPP, Federal Administrative agencies cannot impose actions that affect people's rights and interests without formal adoption of a directive per the procedures provided under FAPP.¹⁰⁴ Thus, actions of administrative agencies that are

¹⁰² See Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984), Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights adopted in Maastricht on 2–6 June 198.

¹⁰³ Siracusa Principles, Section I(A), Par. 5 and (B) para. 13.

¹⁰⁴ Cumulative reading of Article 2(2) and 4(2) provide that Federal Administrative Agencies cannot affect the rights and interests of individual's without adopting a formal directive in accordance with the procedures of FAAP.

affecting the rights and interests of individuals without formal legislation, in this case, a directive, could be revoked by the court through the system of judicial review.¹⁰⁵

Furthermore, concerning administrative decisions, the court can also revoke administrative decisions that are made by a person without the requisite authority, in contradiction with the law, and beyond the scope of authority of the administrative agency.¹⁰⁶ This concept is closely related to the principle of legality in the context of the limitation of human rights. Similarly, other grounds of judicial review of administrative decisions stipulated under FAPP could encompass principles of ‘rational connection’¹⁰⁷ and ‘minimal impairment’ as understood in the discourse of limitation of human rights. Multiple grounds of review for the administrative decision, such as Balancing of Public and Individual Interest¹⁰⁸, Avoiding Irrelevant Matters and Interests¹⁰⁹, Reasonableness¹¹⁰ are closely related to the notions of necessity and proportionality as understood in the discourse of limitation of human rights.¹¹¹ Nevertheless, the system of judicial review established by FAPP is limited to directives and decisions made by administrative agencies. This might limit the impact of the judicial review on the overall legal system.

5.2. As Remedy for Human Rights Violations

International and regional human rights systems envisage an effective remedy be provided for an individual whose human rights have been violated.¹¹² The first element of a proper remedy for human rights violation is the victim’s access to the appropriate authorities such as court and commissions to have his claim heard and decided.¹¹³ The second element is the redress or relief that a victim can receive.¹¹⁴ However, due to legal/constitutional barriers and inactiveness of the judiciary, courts, and national human rights institutions in Ethiopia

¹⁰⁵ FAPP, Art. 50(1/a).

¹⁰⁶ FAPP, Art. 24 and 25.

¹⁰⁷ See Aharon Barak Rational connection. In *Proportionality: Constitutional Rights and their Limitations* (Cambridge Studies in Constitutional Law, pp. 303-316). Cambridge: Cambridge University Press. 2012.

¹⁰⁸ FAPP, Art. 25.

¹⁰⁹ FAPP, Art. 26.

¹¹⁰ FAPP, Art. 30.

¹¹¹ Such grounds of review for administrative decision, are closely related with the constitution and human rights law notions of ‘appropriateness’, ‘rational connection’, balancing, ‘necessity’ and ‘minimal impairment’.

¹¹² The International Center for Transitional Justice, *Effective Remedies to Human Rights Violations*, FOCUS: ICTJ AND THE RIGHT TO A REMEDY, December 2009, p. 1.

¹¹³ Ibid.

¹¹⁴ Ibid.

have not developed a human rights jurisprudence, which can remedy victims of human rights violations.¹¹⁵

Therefore, the system of judicial review could serve as an alternative platform for addressing human rights violations committed by administrative agencies. Most importantly, violations of socio-economic rights such as unlawful revocation of property rights and business licenses could be partly addressed through the system of judicial review which can assess the legality, fairness, and the due process of administrative actions. Individuals whose rights have been violated by federal administrative agencies can access the Federal High Court to have their grievances heard, at least on those limited grounds stipulated by FAPP. Remedies of judicial review under FAPP include quashing decisions or directives of agencies, ordering agencies to reassess and correct their decisions and directives, as well as the compensation of damages.¹¹⁶ This, to a limited extent, goes in line with accepted principles in remedies for human rights violations such as recognition, injunctions, and restitution.¹¹⁷

5.3. Enhancing Implementation of Human Rights and Democratic Principles

Other than its significance to the realization of the right to access justice of individuals, the system of judicial review does also serve as an instrument for the operationalization of certain specific rights recognized under the FDRE Constitution and international human rights instruments. This includes the respect of the right to equality and the right to democratic participation in the conduct of public affairs. FDRE constitution recognizes the equality of everyone before the law and effective protection of every person without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status.¹¹⁸ Due to the very nature of their discretionary power and as indicated by several studies, administrative agencies are exposed to discriminatory actions based on the basis of class, gender, ethnicity,

¹¹⁵ See Sisay Alemahu. The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia, [2008] 8(2) African Human Rights Law Journal, 273-293, available at <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962008000200003&lng=en&nrm=isohttp://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962008000200003&lng=en&nrm=iso> (last accessed on 02 Aug. 2020).

¹¹⁶ FAPP, Art. 56 and 58.

¹¹⁷ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005.

¹¹⁸ FDRE Constitution, Art. 25.

etc.¹¹⁹ To this effect, FAPP has recognized discrimination as one ground for judicial review of administrative decisions.¹²⁰ Therefore, the empowerment of the court to quash discriminatory decisions serves as an important tool to operationalize the right to equality of individuals before administrative actions.

Furthermore, the FDRE constitution has guaranteed the right of every Ethiopian national to take part in the conduct of public affairs, directly and through freely chosen representatives.¹²¹ Moreover, the direct participation of citizens in the conduct of public affairs is also an expression of the sovereignty of citizens.¹²² Though the parliamentary model of the Ethiopian government allows citizens to choose their legislators at a higher level, administrative agencies are run by political appointees and technocrats. Accordingly, administrative rulemaking is undertaken through these political appointees and technical experts. Nevertheless, FAPP has introduced a legislative process in which citizens can make direct participation in the adoption of directives through public and stakeholder consultations.¹²³ Most importantly, non-observance of this legislative process is one of the grounds for judicial review administrative directives which can result in the annulment of the Directive.¹²⁴ This could serve as a vital instrument for the implementation of the right to public participation of citizens.

Concluding Remarks

Contemporaneously with the emergence and later entrenchment of human rights, the modern administrative state flourished, and the everyday lives of individuals became more entangled with the ubiquitous state. Because elected officials in the legislative and executive branches lack both the time and expertise to attend to every policy matter in detail, administrative officials have wide latitude in norm-setting through delegated legislation. Moreover, administrative agencies routinely engage in quasi adjudication and determination of individual legal positions. The three-pronged state obligations in relation to human rights require that states must refrain from interfering with or curtailing the enjoyment of human rights, to protect individuals and groups against human rights abuses and to take positive action to facilitate the enjoyment of such rights. In all these three

¹¹⁹ Addiswork Tilahun, et al, A Study on the Problems Encountered for Lack of Uniform Administrative Procedure Law in Ethiopia and Suggested Solutions, Justice and Legal Systems Research Institute of Ethiopia (JLSRI), 2013, as quoted in World Bank Group, Regulatory Policy and Delivery Review: Regulatory Governance in Ethiopia, Good Regulatory Practice (GRP) Program, March, 2017, 40.

¹²⁰ FAPP, Art. 32 and 50(2).

¹²¹ FDRE Constitution, Art. 38(1).

¹²² FDRE Constitution, Art. 8(3).

¹²³ FAPP, Art. 9 and 10.

¹²⁴ FAPP, Art. 50 (1/a).

dimensions administrative authorities being the most immediate actors to the individual can enhance or diminish the performance of the state on human rights standards. Should they violate one of these obligations either through action or inaction, access to justice in the form of judicial review is an indispensable component of the human rights architecture.

However, the normative position and the practice in Ethiopia regarding judicial review of administrative acts have been far from clear. Leaving the issue of constitutional review aside, multiple legislative ouster clauses including through executive subsidiary legislation as well as inconsistent judicial practice that has ceded a lot of power to the executive has all but made judicial review of administrative acts irrelevant as mechanism of access to justice for human rights protection. The Federal Administrative Procedure Proclamation goes a long way in clarifying the normative confusion and placing judicial review of administrative acts on a firm footing. Apart from affording individuals a mechanism of redress for rights violations, it also has created a tremendous opportunity for human rights advocacy in the form of strategic litigations. From the careful way in which grounds for judicial review and the remedies available are crafted, it is clear that the legislator appreciates the risks this may pose for separation of powers.

What the successive consultations during the drafting and adoption process amply revealed is the dearth of expertise and awareness about the subject matters. Both during oral hearings and in the few written submissions the section of the proclamation on judicial review drew little to no attention. It was rather surprising that virtually no representatives of agencies raised the expected resistance to the new empowerment of the judiciary. This does not of course necessarily imply there is an overwhelming buy-in. Short of a robust program to train judges as well as other practitioners aimed at instilling both the advantages of having such a system and the careful way it needs to be exercised, the immediate future is sure to be a bumpy ride until the balance is figured out. In the context where there is no meaningful separation of civil service and party politics, the judiciary is strongly advised to be cautious in how they want to ease the agencies into the new *modus operandi* lest they risk a political backlash undermining the gains.

Access to Justice, Public Interest and Independence of the Lawyer Profession

Cord Brügmann*

Abstract

The lawyer profession has evolved in many jurisdictions as a regulated profession. Today, globally, we see various forms of regulation, which range from pure government supervision of the profession on the one side to self-regulation on the other side. In many countries, lawyer regulation is under scrutiny, often being changed – from either direction – to a balanced form of co-regulation with strong self-governance and a supervision independent of the profession. The Ethiopian lawyer profession is traditionally quite strictly regulated by the federal government and the government, academics, members of the lawyer profession, the judiciary and representatives of clients’ interest have all identified the need for change.

After a look at the international regulatory landscape, and a discussion of the role the lawyer profession has in providing access to justice, this paper reflects the regulatory status quo in Ethiopia, and describes the process which led to two draft laws, attempting to find a good regulatory regime for the lawyer profession. It evaluates the Federal Attorney General draft of late 2019, finding that it lacks necessary provisions to grant independence to the individual lawyer and to the profession as a whole. In particular, it is missing the necessary separation of roles which in the draft’s “joint regulation” approach essentially remain within the government. The paper concludes with lessons from the legislative process, and commends the open, bottom-up approach the Advisory Council has used to gather voices from stakeholders.

Introduction

In mid-2018, the Ethiopian Lawyers’ Association (ELA) inquired if the International Bar Association (IBA) was able to assist with the ambitious project to update the statutory framework for the lawyer profession.¹ The ELA, like other actors in the legal profession, had

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¹ This paper uses the term “lawyer profession” instead of “legal profession” to make clear that – unlike in many common law jurisdictions where there might be one single legal profession – in most jurisdictions with a civil law tradition

been advocating for reforms of the framework guiding the profession (including the Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000) for a number of years², in line with reform initiatives for the judicial system which were triggered by the 2002 Justice System Reform Program (JSRP) under the authority of the Ministry of Capacity Building.³ The author of this paper has consulted with the ELA and the Legal and Justice Affairs Advisory Council on behalf of the IBA⁴ since 2018. Information from discussions with various stakeholders was used for this paper.

The new leadership under Prime Minister Dr. Abiy Ahmed launched a number of reform projects to change legislation in the political sensitive fields of anti-terrorism, charities and societies, media, and election laws. These reforms were also to include the legislative framework for the judicial system. Their overall goal was to build a legislative framework for democratizing and strengthening those institutions relevant for an open society. There was hope for swift reforms; the time seemed to be right for more independence of the lawyer profession. The last efforts to reform the statutory framework for the lawyer profession had ended four years before, unsuccessfully.⁵ Today,⁶ the debate about how to best regulate the lawyer profession is still ongoing. This paper reflects the discussion on the draft law against the background of the international debate about independence of the lawyer profession, rule of law, and access to justice.⁷

1. Lex Lata

Currently, legal services at the Federal level (concerning work related to Federal courts)⁸ are regulated by the Federal Courts Advocates' Licensing and Registration Proclamation No.

there are different legal professions with distinct career paths, often starting to diversify after the academic stage of the legal education. A "profession" in the terminology of this paper stands at the end of a process, which social sciences call "professionalization, and which is describe more closely below in chapter 4.2.

² Cf. the project outline "Engaging the Justice Sector for Good Governance [sic!]: "Enhancing Justice sector stakeholders' capacity on Rights Information, Legal Aid, Resource Center and Legislative Advocacy to Promote Rule of Law.", <https://www.ethiopian-bar.org> (last accessed: November 28, 2020).

³ Elias N. Stebek 'Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements – versus Promise Fatigue' (2015) (9) (2) *Mizan Law Review* 215-257, 227.

⁴ And – partly – the German *Gesellschaft für Internationale Zusammenarbeit (GIZ)*

⁵ A very comprehensive draft "Federal Legal Profession Proclamation" dated 2014 (copy in the author's possession) was never adopted by the legislator.

⁶ In August 2020. (Addendum November 28, 2020: A new draft was prepared by the Office of the Attorney General (copy in the author's possession) the contents of which could not be discussed in this paper.)

⁷ The author's perspective is that of a continental European lawyer; although Ethiopian interlocutors, colleagues and friends have helped to understand the complexities of the Ethiopian legal landscape, every factual mistake is to be attributed to the author.

⁸ Regional State regulations are not discussed here.

199/2000⁹, the Federal Court Advocates' Code of Conduct Council of Minister Regulation No. 57/1999, the Federal Court Advocates' License, Exam. Registration and Registration of Law Firm Fees Council of Ministers Regulation No. 65/2000, and the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010. The main regulatory ideas¹⁰ behind these laws can be summarized as follows:

- "Advocacy services" are defined broadly: basically, every type of legal advice and representation, at court and outside of courts, falls under the definition of advocacy services;¹¹
- Advocacy services are reserved activities;
- only licensed and registered advocates¹² may deliver advocacy services (minor exceptions apply);¹³
- to become an advocate, one has to undergo a certain training (theoretical and practical), pass an exam, meet personal requirements and take out a professional liability insurance;
- there are three types of licenses: a federal first instance court advocacy license, a (general) federal courts advocacy license, and a federal court special advocacy license;¹⁴
- in addition, to practice as an advocate, one has to be listed in the advocate's register;
- law firms are permitted;
- the goal of regulation is to enable advocates to work "for the rule of law and the prevalence of justice";¹⁵
- regulation of access to the advocate's profession is the responsibility of the Federal Ministry of Justice (now: Attorney General);

⁹ The 2000 Proclamation replaced the Legal Notice No. 166/1952.

¹⁰ As can be extracted from the proclamations and regulations mentioned above for lack of concrete information which could only be drawn from legislative material which was not available for the author.

¹¹ Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000 (hereinafter Proclamation No.199/2000), Art.2 (2).

¹² Amharic: "ጠበቃ" (phon. *t'ebek'a*), which is usually translated as "advocate", is used synonymously with the term "lawyer" as described in footnote Error! Bookmark not defined..

¹³ Proclamation No. 199/2000 (n 11), Art.3 (2).

¹⁴ The "federal court special advocacy license" was designed for certain pro bono work; it has never been issued to NGOs and only to two individuals, according to Mizanie Abate & Alebachew Birhanu & Mihret Alemayehu (2017). Mizanie Abate & Alebachew Birhanu & Mihret Alemayehu, 'Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia: Constraints and Opportunities' (2017) (11)(1) *Mizan Law Review*, 1-31, 12.

¹⁵ Proclamation No. 199/2000 (n 11), Preamble.

- professional supervision of an advocate and a disciplinary system is the responsibility of the Federal Ministry of Justice (now: Attorney General);
- representatives from the advocates' profession, the judiciary, and the academia play a role in regulatory bodies established by the law;
- the individual conduct must be of professionalism and integrity; and
- advocates must adhere to professional rules, which include confidentiality, and avoidance of conflicts of interest. Professional independence is explicitly mentioned only in the Federal Court Advocates' Code of Conduct Council of Minister Regulation No. 57/1999 with regard to fee sharing and partnerships with non-lawyers, and with relation to subsidiary activities of a lawyer¹⁶ which might affect this independence.

It seems noteworthy that an advocate, according to current law, is not regarded as an officer of the court¹⁷ nor an organ of the administration of justice,¹⁸ but shall "assist the organs of the administration of justice".¹⁹

2. Need for Change

This current framework has been found to need change for practical reasons as well as for reasons of coherence with (national and) international best practice and law.

2.1. Practical Issues

One of the main motivations for change was not possible weaknesses of the written law, but lack of implementation. Throughout the profession and beyond,²⁰ it was regularly noted that whatever the strengths or weaknesses in the positive law the biggest gap existed in the inability to take advantage of the existing normative system. Within the legal profession, one can for example point out that the regulatory administration was understaffed, not always trained to deliver highest quality services, and in some cases biased especially when it came to licensing, and disciplinary decisions. Some provisions such as those relating to the

¹⁶ The term "lawyer" is used in the meaning mentioned in Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998. "Lawyer" describes an individual licensed to practice law independently.

¹⁷ This is a concept known in some common law countries (e.g. USA, New Zealand, Canada).

¹⁸ This is a concept known in civil law countries like Germany; the European Court of Justice has adopted this concept, too: ECJ, Judgement, February 04, 2020 – C-515/17 P und C-561/17 P –.

¹⁹ Federal Court Advocates' Code of Conduct Council of Minister Regulation No. 57/1999, Art.3.

²⁰ As was heard in meetings and hearings, some of which were televised live.

establishment of a public advocate register, the establishment of law firms,²¹ or quality assurance (such as continuing legal education) were never implemented. Many of the provisions such as initial training system for future advocates or the administration of pro-bono cases was implemented very poorly.

2.2. Regulatory Issues

The greatest need for change was seen in the general regulatory system which was – and still is – a system of government regulation, which is said to – systemically – not allow for a necessary degree of independence, neither for the individual advocate nor for the profession as a whole. Also, a lack of subsidiary rules to regulate law firm licensing, a fair disciplinary system, pro bono case management, and specialization of lawyers were noted by stakeholders.²²

In addition, there seemed to be a need for reviewing the Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000 itself with regard to changed societal, political and economic circumstances, for example with regard to:

- initial training (especially the post-academic training before admission to the profession);²³
- foreigners (of Ethiopian descent) who were interested in getting a license to practice as an advocate;
- cross-border services;
- collaboration with foreign law firms;
- multi-disciplinary practices;
- the handling of trust accounts, and, most notably; and
- real self-governance in a system of independent regulation.

²¹ A law firms directive as foreseen in the Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000 was never created; in practice, no law firm had been licensed.

²² In the meetings mentioned in fn. 21.

²³ No specific practical training for future lawyers is provided, though, cf. Abdi Jibril Ali (2011). Abdi Jibril, 'The Need to Harmonise Ethiopian Legal Education and Training Curricula' (2017) *Ethiopian Journal of Legal Education* (4)(1), 50-92, 80.

3. Lawyer regulation – international standards

Before we look at general international standards, we should note that in the past years, regulatory regimes in many jurisdictions had changed.

3.1. Trends

Current trends in regulatory change include:

- allowing various law firm structures;
- stricter separation of regulatory and representative functions of professional organizations;
- a critical review of strict self-regulatory regimes with regard to their possible unfair restrictions of competition;
- lay involvement in regulation to stress that the reason for regulation is first and foremost the public interest;
- harmonization of regulatory rules in federal countries;
- integration of empirical research into policy-making regarding the legal services market (unmet legal needs studies);
- adding consumer protection to the public interest as a measure to justify regulation;
- change of perspective from lawyer regulation to entity (law firm) regulation;
- change of perspective from lawyer regulation to legal services regulation;
- creation of new “para-professions” as legal service providers with restricted licensed to improve access to justice in certain fields; and
- re-calibration of the limits of activities reserved for licensed lawyers.

3.2. International Standards

Beyond current trends there are some basics in regulation that have developed to become international standards, and are nowadays regarded as the cornerstones of lawyer regulation. They have been established over centuries and refined since the late 1800s in Europe and North America. This time is often described as the period of professionalization of lawyers. Professionalization here is understood as the development of standardized education and rules for admission, some form of association of members of the evolving profession, adoption of standards for professional conduct by the profession and the taking

shape of a disciplinary system to enforce these standards.²⁴ One of the main drivers for this professionalization was the development of a more sophisticated judiciary.

3.2.1. Education

The need for well-educated and trained lawyers grew in order to provide equality of arms between the different actors in the legal community. In the 11th century A.D., it was the university of Bologna where academic legal education began with lectures in Roman law.²⁵ Subsequently, jurisdictions began to require studies of the law at universities and/or a practical training as a prerequisite for admission to the lawyer profession. Today, standards for legal education and/or practical training have become a universal element of regulation of the lawyer profession.²⁶ The IBA describes [p]roper education and training [as] one of the pillars of a strong and independent legal profession”, as “[t]here is a correlation between the lack of comprehensive legal education and training, and a weakened state of independence in a jurisdiction.” The IBA also reports about a correlation between proper education and training and the reputation an independent and unbiased judiciary holds in the legal profession.²⁷

It should be noted here that education and training according to common standards do not only secure a common set of knowledge; education and training furthermore lead to a common socialization of members of the legal profession, especially when future judges, prosecutors, government lawyers and private lawyers are trained together. The flip side of this model is the inherent danger that “unfit” candidates can be informally pushed out, before joining the profession. The alternative would be to only have an admission exam without requirements as to how a candidate requires her or his knowledge. Such a model can be found in some US states and in England and Wales, where an academic law degree is not required as prerequisite to admission. Such outcome-based educational models internationally seem to be a contemporary way of defining educational goals.²⁸ A drawback could be that a focus just on a (final) admission exam might reduce involvement especially

²⁴ Cf. Hubert Treiber. ‘Professionalisierungskonzept und Formierung der Anwaltschaft (1830-1870)’ [Trans. Concept of Professionalization and Formation of the Lawyer Profession (1830-1870)]. in: *Anwälte und ihre Geschichte* [Lawyers and their History] 161-187, page. 164 (Deutscher Anwaltverein 2011)

²⁵ Uwe Wesel, *Geschichte des Rechts. Von den Frühformen bis zum Vertrag von Maastricht* [History of Law From early Manifestations until the Maastricht Treaty] (C.H. Beck 1997), para 109.

²⁶ The term “lawyer profession” is used here to distinguish licensed practitioners from the wider “legal profession”, which includes solicitors, barristers, judges, notaries and some other legal services providers.

²⁷ IBA, *The Independence of the Legal Profession: Threats to the bastion of a free and democratic society* (2016), 24.

²⁸ Cf. UNESCO, *Education and skills for inclusive and sustainable development beyond 2015* (2012) http://www.un.org/millenniumgoals/pdf/Think%20Pieces/4_education.pdf (last accessed: July 17, 2020).

during practical training periods in which skills can be acquired that cannot be easily tested in an exam.

3.2.2. Admission and Licensing

The objective of admission rules is to safeguard that only those who are qualified to give legal advice and represent clients may do so. Rules of admission vary considerably. The responsibility for admission and licensing should, according to the UN Special Rapporteur on the independence of judges and lawyers, lie with professional organizations of lawyers.²⁹ In most jurisdictions this is the case. According to the IBA, 55 % of the jurisdictions internationally have a system in which either the national or the regional / local bar is responsible for admission, alone or in shared responsibility. Only in 7% of the jurisdictions, it is the executive branch of the government, which is the regulator of admission.³⁰ This group of jurisdictions in which the executive has the power over admission is composed mainly of authoritarian states: Out of 16 states which – according to the IBA Directory of Regulators of the Legal Profession – belong to this group, 11 are ranked as “hybrid” (Bolivia, Kyrgyzstan) or “authoritarian” (Bahrain, China, Laos, Oman, Qatar, Russia, Saudi Arabia, UAE, Vietnam) states in the EIU Democracy Index.³¹

Most jurisdictions require a certain amount of theoretical (and often: practical) training, an exam, and proof of a proper conduct (no relevant criminal record), sometimes proof of a professional liability insurance. Even in countries like Finland, where the legal services market is rather unregulated, and where everybody can offer legal services, the right to bear a professional title is regulated. In most jurisdictions, either the title or certain activities are restricted. Prerequisite for being able to practice law is some kind of registration, certification or licensing, sometimes a combination. As stated above, a regulated entry to the profession is one of the main features to define a profession. Justification for entry regulation are traditionally administration or justice reasons. While in the past admission procedures were often used to limit the number of lawyers in order to ensure that an oversupply does not lead to price competition and lower quality, today it is widely accepted that it is the qualification of a candidate which is the decisive criterion. Registration thus should rather be a technicality, if qualification criteria are met; in order to allow for non-discriminatory entry to the profession and to prevent arbitrary refusals or limited access to the profession for socio-economic reasons, no further substantial hurdles should be

²⁹ UNDOC, *Report of the Special Rapporteur on the independence of judges and lawyers* (2012), UN DOC A/49/305, 22.

³⁰ IBA, *Directory of Regulators of the Legal Profession* (2018), 13. It has to be noted that the IBA Directory does not include every state; jurisdictions like North Korea are not included.

³¹ The Economist Intelligence Unit, *Democracy Index 2019: A year of democratic setbacks and popular protest* (2020), 10-14.

introduced.³² There are economic studies demonstrating that restricted access to the profession (“regulated social optimum”) is an effective means to ensure quality. Minimum qualification standards – from an economic perspective – actually can enhance societal welfare.³³

3.2.3. Quality Assurance

Quality assurance as a regulatory goal has elements of standards, services, incentives, and policing. In many jurisdictions, regulation mainly sets the framework for continuing legal education (CLE) programs offered by various actors. This might include content and curriculum standards as well as an accreditation system. There are regulatory institutions, especially self-regulatory institutions, that offer those programs themselves as services for their members, be it commercially or at prizes that are cost-covering or even subsidized by membership fees. Incentives include training certificates or specialist certifications.³⁴ Policing, which rather belongs in the next sub-chapter “Disciplinary system”, includes the regulatory powers to sanction members of the profession if he or she has not fulfilled the requirements to maintain and further develop knowledge and skills. It seems worth mentioning that it has become accepted over the past years that quality does not only mean legal knowledge, but also soft skills and law firm management.

3.2.4. Disciplinary System

Disciplinary models range from disciplinary panels within professional bodies³⁵ to a disciplinary system under the judiciary. According to the 1990 UN Basic Principles on the Role of Lawyers, proceedings should be brought before a disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and ought to be subject to an independent judicial review.³⁶ This illustrates that according to international law and best practice, the disciplinary system must be organized outside the executive branch of the government, and judicial review must be available.

³² Cf. IBAHRI, *Stakeholder Submission to the Special Rapporteur on the Independence of Judges and Lawyers on the role, composition and functions of bar associations* (Draft)(2018), 32.

³³ Justus Haucap ,Alexander Rasch & Christian Weibel (Düsseldorfer institute for Competition Economics) (2017). *Aspekte der Deregulierung bei den Freien Berufen*, pages 11-13.

³⁴ For an international overview cf. Péter Köves, *IBA and CCBE Recommendations Concerning Continuous Legal Education* Presentation (2015) , https://www.ccbe.eu/document/PECO_Portal/Ukraine-June2015/Slides_Peter_Koeves.pdf (last accessed: July 31, 2020).

³⁵ IBA (n 30), 14, 15.

³⁶ UN Basic Principle 28.

3.2.5. From Government Regulation to Self-Governance to Co-Regulation

As mentioned at the beginning of chapter 4.2, professionalization has included elements of self-governance. Historically, though, the lawyer profession's self-regulation is a rather young phenomenon. Until the late 18th century, the profession had mainly been regulated by different branches of the government. In Canada, for example, the year 1797 marks the beginning of self-regulation, when the Law Society of Upper Canada was created by statute. Before, the lawyers had been supervised by the judges they appeared before.³⁷ In the USA, self-regulation began informally and by private association, when – in the 19th century – local clubs of lawyers decided to give themselves codes of conduct to fill “a vacuum of regulatory institutions and standards”.³⁸ This vacuum also gave room for state judiciaries that developed regulatory framework for the lawyers in their jurisdiction.³⁹ Integrated mandatory bars were established in the USA only in the 1920s.⁴⁰

In Germany, to give an example from continental Europe, self-regulatory bars (*Rechtsanwaltskammern*) were established in the late 19th century, after private associations of lawyers (*Anwaltsvereine*) had demanded independence from a government-supervision which was so tight that lawyers were indeed rather civil servants. The demand for self-regulation did match an attitude of growing self-esteem of citizens who increasingly wanted to break free from subservience to the monarchs. In late 19th century Germany, an important element of independence of the profession was unhindered access to the profession, meaning access for everyone who was qualified, without numeric restrictions. Ironically, it was under the reign of the emperor of the *Reich* when self-regulation in statutory bars was eventually granted to the lawyers in Germany in 1878.⁴¹ France saw the development of mandatory bars (*barreaux*) with a responsibility mainly for disciplinary procedures of their members. The profession reached at least partial independence from government administration in the mid-19th century.⁴² Other models include private associations that as entrusted bodies perform regulatory tasks (Norway), or quasi-mandatory membership

³⁷ John Pearson, 'Canada's Legal Profession: Self-regulating in the public interest?' (2013) (92) *The Canadian Bar Review* ,555-594, 557. The Law Society of Upper Canada was not a pure self-regulatory body, since the attorney general and solicitor general of Upper Canada were members of the board, and the judges of the province were able to inspect the Law Society's actions.

³⁸ Fred Zacharias, 'The Myth of Self-Regulation' (2009) (92) *Minnesota Law Review* ,1147-1190, 1157.

³⁹ Charles Wolfram, 'Lawyer Turf and Lawyer Regulation – The Role of the Inherent-Powers Doctrine' (1989-90) (12) *University of Arkansas at Little Rock Law Journal*, 1-23, 5.

⁴⁰ Joseph Planck, 'We, the Lawyers' (1961) (47) *American Bar Association Journal*, 282-285, 284.

⁴¹ Tillmann Krach, '*Eine kleine Geschichte der deutschen Anwaltschaft. Von den Anfängen bis 1945*' [A Brief History of the German Lawyer Profession. From its Beginnings until 1945], in: 2 DAV-Anwaltsausbildung 47-85 (Deutscher Anwaltverein 2005).

⁴² Jörg-Detlef Kühne. *Umbruch der Anwaltschaft: Beginn der Selbstorganisation – Deutschland und Frankreich* [Transformation of the Lawyer Profession: Start of self-regulation – Germany and France]. in: *Anwälte und ihre Geschichte* [Lawyers and their History], pages 136, 137 (Deutscher Anwaltverein 2011).

where, like in Finland or Sweden, the legal services markets are free, but the title *advokat* (Sweden) *oder asianajaja* (Finland) is reserved to members.

It should be mentioned that the term “self-regulation” is not used consistently in different jurisdictions. It is used more or less synonymously with “self-government”⁴³ and “self-administration”.⁴⁴ “Self-government” seems to stress independence, while the term “self-administration”, which is a literal translation of the German term *Selbstverwaltung* puts an emphasis on self-governance being part of (independent) public administration, which has to follow public administrative rules. All models have in common that the self-regulatory aspect is more or less bound by legislative framework, and that there is no pure, absolute self-regulation without any role of government, be it the legislature, the executive or the judiciary. They share the common denominator that they rely on democratic legitimization from outside of the profession, while making use of the in-depth knowledge of members of the profession to govern.⁴⁵ A regulatory trend, especially notable internationally since the 1990s, is to stress public interest legitimization, because regulation limits professional freedom of the individual lawyer, and controls the legal services market to some degree.

The term “co-regulation” was first introduced in the field of lawyer regulation in Australia since the 1990s, as a reaction to the observation that unsupervised self-regulation by the profession itself might lead to reducing necessary competition and did not fulfil necessary requirements regarding quality and conduct.⁴⁶ Ultimately, it is important to note that there is no “pure” self-regulation; but at the same time, there is no good regulation without considerable space for professional bodies to self-regulate, in order to systemically reduce the risk of undue government influence and arbitrariness.

3.2.6. Supervision / Oversight

Independent supervision of decisions and measures of the regulatory institution(s) is necessary to complete the system of regulation. Supervision should include a supervisory institution the power of which is restricted to reviewing the lawfulness of decisions and measures, and the possibilities of judicial review.

⁴³ Used i.a. in Canada, and England.

⁴⁴ Used predominantly in contexts that are influenced by German law tradition.

⁴⁵ Cf. Cord Brüggmann, ‘Lawyer Profession International – Better Regulation’ (2019) (1) Bucerius Law Journal, 7-12, 9.

⁴⁶ David Robinson, ‘An overview of the Legal Profession Uniform Law BarNews’ (2015) The Journal of the New South Wales Bar Association (2015), 37; <http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2015/48.pdf> (last accessed: July 28, 2020).

3.2.7. Independence

While education, admission, quality assurance, a disciplinary system and self- or co-regulation are elements of the profession's constitution as a whole, it is independence, confidentiality and avoidance of conflict of interest that are universally regarded as the core values the individual lawyer has to follow. Independence is the overarching principle for the profession and the link between the profession as a whole and the individual lawyer. Independence for the profession as a whole requires independent regulation, which – as shown – includes institutions for the independent administration of non-discriminatory admission and licensing, quality assurance, and a fair disciplinary system, as well as a statutory framework for the adoption of subsidiary rules and regulations. Independence with regard to the individual lawyer, like the other core values, is not a privilege for the lawyer, but a duty toward the client.

The IBA International Principles on Conduct for the Legal Profession state that “[a] lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client’s case.”⁴⁷

Independence includes independence from the government as well as independence from the client. Independence does not mean impartiality. As the UN Special Rapporteur on the independence of judges and lawyers stated: “[L]awyers are not expected to be impartial in the same way as judges, they must be as free from external pressures and interferences as judges⁴⁸ [in order to exercise their profession in accordance with the UN Basic Principles on the Role of Lawyers⁴⁹].”

The German Federal Constitutional Court in 2003 said: “As independent organs of the administration of justice and as [legally] authorized advisors and representatives of those who seek justice, it is the task of lawyers to produce adequate conflict solutions, to fight for justice on behalf of their clients in court, and at the same time to prevent the government from making wrong decisions to the detriment of their clients.”⁵⁰ Independence of the lawyer from the government is one important precondition for the necessary client’s trust

⁴⁷ IBA, *International Principles on Conduct for the Legal Profession* (adopted May 28, 2011), 5.

⁴⁸ UN Report of the Special Rapporteur on the independence of judges and lawyers (2014), UN DOC A/HRC/26/32/Add. 1, para 78.

⁴⁹ UN Basic Principles on the Role of Lawyers (1990).

<https://www.un.org/ruleoflaw/files/UNBasicPrinciplesontheRoleofLawyers.pdf> (last accessed: August 3, 2020).

⁵⁰ German Federal Constitutional Court, July 3, 2003 – 1 BvR 238/01 –

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2003/07/rs20030703_1bvr023801.html (last accessed: July 21, 2020).

in his or her lawyer. Concepts such as lawyers as “officers of the court” (Anglo-American legal tradition) or “organs of the administration of justice” (German legal tradition) do not compromise independence from government branches. On the contrary: independence allows the lawyer to counter possible attempts of courts and the government to ask for an inadequate collegiality or false considerations: The duty to be independent gives the lawyer the freedom to stay obliged only to the law. The concept of independence also includes the duty to stay independent from the client’s demands if these demands are not within the boundaries of the law. It is important that the lawyer is not perceived as the “mouthpiece” of the client.

3.2.8. Avoidance of Conflict of Interest

Avoidance of conflict of interest, which is a specific expression of independence, illustrates that independence does not mean impartiality. Avoidance of conflict forbids the lawyer to be in a position in which she or he cannot full represent the interests of the client. It includes the prohibition to take new clients if representing them would violate the duty to avoid conflicts because of previous client-relationships. In many jurisdictions, this duty is absolute, meaning it is not dependent on the client’s will. Internationally, the duty to avoid conflicts of interest is laid down in Art. 13 (b) and Art. 15 of the UN Basic Principles on the Role of Lawyers.

3.2.9. Confidentiality

The main aspect of confidentiality (laid down in Art. 22 of the UN Basic Principles on the Role of Lawyers) is that in most jurisdictions the lawyer is allowed to refuse to give evidence in court proceedings and before authorities, which may extend to everything which the lawyer becomes aware of during her or his mandate. The duty of confidentiality is secured by statutes and codes of conduct. In France⁵¹ and Germany,⁵² for example, it is secured by criminal statute making the breach of this duty a criminal offense. The extent of the attorney-client privilege varies in different jurisdictions. The substantial reason for the lawyer’s duty to keep confidentiality is to protect clients by providing a “safe space”: This is true for clients who feel that their rights are violated, but also for clients who potentially committed a violation of the law, and want to find a way to deal with potential consequences in order to return to lawfulness.

⁵¹ French Criminal Code, Article 226-13.

⁵² German Federal Criminal Code, Section 203.

3.3. Cui Bono?

Often, lawyer regulation is regarded as a regulation that first and foremost serves the lawyer profession. Some historical developments might have contributed to this view. However, as we have seen with regard to the core values, they are not privileges for lawyers, but duties and restrictions of professional freedom, established to protect clients' rights. Good regulation, therefore, has to serve the public interest, which again has individual and collective elements. Individual elements of public interest seem to become all the more important the more heterogeneous a society is structured.

3.3.1. Clients, Access to Justice

From the perspective of the (potential) client, the regulation of lawyers is to safeguard their individual access to justice in a "market" with asymmetric information. The client cannot assess quality and prize of legal advice, and thus has to be protected by rules that guarantee (minimum) standards. The definition of access to justice used here is as follows: Access to justice is to have rights, to know about one's rights, and the ability to pursue one's rights within the system of the administration of justice." This definition mostly corresponds with the definition the UN has developed: According to the UNDP, access to justice is "[t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards."⁵³ The definition used here is narrower than the UN definition in that it does not explicitly include traditional and private justice systems, unless those systems are recognized by the formal justice system and unless a minimum appeal procedures to the government judiciary are provided for; in that case, informal⁵⁴ and private justice systems become part of the administration of justice. The definition used here is at the same time wider than the UN definition, because it includes the knowledge about one's rights, hence access to legal information: Good legal advice often prevents loss of individual rights that cannot always be reclaimed in the justice system. This definition shows that the scope of regulation in the interest of the individual client has to include advice and representation. It should encourage those who are regulated to provide low-threshold legal information. The definition used here also explicitly includes not only access to a remedy by the formal justice system when one's rights are violated. It includes a fair decision even if the formal justice system decides that one's rights have not been violated.

⁵³ United Nations Development Programme, *Strengthening Judicial Integrity through Enhanced Access to Justice*, (2013).

⁵⁴ The scope of federal court lawyers' regulation is limited and necessarily does not reflect the legal pluralism in Ethiopia, as granted by the Ethiopian Constitution, which recognizes and allows religious and customary courts in Art. 78 (5). For an instructive overview of the diverse legal landscape in Ethiopia cf. Susanne Epple & Getachew Assefa (eds.), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, (Majuskel Medienproduktion GmbH, Wetzlar 2020).

And it further includes the right to pursue one's rights within the whole system of administration of justice, which again goes beyond the judiciary, and includes the right to a lawyer.⁵⁵

It is important to note here that the term "client" includes any recipient of services by an advocate. The scope of this access to justice definition includes individuals as well as entities. Hence, access to justice has a human rights aspect, but the concepts of access to justice and human rights are not congruent. Access to justice is a principle also laid down in the AU African Commission on Human and Peoples' Rights' 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.⁵⁶ Sec. G of these Principles and Guidelines emphasize that governments must ensure access to a lawyer in order to implement the right to access to justice.

3.3.2. The Rule of Law

Internationally, the most commonly used definition of rule of law is the 2004 UN description of the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."⁵⁷ The great significance this concept of the rule of law, which has a number of historical predecessors, lies in the understanding that not only the citizens, but that the state, too, is bound by the law, which restricts, or better: contains, government power in order to prevent disproportionate infringements on human and civil rights. It is important to understand that restriction or containment of government powers do not weaken the overall functioning of a country, but the constitutional or statutory "fence" is the necessary formal element of the rule of law, which allows its substantial elements: justice, predictability of legal and administrative decisions and individual freedom, to be implemented.

Lawyer regulation in the public interest constitutes a systemic element of the rule of law. First, empirically: A look into history allows to make a strong case for the assumption that there is a correlation between the existence of an independent profession and a strong state of democracy and rule of law in a society: "Autocrats [...] have much less need for law and

⁵⁵ Some consider legal aid regulation to be part of lawyer regulation, since legal aid is an integral part of implementing access to justice. Here, legal aid regulation is not mentioned, because it is not included in the current reform discussion in Ethiopia. It should be noted, though, that legal representation at state expense is granted by Art. 21 (5) of the Ethiopian Constitution.

⁵⁶ <https://www.achpr.org/legalinstruments/detail?id=38> (last accessed: July 28, 2020).

⁵⁷ UN Secretary-General, *The rule of Law and Transitional Justice in Conflict and Post Conflict Societies*: the report of Secretary General, (2004) UNDoc. S/2004/616, para 6.

lawyers [...]”⁵⁸ Also, with the absence of corruption being an indicator for the strength of the rule of law⁵⁹ a strong, independent regulatory system for lawyers is necessary to maintain and enforce individual independence of lawyers, which is key to a low risk of corruption. According to the UN Special Rapporteur on the independence of judges and lawyers, it is “a legal culture [of] the rule of law, in which the respect for the independence of judges and lawyers plays a crucial role.”⁶⁰ This implies a set of regulations to minimize the risk of government interference in the affairs of the professional organizations. Another principle of the rule of law is that the executive itself has to follow principles of transparency and accountability, to act only within the limits and through procedures the law sets, and, in their decisions, to consider the fundamental rights of parties involved or affected.⁶¹ In Ethiopia, this important principle has just been manifested in the recent Federal Administrative Procedure Proclamation No. 1183/2020 of April, 2020.

On an individual level, potential clients need trust in a well-organized and independently regulated lawyer profession in order to be able to approach a member of the profession, especially in case of distress. The rule of law can only be realized on an individual level if the individual client knows that she or he can find a safe and protected space in which she or he can open up to the lawyer, and safely assume that confidentiality is maintained. The chapter on confidentiality⁶² has shown the significance of this aspect of spaces in safe from government interference.

Independent regulation also serves the individual lawyer by protecting her or him from arbitrary or politically motivated government interference. Defending against such interference is, while a respite for the individual lawyer from unprofessional interference with her work, primarily also meant to protect the interests of the equality of arms, administration of justice, and rule of law.

⁵⁸ Richard Abel & Philip Lewis, *Lawyers in Society: An Overview*, (University of California press 1996), 284, <http://ark.cdlib.org/ark:/13030/ft8g5008f6/> (last accessed: August 1, 2020)). This finding from the viewpoint of a sociologist can be underpinned by a comparison from Germany during its separation. Before the fall of the iron curtain in 1989, there were around 57,000 lawyers in the Western Federal Republic of Germany, while in the Eastern Communist German Democratic Republic only around 600 lawyers were registered.

⁵⁹ According to the World Justice Project, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017-2018/factors-rule-law/absence-corruption-factor> (last accessed: July 29, 2020).

⁶⁰ UN Report of the Special Rapporteur, *on the independence of judges and lawyers (2016)*, UN DOC A/HRC/32/34, para 48.

⁶¹ In German law, this has found its manifestation in the principle of *Justizförmigkeit der Verwaltung*, which says that the administration has to issue decisions in a form corresponding to that of a judgement, and that are subject to review. Also, whenever the administration has a scope of discretion, it has to consider fundamental rights of parties involved or affected.

⁶² See above, page 10.

3.3.3. The Lawyers

Last, but not least, lawyer regulation, being restrictions of a free legal services market and of the individual lawyer's professional freedom, has to be proportionate in order to allow for an economically stable lawyer profession. Burdens imposed on lawyers such as pro bono obligations, fee restrictions, or the prohibition to accept a client in case of conflicting interests cannot lead to a loss of income to an extent that could affect independence and thus destabilize the role of the lawyers as agents for public interest and access to justice. In short: An economically sound lawyer profession is better for the rule of law and economic prosperity of a country than a lawyer profession which is economically unstable and thus does not possess the independence it needs to work for the interest of the individual client and the rule of law.

So, good lawyer regulation must provide access to justice for the individual client, systemically strengthen the rule of law, and establish and ensure that a resilient lawyer profession can develop. The regulatory framework as a whole must give the profession and the individual lawyer a role within the system of the administration of justice, which allows equal footing with the judiciary (and prosecutors), especially within judicial proceedings.

4. Ethiopia – From status quo to two Draft Laws

4.1. The 2018 Reforms

As mentioned above, the time seemed ready for an overhaul of the regulatory framework for the lawyer profession, which consists of about 4,000 lawyers admitted and licensed to practice at federal courts. The reform process the Ethiopian Prime Minister Dr. Abiy Ahmed initiated seemed to offer a good basis for a critical assessment and revision of the existing law. The government, in mid-2018, established an 13-member independent Legal and Justice Affairs Advisory Council (LJAAC), comprised of academics, lawyers, and civil society organization representatives. The LJAAC is presided over by Professor Tilahun Teshome, a former Supreme Court judge and legal scholar, at Addis Ababa University. It is an independent body, administered by its own staff. For each legislative reform project, the LJAAC established a volunteer specialist working group tasked to prepare draft laws which, following discussion, public consultation, possible amendment, and approval, were to be submitted to the Federal Parliament in order to go through the legislative process. This open,

“bottom-up” approach to assessing needs and drafting legislation has gained international acclaim as a model for public participatory processes of legislative drafting.⁶³

The reforms included revising the anti-terrorism law, work towards a more liberal media law, a law guiding future elections, and a new charities and societies law to strengthen freedom of association. Reform efforts have also focused on the regulatory framework for the judiciary. Reform of the justice sector seemed particularly important because, as reports state, and as many interlocutors have confirmed, there is a widespread perception in Ethiopia that the judicial system suffers from corruption and discrimination. Tackling these issues is crucial: corruption in the justice sector undermines efforts to control corruption in other sectors of society, weakens the rule of law, and hinders positive economic development.⁶⁴

Against this background, the Ethiopian government agreed to look into reforming the regulatory framework for the lawyer profession.

4.2. The Working Group Draft

A lawyer regulation working group was established in mid-2018. It was composed mainly of practicing lawyers and academics and chaired by Manyawkal Mekonnen, director of the ELA. The working group conducted focus groups and stakeholder workshops, collecting facts and opinions in order to identify details about needs for reform. In addition to the issues mentioned above,⁶⁵ members of the lawyer profession, the judiciary, and stakeholders repeatedly mentioned instances of politically motivated (re-licensing and disciplinary) decisions by government officials vis-à-vis lawyers whose work interfaced with repressive laws, such as the 2009 anti-terrorism proclamation. Some described this as harassment, others as intimidation, or as a biased disciplinary system which not only affected lawyers, but also judges and public prosecutors. All this leads to a considerable level of distrust towards the regulatory system among key stakeholders. In the focus group's discussions and stakeholder meetings, representatives from many groups called for a more pro-active, independent regulation of the lawyer profession. In order to get international best practice

⁶³ David Kaye, *United Nations Special Rapporteur on the right to freedom of opinion and expression: End of mission statement* (2019). <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E> (last accessed: July 27, 2020); IBA, *Report on Missions to Ethiopia* (April 2020) (English and Amharic), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=c36cc061-afda-4d34-9e1e-4b7c5b76ee0e> (last accessed: August 01, 2020).

⁶⁴ Cf. The World Bank, *Diagnosing Corruption in Ethiopia* (2012), 181-236; World Justice Project, *Rule of Law Index* (2020), <https://worldjusticeproject.org/rule-of-law-index/factors/2020/Ethiopia/> (last accessed: July 27, 2020).

⁶⁵ Chapter 3.

experience, the ELA asked the IBA⁶⁶ to provide expert advice.⁶⁷ The working group decided to evaluate, consider and – if and insofar as appropriate – adopt international trends in a new draft.

As a result, the working group prepared a comprehensive study about the legal profession in Ethiopia and the regulatory framework guiding it. The study was submitted to the LJAAC. Upon further discussion and receiving feedback from the LJAAC, the working group prepared a draft statute. In order for the draft to be coherent with needs of the profession and stakeholders, in the drafting phase, too, the working group conducted stakeholder meetings in Addis Ababa, Bahir Dar, and Awassa. In discussions with the LJAAC (and government representatives), it became clear that while many reform proposals were undisputed, the extent of supervision of self-governing bodies and the extent to which licensing power was to be transferred to the profession were issues in which agreement had not yet been achieved. Especially, it seemed that the then Attorney General⁶⁸ did not yet want to fully hand over licensing and annual re-licensing to the profession.⁶⁹

Subsequently, in August 2019, the working group submitted a draft which included articles stipulating a sound legal framework for the individual lawyer's independence including a section on the core values independence, professional secrecy, and avoidance of conflict of interest, as well as sections creating a (mandatory) independent federal bar⁷⁰ as a public body with the power to play a role in regulating admission and licensing, quality assurance and a disciplinary system. The controversial issue of licensing power was resolved by a language which on the one hand gave an applicant an explicit right to be licensed when she or he met the criteria laid out in the proclamation. This was to clarify that access to the profession

⁶⁶ The IBA was established in 1947, and has since contributed to global stability and peace through advocating for the rule of law. The IBA's membership consists of 80,000 individual lawyers and law firms, and over 190 bars and law societies from more than 170 countries. As the global umbrella organization for the legal profession, the IBA has supported the establishment of mandatory bars and voluntary bar associations in many jurisdictions. The IBA has a long-lasting relationship with its member, the ELA.

⁶⁷ While an IBA commissioned report of January 2019 was used for internal discussion, the IBA published a Report on Missions to Ethiopia in April 2020 (English and Amharic): <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=c36cc061-afda-4d34-9e1e-4b7c5b76ee0e> (last accessed: August 02, 2020).

⁶⁸ Berhanu Tsegaye. He was appointed ambassador to Australia in March 2020 and succeeded by Adanech Abiebie.

⁶⁹ This conclusion can be drawn from discussions the author had with interlocutors in Ethiopia. The concerns would be valid, since the transfer of power to a professional organization would – in any case – need capacity building on the profession's side. This seemed undisputed in the debate.

⁷⁰ Although in the international world of lawyers' organizations numerous names can be found for regulatory and representative organizations, in many jurisdictions the term "bar association" is used for voluntary associations (for example: American Bar Association, Canadian Bar Association, German Bar Association) which mainly represent the interest of the profession, while the terms "bar" or "law society" are used for mandatory statutory (predominantly) regulatory bars (for example: German Federal Bar, Austrian Bar, Danish Bar and Law Society, Hong Kong Law Society, Law Society of Kenya).

must be non-discriminatory, and that whoever is in charge of issuing the license cannot arbitrarily refuse to do so, or create subsidiary legislation that limits this right:

31. Principle

[...]

- 2. Any person who meets the qualification criteria specified in this section shall be entitled to be admitted to the legal practice as an advocate.*
- 3. The right provided under sub-Article 2 of this Article may not be denied by reason of sex, gender, religion, ethnic or social origin, political opinion, property, birth or physical disability [...].”*

The working group draft suggested that the federal bar would consider an application through an admissions committee, and make a recommendation to the Attorney General who would only be able to not follow the recommendation if the recommendation was unlawful. This concept was designed to address and consider the concerns the Attorney General had by leaving the legally effective decision with the Attorney General Office. At the same time, handing over administrative duties (and powers) to the bar would allow for a preparation of the transition of administrative functions to the bar which was the final aim of this legislative project.

4.2.1. Oversight

In order to set out roles and powers between the regulatory institutions (professional bodies and government) clearly, while at the same time balancing the interests between allowing for a necessary degree of self-governance of the profession and preventing self-governance from becoming self-serving and from losing sight of public interest, the working group chose a model of co-regulation. According to the Working Group's model, primary responsibility for administering and governing the profession within the boundaries of the proclamation lies with the profession through the mandatory federal bar. The government, through the Attorney General Office, has the duty and the right to supervise and examine the legality of measures and decisions of the bar. Judicial review through independent courts can be initiated by any party. This supervision which is limited to the question if measures and decisions are lawful rather than a supervisory power which allows the supervisor to step in if measures and decisions are deemed to be inexpedient adequate for the necessary degree of independence of a bar, but gives the government a possibility to intervene directly without the need to first take matters to the court system.

This model of legal supervision is reflected in a general clause:

9. Supervision

- 1. As a public body, the Bar shall be supervised and supported by the Federal Attorney General.*
- 2. The supervision is restricted to the question of whether directives of the Federal Bar are lawful and shall not extend to the day-to-day functioning of the Bar.*
- 3. Decisions by the Federal Bar regarding the adoption, amendment, and annulment of directives shall not enter into force until they have been approved by the Federal Attorney General.*
- 4. In case of non-approval, the Bar may submit the matter to a competent court for review and annulment if it deems that this decision of the Federal Attorney General unlawful.*

4.2.2. Transition

A realistic transfer of regulatory and administrative duties was one of the specific challenges during the process of drafting in which the specifics of the Ethiopian political and societal situation needed to be considered very carefully. The solution the draft came up with was to find explicit, but not unalterable transitional provisions. Also, the draft provided that the Attorney General and a newly established steering committee which would have had to manage the transition would agree on a timetable for the transition:

91. Transitional Provisions

- 1. The Federal Attorney General shall continue the regulation of advocates pursuant to the existing laws until the Bar takes over the responsibility in accordance with this Proclamation.*

[...]

- 4. The Federal Attorney General shall form a five-member steering committee drawn from the Federal Courts, the Attorney General, legal professional's associations.*
- 5. The steering committee shall call the first General Assembly meeting [of the bar] and shall serve as an election committee under this Proclamation.*

[...]

- 7. The Federal Attorney General shall hand over regulatory duties to the Bar according to a time plan agreed upon between the steering committee and the Federal Attorney General. ... The Bar shall strive to take over the core regulatory functions as follows:*

[...]

c) *Admission and licensing: fifteen months after the effective date of this Proclamation;*

[...]

8. *The Federal Attorney General shall extend the time for the handing over of a duty for a period not longer than one year, where the Bar requests such extension upon determining that it is unprepared to take over a duty under this Proclamation.*

9. *The Federal Attorney General may assign the duty to issue licenses to advocates to the Bar through an agreement. Such assignment shall not be effected unless the Attorney General is convinced that the Bar is able to properly administer licensing of attorneys.*

This was considered by the working group as a compromise which took into account the concerns the Attorney General had regarding licensing. At the same time, the working group, assisted by the IBA, worked on a detailed plan which set out milestones and detailed steps for a capacity project to establish the mandatory federal bar and other institutions mentioned in the draft. Such time plans serve three main purposes. Firstly, a rather detailed plan allows for a more concrete picture of how to reach the proclamation's legislative objectives with regard to the actual establishment of a self-governing institution and its organs and bodies. Secondly, it illustrates that such a process would be incremental, and last 3-5 years. And last, but not least, an early project plan which includes budgetary suggestions can illustrate the possible need for outside funding. In short, such a time plan can demonstrate executability of a statute.

4.2.3. Other

The working group's draft also included regulation for lawyer/client trust accounts (which have not been introduced in Ethiopia), requirements for continuing legal education, and the need to maintain a professional liability insurance. In reaction to requests from the profession, the draft proclamation also included rules that allow the establishment of law firms. This seemed important to the working group to allow structures that are competitive with international law firms, but also to allow for a modernization of structures in the national context. Regulatory and representative functions were separated clearly in the draft. The working group decided that as a general rule, the draft proclamation was to contain general principles which lay the ground for the profession to regulate specifics in a code of conduct.

4.3. The AG Draft

In December 2019, a new draft by the Office of the Attorney General became known.⁷¹ This came to a certain surprise for all actors involved, because it showed that the then Attorney General had reconsidered his initial ideas.⁷² With regard to regulation and administration of the profession, the AG draft

- leaves regulation and administration mainly with the Office of the Attorney General,
- establishes a mandatory “Federal Bar Association” with limited powers,
- adds an “Advocates Board of Administration” with a role somewhere between regulation, administration, and supervision, and
- adds a regulatory role for the Council of Ministers.

The AG draft reflects that the government seems to have felt that the regulatory and governing power should remain with it, and not yet be transferred to the profession. The following analysis is limited to those parts of the draft which concern regulation of the profession and professional core values. They do not comment on many aspects important for the exercise of the profession, like the new possibilities to form a law firm, rules regarding trust accounts, or the rules for non-Ethiopians to access the profession.⁷³

4.3.1. Title of the AG Draft Proclamation

The title of the AG draft refers to “advocacy services”, thus making clear that it focusses on lawyers⁷⁴, and not on the legal services market in general.

4.3.2. Preamble

The AG draft’s preamble makes clear that to protect “recipients of advocacy services” and “to ensure access to justice and the rule of law” are key objectives of the new law. Like the working group draft, it indicates that high quality of legal services and high professional standards are needed to reach this goal. The AG draft does not, however, refer to independent regulation and administration of the lawyer profession; although it does

⁷¹ For my analysis an unofficial translation of the original Amharic draft is used, which had been prepared with IBA support for its consulting work.

⁷² Before, the then Attorney General had endorsed the working group draft in public events.

⁷³ It would go beyond the scope of this paper to analyze these regulations, even though they have implications for the stability of the profession as a whole.

⁷⁴ As defined in (n 2).

mention “professional independence” as being necessary “to protect public interest and to ensure justice”. The essential difference compared to the working group draft, though, is that the AG draft clearly states that regulation is a joint regulation by government and professionals. We will see below what the drafters had in mind when describing their regulatory system as a “joint regulation” system, and if it meets the international standards known as co-regulation. It should be noted that the AG draft in its preamble does acknowledge the need to establish law firms as well as a continuing legal education system and a “fair and adequate” complaints handling system.

4.3.3. Education

The AG draft does not change the education requirements as set in the current law. It does not require a structured practical training. The principles in the AG draft, though, would allow for specific regulation in the code of conduct. If the code of conduct is to include specifics, though, the proclamation should explicitly allow for this.

4.3.4. Admission and Licensing

Most licensing requirements the AG draft sets out (e.g. legal education, practical experience) are not unusual; one finds similar requirements in many jurisdictions. They serve the purpose to set minimum criteria for knowledge and experience those who are new to the profession must meet. It seems remarkable, though, that the AG draft adds the requirement of not having been “subject to serious disciplinary measures during [the] last two years of employment”⁷⁵ to the existing law, which only requires “a letter from [the] former employer regarding the applicant’s conduct or performance”.⁷⁶ Although it might be argued that “serious disciplinary measures” narrows the scope for denying a license compared to general good ethical behavior criteria, “serious disciplinary measures” seems to be too vague a term in light of the requirements of clarity and predictability. Those terms are windows for arbitrary administrative decisions and should be avoided from a *lex certa* point of view based on the language of the draft. However, given the fact that there are reports about a history of abuse of such discretion by the previous ruling party including by threatening the license of lawyers, this is not a matter that should be taken lightly.⁷⁷

The same is true for the terms “adequate experience in the legal profession.”⁷⁸ As much as it is true that the proclamation should only set principles, the experience reported in public

⁷⁵ AG draft, Art. 6 (1) c.

⁷⁶ Proclamation No. 199/2000, (n 11), Art. 4(1).

⁷⁷ The author has received such report; they are in his possession.

⁷⁸ AG draft, Art. 6 (1) e.

hearings shows that clearly defined criteria seem to necessary to minimize the risk of arbitrary licensing decisions. Clarity and predictability actually are important criteria for good legislation in a system governed by the rule of law.⁷⁹ This requires to refrain from the use of blanket clauses as much as possible in order to narrow down too wide discretionary power of the executive. It should be noted that this is true regardless of which institution is responsible for the licensing and re-licensing decisions, be it a self-governing body, an independent regulator or the government itself: Legislation based on the rule of law has to be precise, clear and must allow predictability of decisions by public authorities. Again, the aim of good licensing regulation, in addition to quality assurance, is to allow non-discriminatory access to the profession as well as the prevention of misuse of the re-licensing rules to become instruments to enforce (political) “well-behavior”. This is not just a theoretical risk, but has been reported from quite a number of jurisdictions.⁸⁰

4.3.5. Quality Assurance

Most importantly, the AG draft sets a clear objective of the draft law:

25. Objective

The objective of continuing legal education is to update the legal knowledge and skills of advocates on a regular basis in order to enable them to carry out their professional responsibility.

Read together with the overall objective of the draft as set out in the Preamble (“to ensure the availability of improved [...] legal services”, “to raise the professional [...] ethics of the legal profession”, and – especially – “Setting up a system of continuing legal education by which advocates familiarize themselves with newly enacted laws, legal concepts and national and international experiences”), the introduction of a systemic CLE requirement seems to be a proportionate instrument to reach these goals.⁸¹

The AG draft further sets out principles for continuing legal education (CLE). The amount of mandatory CLE (10 days a year) seems high in international context: The ABA Model Rules on Continuing Legal Education⁸² suggest 15 hours of training per year; the Law Society

⁷⁹ This general rule is specifically set out for Directives in Art.15 (2) of the newly adopted Federal Administrative Procedure Proclamation No. 1183/2020.

⁸⁰ Cf. IBAHRI (n 32),35.

⁸¹ The important question of who administers, monitors and is responsible for disciplinary actions after breaches of the CLE duty will be dealt with later under chapter 4.3.7, as this question should be answered for all regulatory powers and duties.

⁸² https://www.americanbar.org/content/dam/aba/directories/policy/2017_hod_midyear_106.pdf (last accessed: July 28, 2020).

of British Columbia⁸³ requires at least 12 hours; in Kenya, Sec. 4 (a) of the Advocates (Continuing Professional Development) Rule, 2014 states that every advocate has to undergo 5 units of approved CLE events. An online webinar of 75 min, to give an example, allows for 1 unit.⁸⁴ In Europe, CLE requirements range between 16 and 20 hours per year,⁸⁵ with exceptions such as Germany. Sec. 43 a Para 6 of the German Federal Lawyer's Code⁸⁶ says: "A Rechtsanwalt has a duty to engage in continuing professional development." Continuing professional development here can be used synonymously with CLE. The legislator, when adopting this statute in the 1990s, decided that this requirement does not need a more concrete language, because every lawyer knows which kind of and how much CLE would be adequate for him or her. So, the suggested 10 days a year might pose a burden prone to violations. While the AG draft is an improvement over the Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000, which does not include references to CLE, the working group draft requires 24 hours of CLE.

A potentially problematic part of the CLE framework might be that the Bar Association has the power to regulate and accredit CLE providers and – at the same time – offer trainings itself. If the AG wants a private CLE market to grow, as the AG draft indicates, it is necessary to be ensured that the Bar Association does not interfere in this market by regulation that favors its own CLE programs disproportionately, which might be problematic under competition law.

4.3.6. Disciplinary System

Regarding substance, the AG draft's disciplinary system seems not to be problematic. In particular, the fact that offences are clearly described in a graduated system of penalties for minor and more serious offences seems to meet international standards and best practices.

4.3.7. Good Regulation – Who is the Regulator?

The rules for licensing, quality assurance, and the disciplinary system laid out in the AG draft cannot be seen separately from the question of who has the power to regulate and

⁸³ Decided by the benchers of the Law Society (<https://www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-misc/info-cpd.pdf>, last accessed: July 28, 2020) according to Rule 3-29 (1) of the Law Society Rules 2015. https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/mm/LawSocietyRules_2018-03.pdf (last accessed: July 28, 2020).

⁸⁴ <https://lsk.or.ke/events/events-countdown/> (last accessed: July 28, 2020).

⁸⁵ Cf. CCBE Model Scheme for Continuing Professional Training (2006). (https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TRAINING/TR_Position_papers/EN_T_R_20061125_CCBE_Model_Scheme_for_Continuing_Professional_Training.pdf (last accessed: July 28, 2020).

⁸⁶ https://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf (last accessed: July 28, 2020).

administrate the profession. As we have seen, this plays a – if not: the most important – role to determine the independence of the lawyer profession as a whole. The AG draft departs clearly from previous ideas discussed since the working group had been established. The AG draft makes the Office of the AG the primary regulatory institution. Under the framework of the draft, the AG would have the power:

- to give itself a directive regulating details for licensing;
- to license lawyers;
- maintain the register of licensed lawyers;
- to assign pro bono cases and to administer the pro bono system;
- to appoint the chair persons of the board's committees;
- (the obligation) to fund the board and its secretariat;
- (the obligation) to provide office space for the board secretariat in the AG offices; and
- to delegate powers to the Bar Association.

A newly established Advocates Administration Board (board), comprised of 3 members of the lawyer profession, 2 representatives of the AG office, 1 representative of the Federal Supreme Court, and a representative of the Addis Ababa University,⁸⁷ would:

- have an AG funded secretariat in the AG offices;
- serve as appellate institution for licensing issues;
- serve as the general supervisory authority of advocates with:
 - o restricted supervisory power over AG decisions and regulations;
 - o restricted supervisory power over Bar Association decisions and regulations;
 - o duty to review complaints;
 - o duty to decide on administrative fees;
- regulate trust accounts; and
- have committees for discipline and entry exam matters (the chair being appointed by the AG).

⁸⁷ AG draft, (n 75), Art. 70 (2).

The Council of Ministers would have the power to

- regulate details of form requirements for lawyers' contracts; and
- adopt a code of conduct to regulate lawyers' duties and ethical responsibilities in detail.

The mandatory Bar Association would:

- be involved in preparation of the entrance exam;
- control compliance with CLE rules;
- have to inform the AG if a lawyer does not comply;
- have to monitor compliance with pro bono duties (without having disciplinary power);
- have some powers in regulating trust accounts;
- have the duty to do the initial investigation of clients' complaints, to forward a case to the AG;
- have the duty to protect members' interests; and
- have to make sure members follow conduct rules.

Judicial review of board measures and decisions lies with the Federal First Instance Court⁸⁸ and the Federal High Court.⁸⁹

In the terms of the draft's preamble, this allocation of powers and duties is to constitute a system in which the profession "regulated jointly by the government and professionals." Is "joint regulation" the same as "co-regulation"? As stated above,⁹⁰ co-regulation historically has meant taking powers away from self-regulatory bodies, in order to reach a system in which self-regulatory institutions are integrated in a system of accountability and in which public interest is safeguarded better than in an unsupervised self-regulatory system. Here, the term "joint regulation" suggests that the Federal government is willing to give up some of its regulatory powers to reach a more balanced system with substantial elements of self-governance. So, one could reach co-regulation from two different starting points.

But it seems that the AG draft understanding of joint regulation differs considerably from the international understanding of co-regulation, because co-regulation always implies that

⁸⁸ AG draft (n 75), Art. 9 (7) for licensing decisions; Art. 41 (6) for decisions regarding the establishment of a law firm.

⁸⁹ *ibid*, Art. 74, Art. 89 (3) regarding decisions in disciplinary matters.

⁹⁰ Cf. chapter 3.4.5.

every actor in the regulatory system has room for their own regulatory decisions. Joint regulation understood as a shared, collective regulation with organs that include representatives of the government and the profession (and – maybe – lay persons as representatives of consumer or clients' interest) does not meet the minimum requirements of independence from the government, if the government remains the predominant actor in regulation.

Good regulation needs competence which comes from the profession. And regulatory decisions must be independent from government policies, accountable only to public interest and the rule of law; cases are imaginable (and have been internationally) in which the interests good regulation stands for and government policies have been conflicting: Just think of conflicts over government plans to reduce legal aid budgets or government initiatives to weaken the lawyers' confidentiality obligation in favor of a more effective fight against international terrorism or – to give a less delicate example – against tax evasion. These examples of diverging interests have led legislators internationally to accept the need for checks and balances between the executive branch of governments and regulatory institutions.⁹¹ Lately, there are examples internationally in which co-regulation was extended to include lay involvement. This was intended to include the interest of (potential) recipients of legal services into regulatory decisions.⁹²

The AG draft, as shown, allocates substantial regulatory powers to the office of the Attorney General, where the main regulatory power already lies under the current law. In light of the reported experiences with the AG's pre-2018 licensing practice, considering international developments which formed the positions of the IBA, and taking into account the reports of the UN Special Rapporteur on the independence of judges and lawyers, the power to regulate admission and licensing cannot mainly lie with the government. The same is true for the power to maintain a register of licensed lawyers, which – internationally – is a typical duty of mandatory bars and a reflection as well as a manifestation of the power to license.

The fact that the power to manage the pro bono system shall remain with the AG seems rather unusual. This type of power is typically a task fulfilled by bars. Besides the administrative management, the assignment of cases, unless it is up to the individual lawyer how to fulfil her / his pro bono duty, internationally lies with the bars or the judiciary.⁹³ For

⁹¹ Of course, there are also cases of diverging interest between good regulation in the public interest and the interest of the rule of law on the one side and the legal profession's interest on the other side. These can best be resolved, if there is a strict separation between regulatory and representative functions within a self-regulatory institution or – like for instance in Canada, Denmark or Germany – by having a self-regulatory bar and a voluntary representative organization which complement each other in their areas of responsibility.

⁹² Australia, the Netherlands, Scotland, England & Wales.

⁹³ The latter might be the case especially where there are no formal pro bono requirements, In Germany, for example, where there is not pro bono duty but a duty to accept (very poorly compensated) legal aid cases, is with the judiciary.

reasons of proximity to the subject matter, which is rather a functional argument for self-regulation, it makes sense to organize a pro bono structure at the level of the self-governing body. The AG draft also provides that the AG has the power to appoint the chairpersons of the board's committees, to fund the board and its secretariat, and to provide office space for the secretariat in its own offices. This does not seem to be a system which systemically allows for the independence of the board, whatever the organization of the board might look like.⁹⁴

Lastly, the AG draft gives the Attorney General the power to delegate powers to the mandatory Bar Association.⁹⁵ The wording of Art 81 (9) of the AG draft is as follows:

[The Attorney General] may delegate to the Bar Association all or part of the powers and functions vested in it by this proclamation, regulations and directives issued in accordance with this Proclamation.

Described very schematically, there are three possible scenarios: The AG does not delegate any of its powers and functions to the Bar Association, the AG delegates some of its powers to the Bar Association, and the AG delegates all of its powers to the Bar Association. The first scenario is the one described above; it does not meet minimum international standards.

4.3.8. Transfer of Powers – Transition Rules

The second and third scenarios would allow the bar to have the responsibility for some fundamental powers a self-governing body typically have in order to fulfil their duties towards members and the public. From a systemic perspective, it would not be problematic for the AG to not have oversight power, as there is still the board as an institution to independently supervise the bar, as well as the possibility for judicial review. Actually, the working group draft, too, provided for a transfer of powers from the AG to the bar.

The AG draft, however, gives the AG full discretion with regard to the transfer; it contains hardly any substantive requirements nor a time frame for the transfer. Such criteria must be set in the legislative framework, though, for the proclamation to give the AG a clear and predictable basis for its decisions. In an unpredictable transitory environment like the one we see in Ethiopia, such clarity is all the more important as the AG draft does not set the goal of independence and a high degree of self-governance of the profession. Furthermore, Art. 81 (9) is problematic, because it would allow the AG not only to transfer powers to the bar, but it seems that it would allow the AG to reverse such a decision if it deems adequate, and go back to direct government regulation again. This would make a transitional power

⁹⁴ The IBA states that mandatory bars, too, should be able to sustain themselves, because government funding “could potentially open the door to interference.” IBA, *Benchmarking Bar Associations* (2016), 32, 33.

⁹⁵ AG draft (n 75), Art. 80 (9).

(i.e. the power to transfer duties to the bar) a permanent power. The decision about who has which regulatory competence, though, is too essential to be left with the government. The rule of law requires that this has fundamental question has to be decided by proclamation.

Altogether, this extremely wide discretion of the AG without clear objectives in the draft as to what the co-regulatory structure is to look like does not meet the minimum requirements for a law to create a good regulatory system.

The Council of Minister's role according to the AG draft seems to be in line with the Ethiopian Constitution's allocation of powers to government organs. However, with regard to Art. 77 of the Federal Constitution, this is true only if the AG as part of the government is the primary regulator. With regulatory functions transferred to a professional body, it is at least questionable if the tasks the AG draft allocates to the Council of Ministers can be derived from Art. 77.

This question can be left open, though, because more importantly, it should be asked if the power to adopt subsidiary law should really lie with a government institution, or if this isn't a core function of self-governance, be it in a self-regulatory or a co-regulatory system. It is important to note that terminology should not interfere with what self-governance or self-regulation implies. According to international standards, as laid down by the IBA, regulation is rule-making and administration should be done predominantly by members of the profession. The "production and dissemination of a code of ethics" is part of what should be managed by the profession.⁹⁶ This IBA description of international best practice does not include any comment as to the legal nature of a code of ethics, or: code of conduct. While Art. 77 (13) of the Ethiopian Constitution assigns the power to issue regulations to the Council of Ministers, a Code of Conduct for the lawyer profession could be issued by a statutory bar⁹⁷ in the form of a directive, as specified in the Federal Administrative Procedure Proclamation No. 1183/2020, which entered into force in April 2020, after the AG draft was published. In order to be in line with international best practice, it is important on the one hand that those professional rules actually specify what is already laid out in the principles of the proclamation; they have to be issued within the limits the proclamation set (top-down legitimation). And on the other hand, the code of conduct must be a set of rules by the profession, issued by elected representatives of the profession, not by government-appointed lawyers (bottom-up legitimation).

While this rule-making power for the profession is clearly missing from the AG draft, the same is true for administrative powers a bar needs to meet minimal requirements of self-

⁹⁶ IBAHRI (n 32), 18.

⁹⁷ In the absence of specific rules for public self-governing bodies in Ethiopian law, the rules for public agencies can be applied here analogously.

governance. There is a risk that a bar established with the powers the AG draft assigns would be an institution which is rather an auxiliary body for the main regulatory institutions than a body which can responsibly govern its members. Besides not having the room for responsible, independent decision-making, the risk of a somewhat cropped mandatory organization is that the members might not take it seriously, and – because they have to pay fees to entertain the bar – might develop a negative attitude right from the start. Of course, the latter is not a legal argument, but members' acceptance is a crucial element of building a new institution which has yet to earn trust.

Also, the role of the professional body in the regulatory system is to keep the profession as a whole independent, and to ensure that the individual lawyer can exercise her or his profession independently. Independence here means independence from third parties, be it private actors or the government.⁹⁸ Regulatory framework is one basis for this; a strong and stable bar is the other. In a transitional situation, of course there is the risk of a regulatory vacuum when the government withdraws, before the mandatory bar is strong and capable to regulate. The present situation and worries about the transitional phase must not lead to the fact that the statutory framework does not even envisage a strong bar.

And lastly, what has been said here is true for self-regulation and for co-regulation. Good regulation is regulation independent from the government, which takes advantage of the profession's proximity to the subject matter. International best practice requires that a majority of members of the regulatory bodies are non-government lawyers or legal professionals.⁹⁹ We have seen, though, that there is more to independence than counting the number of members of a body. Even a regulatory body which consists predominantly of licensed lawyers would not meet the minimum requirements of independence, if their scope for decision-making is not adequate.

The newly established board would be a new element in the regulatory system. The composition with government representatives, members of the profession as well as the judiciary and the academia, could be a solution to create an independent supervisory body. It should be noted, though, that adding another new body to a newly established bar involves risks, as international experience has shown: In England and Wales, for example, even after more than 10 years, lack of clarity about roles and competencies between the (traditional) Law Society of England and Wales and the (newly established) Solicitors Regulation Authority (SRA) are still a source of conflict. Also, the SRA has grown to become quite large, costly institutions.¹⁰⁰ Also, an additional body between the government and the profession

⁹⁸ IBAHRI (n 32), 20.

⁹⁹ IBA (n 27), 8.

¹⁰⁰ SRA expenditure in 2018/19 was 77 million GBP (<https://www.sra.org.uk/sra/how-we-work/costs-statement/>, last accessed: July 30, 2020).

might make communication more difficult, especially in light of the fact that such a body lacks familiarity with the specifics of the lawyer profession, compared to a self-governing body. Also, if such a board is established, its independence from the profession and the government should manifest in a physical separation from the AG office; the funding structure should be reconsidered, too. The AG draft's provisions for judicial review seem adequate.

4.3.9. Individual Lawyer's Core Duties – Independence

Let us in a last step look at the implementation of the individual lawyer's core duties, assuming that self- or co-regulation is no end in itself, and that it is a form of professional supervision best suitable to create an environment for the individual lawyer that allows her or him to best serve clients. Like the general regulatory framework which we have looked at above, the rules for the individual lawyer include elements of (professional) freedom and obligations (towards clients and the public interest).

Independence is only mentioned in the AG draft's preamble ("... it is necessary to provide legal service with professional independence ..."), not in the actual text of the draft. With independence being an overarching goal of professional conduct, this could be adequate, if the draft itself doesn't include norms that counter this goal. As we have seen, it is especially the system of licensing and re-licensing which at the very least poses a risk to the independence of individual lawyers. The systemic risk of a government-run licensing and re-licensing system is unacceptable with regard to independence even if there were no concrete examples of abuse. We know that this systemic risk can manifest itself indirectly, for example when it leads to fear to accept certain clients out of concern that one won't get re-licensed, or when the same fear prevents a lawyer to courageously represent a client who might be seen as a political trouble-maker. This "self-censorship" is dangerous for this specific client, but might also lead to a lack of trust in the lawyer profession and subsequently to a lack of trust in the justice system and in government in general.

4.3.10. Individual Lawyer's Core Duties – Avoidance of Conflict of Interest

The avoidance of conflict of interest in the AG draft is regulated indirectly, by making the breach of this duty a grave disciplinary breach (Art. 86 (13)). While this penalization strengthens the duty to avoid conflicts of interest, the role of this duty as one of the internationally accepted core duties of the profession would become even clearer if also stated in a separate article. Also, there might be breaches of this duty which do not constitute

grave disciplinary breaches.¹⁰¹ It would be possible for the institution which is responsible for issuing a code of conduct to regulate with a nuanced view, if the avoidance of conflict of interest was set as a core duty in a separate Article. This would also give the regulator a guidance as to which duties are core duties, since they might deserve special attention in the secondary law.

4.3.11. Individual Lawyer's Core Duties – Confidentiality

The AG draft does mention this core duty in Art. 24 (3). It is included only as a sub-item amongst others, which indicates that the AG draft might not regard confidentiality as a core duty, although, in addition, it is mentioned additionally in Art. 56 (3) as a duty for a law firm. Like the duty to avoid conflicts of interest, the violation of the confidentiality obligation would also be a grave disciplinary breach (Art. 86 (6)). The question which relation the duties in Art. 22-36, specific, yet partly overlapping law firm duties in Art. 56, and duties which individuals and law firms have according to Art. 86 of the AG draft cannot be answered here.

The fact, though, that the interaction between those types of norms becomes quite complex if elaborated in detail in the proclamation illustrates that it might be more advisable to just set the principle in the proclamation and leave detailed regulation to the code of conduct.

Core duties, of course, do not apply without any restrictions, as we have seen above. Any restriction of a core duty, which constitutes an infringement of a client's rights, has to be justified. The AG draft itself includes a provision which – according to international standards – would at least need clarification in order to not constitute a breach of the confidentiality duty. Art.23 (1), (2) of the AG draft states that the advocacy service agreement, which must be in writing, and which has to be very specific with regard to particulars of the case, has to be registered in the Documents Authentication and Registration Agency.¹⁰² In order not to disproportionately encroach on the client's right to keep a matter confidential, such a clarification should state that a lawyer does not have to reveal the contents of the advocacy service agreement when registering.

¹⁰¹ Or no breach at all; one might think of cases in which a client waives the protection this duty provides him, or cases of slight negligence.

¹⁰² This paper cannot comment on possible issues which might arise from the requirement that such an agreement is to include "type of result or results the advocate or firm strives to achieve". From a contract law perspective, it might be considered to clarify that in most cases a lawyer cannot – and should not – promise to strive for a specific result, but rather to diligently provide services.

4.3.12. The Overall Role of Lawyers

As mentioned above, the profession and the individual lawyer must have a role within the system of the administration of justice, which allows equal footing with other actors. This understanding already began to be accepted in the 11th century with education requirements and further developed towards a professionalization of the lawyer profession. Existing law in Ethiopia and the AG draft describe the role of the lawyer “in assisting the administration of justice.” The Federal Court Advocates’ Code of Conduct Council of Minister Regulation No. 57/1999, though, limits this to a role of a mere “assist[ant to] the organs of the administration of justice”.¹⁰³ In light of the overall image the AG draft and the Regulation show, there is a risk that the role of lawyers would be even diminished compared to the current law. This is particularly problematic in the light of the international best practices that reinforce the role of the lawyer as an independent organ of the administration of justice or as an officer of the court.¹⁰⁴

Conclusions

We have seen that the substance of the regulations the AG draft proposes mostly meet international standards and best practices. This is true, too, for the administrative procedures, especially under the terms of the recently adopted Federal Administrative Procedure Proclamation No. 1183/2020. The idea of creating an independent Advocates Administration Board outside the government could – depending on the specifics – be an idea to follow up on, which would be in line with international trends to give co-regulatory power to actors and stakeholders from outside the profession. It is mainly the assignment of responsibilities to regulatory organs and institutions which raises some concerns. The AG draft’s understanding of “joint regulation” does not match international standards of co-regulation, since co-regulation requires a degree of independence of the lawyer profession which the AG draft does not permit. Co-regulation in a system governed by the rule of law and relies on accountability of the different actors. Co-regulation, thus, needs some degree of “separation of powers”, hence clear, separated roles.

The need of open spaces for self-regulatory freedom which are fenced by law and not by the government is probably the main challenge the actors in the reform process are facing. A continuing discussion of details will certainly be helpful to get an even more coherent and real excellent draft. It seems necessary, though, to have a second, parallel stream of discussion between the AG office, the LJAAC working group and other stakeholders. In this

¹⁰³ Council of Minister Regulation No. 57/1999 (n 19), Art. 3.

¹⁰⁴ See above, chapter 2.

parallel discussion, ways should be addressed to find out how the long-term vision of more self-regulation in a good system of co-regulation, which is expressed in Art. 80 (9) of the AG draft, could be translated into an action plan. International experience shows that as soon as there is a shared idea of how a transition can work, possible remainders of distrust between actors, which would not be uncommon, could be overcome.

Two main lessons can be drawn from the reform discussion. First, the open, bottom-up approach the LJAAC with its working group organized to gather needs with the profession and stakeholders and which was complemented by public, televised hearings held by the Attorney General together with specialist from the profession are exemplary in international comparison. Secondly, and in hindsight, it might have been wise to turn at least as much attention to transitional provisions as to the actual substantive provisions in the discussions and hearings.

Even though the environment has not become more favorable of reforms, international examples show that a stable regulatory framework for the lawyer profession is an important element for economic growth and political stability. As a study commissioned by the CCBE, the umbrella organization of the lawyer profession in Europe, notes, ... [T]he institutions (including laws and norms) of a legal system condition and determine economic performance. Institutions that are stable and credible facilitate economic development and lead to higher levels of economic activity. In addition, although political institutions determine important aspects of the structure of a legal system, and whilst the judiciary determines how given laws are implemented, lawyers actively contribute, through their everyday actions and conduct, to both the shape of a legal system and how effectively it operates and functions.”¹⁰⁵ This adds to the positive effects such a regulatory framework has for access to justice under human rights aspects.

¹⁰⁵ George Yarrow & Christopher Decker, *Assessing the economic significance of the professional legal services sector in the European Union (2012)*, Summary ii.

Revamping the Electoral Laws of Ethiopia: Major areas of Reform and Lessons Learned

Getachew Assefa* & Sisay A. Yeshanew**

Abstract

The electoral laws of Ethiopia were among the first batch of legislation that were slated for reform with a view to broadening the political space after the political power transition that occurred in 2018. A process that basically revamped the electoral laws of the country introduced a number of changes to the form and contents of the pertinent legislation of the country. It attempted to address the major issues of independence of the electoral management body, the impartiality of electoral officials, the clarity and fairness of the rules that apply to the conduct of elections and the regulation of political parties, and due process in the electoral dispute resolution mechanisms. This article takes stock of and assesses the process and substance of the electoral law reform. It addresses the problems identified, the solutions considered, and the changes introduced to the main electoral laws of the country, from the perspective of the extent to which they either promote or inhibit the fundamental rights to participate in the conduct of public affairs. It also indicates some areas in which there is room for improvement.

Introduction

Since the introduction of a multi-party system in Ethiopia in the 1990s, the country has seen a number of legislative exercises to adopt as well as revise its electoral laws. Nevertheless, the fairness of the electoral rules and their implementation practice¹ remained one of the most contested matters in the context of discussions on democratization in the country. With the political changes that occurred in the country in 2018, the electoral laws were among the first to be slated for reform in an effort to broaden the country's political space. Before the

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¹ Merera Gudina, 'Elections and Democratization in Africa, 1991-2010' (2011) 5(4) Journal of Eastern African Studies, 664.

reform, the body of electoral legislation was composed of the Amended Electoral Law of Ethiopia (Proclamation No. 532/2007), the Revised Political Parties Registration Proclamation (No. 573/2008), and the Electoral Code of Conduct for Political Parties proclamation (No. 662/2009). The three primary legal instruments were reviewed, revised and amended and this resulted in two pieces of legislation, namely, the National Electoral Board of Ethiopia Establishment Proclamation (No.1133/2019) and the Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation (No. 1162/2019).

The electoral law reform process was initiated by the Legal and Justice Affairs Advisory Council ("LJAAC"), which was founded under the Office of the Attorney General to provide technical legal support to the overall legal reform agenda. LJAAC then created the Democratic Institutions Working Group ("WG"), as one of the many thematic working groups, composed of about 10 academics and practitioners, to work more directly on the reform of laws relating to electoral laws and institutions, the Ethiopian Human Rights Commission, and constitutional adjudication. The WG commenced its work with the electoral laws by identifying issues in the existing Proclamations and their implementing legislation. After discussing all the issues identified, the WG decided to carry out in-depth studies on four themes, namely, the independence and functioning of the Election Board, the registration and regulation of political parties, electoral dispute resolution mechanisms and options of electoral design. The studies, which explored the issues and proposed options based on comparative and contextualized experience, were presented and discussed in meetings with political parties.

While the WG developed extended plans for the conduct of legal assessment, consultations on the findings and recommendation with stakeholders and the re-drafting of the laws, the decision of government to prioritize the re-institution of the Electoral Board forced it to change its work plan. After a comparative overview of electoral laws of other countries, a decision was made to pull out the provisions relating to the establishment, composition, structure and autonomy of the Electoral Board and draft them into one proclamation. A draft of the law re-establishing the Board was prepared and presented to meetings of the LJAAC, international and national experts, and political party representatives. It then went through the Council of Ministers and then Parliament to be adopted into law. Meanwhile, a new Chairperson was appointed for the Board and the rest of the reform work and the WG were transferred from LJAAC to the Board itself. This was because the Board is an independent institution that reports directly to the House of People's Representatives and hence the reform of its laws should not be carried out under the aegis of a government Ministry. A Proclamation covering elections, the regulation of political parties and electoral code of conduct was drafted in close collaboration with the Board and different versions of it were presented to meetings of political parties. The draft then went through the process

of the House of Peoples' Representatives ("HoPR") and was finally adopted as law with a number of changes.

This article examines the electoral law reform that occurred in 2019 by highlighting the main bottlenecks identified in the previous proclamations, the options considered and chosen in reforming them and the lessons learned in the process. It is divided into five main parts. The first part evaluates the reforms relating to the structure, composition and autonomy of the electoral management body from the perspectives of independence and impartiality. The second part discusses the changes introduced to the process of conducting elections – from organizing constituencies to vote counting. The third part examines the legal reform relating to the registration and regulation of political parties. The fourth part succinctly presents the changes regarding electoral codes of conduct. Part five presents electoral dispute resolution mechanisms. The article then ends with concluding remarks that highlight the main areas of the electoral law reform and outstanding issues.

1. The Re-Establishment of the National Electoral Board

States establish electoral management bodies ("EMB") as an entity or entities that are legally responsible for managing some or all essential elements of conducting elections or other instruments of democracy such as referenda and recall votes. Functional responsibilities for the management of the different elements of electoral processes may reside in one national institution with branches all over the country or may be divided among two or more national bodies at different levels of government.² In Ethiopia, the Constitution establishes the National Electoral Board ("NEBE") to serve as one EMB with the responsibility of managing all forms and levels of elections in the country.³

The existence of an EMB with the necessary independence, autonomy, competence, capacity, resources and professionalism is accepted as a precondition for the presence of healthy and resilient democracy. The electoral laws of states strive towards meeting these standards. First established in 1992, NEBE has conducted five general elections.⁴ While various post-election evaluations carried out by the Board itself show a positive assessment

² The Electoral Knowledge Network, 'Types of Electoral Management Bodies' (1998-2021 ACE Project), <<https://aceproject.org/main/english/em/emb.htm>>, last accessed 18th March, 2021.

³ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazette, Addis Ababa, Art. 102.

⁴ It also conducted the election of the members of the Constitutional Council in 1993 (1986 E.C.), which debated and adopted the Constitution. The Board was preceded by the Ethiopian Electoral Commission, which managed the election of members of the regional and woreda councils in 1991 (1984 E.C.).

of the way it conducted the elections,⁵ many in opposition political parties and the general public differ in their perception of the independence and impartiality of the institution both at the legal and practical levels. After the comparatively most competitive elections in the country that was held in 2005,⁶ the composition and independence of the Board were subjects of negotiation between the ruling party and opposition political parties, which reportedly broke down as a result of disagreements over the process of nomination and appointment of the Board members.

With the political transition that occurred in mid-2018, the Board's independence, impartiality and competence became one of the most crucial issues in discussions relating to democratization in the country. In the ensuing legal reform processes, a decision was made to prioritize the reform of NEBE. Consequently, the provisions of Proclamation No. 532/2007 relating to the structure, mandate and composition of NEBE were revised and amended into what became Proclamation No. 1133/2019.

This section assesses the legal reform undertaken with respect to the NEBE based on internationally accepted standards and comparative experience regarding designs, structures and composition of EMBs and the fundamental principles of independence, impartiality, integrity, competence and professionalism of an EMB. It outlines the problems identified, options considered and chosen, and lessons learned in the process of the legal reform relating to NEBE.

1.1. Appointment of Board Members– Process, Number and Criteria

In some federal countries, there may be separate EMBs at the national and provincial levels, with different legal frameworks, electoral systems, responsibilities and devolved structures.⁷ In such cases, the national EMB organizes and manages national (federal) elections, whereas regional EMBs take care of provincial and local elections. This is, for example, the case in Australia and Canada. In Ethiopia, like in India and Nigeria, the Constitution establishes one independent National Electoral Board to conduct elections in federal and regional constituencies, and makes the adoption of “all necessary laws governing political parties and elections” the exclusive power of the federal government.⁸ The reform of the electoral laws

⁵ NEBE. 2011. Ethiopian National Electoral Board 2010 Post-Election Evaluation; and NEBE. 2016. Ethiopian National Electoral Board 2015 Post-Election Evaluation.

⁶ Abadir Ibrahim, *The Role of Civil Society in Africa's Quest for Democracy* (Springer Int'l Pub., 2015), 130.

⁷ Helena Catt et al., *Electoral Management Design* (revised edition, 20 December 2014), 18.

⁸ FDRE Constitution, n-3, Arts. 102 and 51 (15).

of the country that was initiated within LJAAC had to keep within these provisions of the Constitution as no constitutional amendments were envisaged.

A critical aspect of the independence of EMBs relates to the manner of appointment of their members. In Ethiopia, members of NEBE were to be appointed by the HoPR upon the recommendation of the Prime Minister.⁹ Despite previous attempts at political negotiations to make this process of appointment more participatory, the best that could be achieved was the requirement that the Prime Minister (“PM”) needs to consult political parties with seats in parliament before nominating candidates for appointment by the HoPR.¹⁰ Considering the 100 percent control of parliament by the ruling party and its affiliates, and the fact that many political parties were in exile before the political transition that led to the reform in question, these provisions were considered unhelpful.

The WG studied the systems of appointment followed by a number of countries, including the representational and joint proposition systems in which political parties play a leading role, and varieties of parallel and integrated appointment systems where different branches of government take part.¹¹ It further discussed the application of competitive selection processes, the inclusion of ex-officio and non-voting EMB members, and the requirement of super-majority vote for parliamentary approval of the members. As the reform needed to keep within the Constitutional prescriptions, the WG considered three main options within the parameters of the procedure of appointment of NEBE members set by the Constitution. These were: (1) a forum of political parties works on shortlist based on agreed procedure and the PM presents the same to HoPR; (2) a similar forum forms a panel to do the shortlist for nomination by the PM; and (3) the PM forms a panel of members from pre-defined representative institutions to shortlist nominees through participatory and competitive processes. Considering the existence of hundreds of political parties in the country and the unhelpfulness of criteria such as past performance, the first two options were considered difficult and time consuming. The third option was presented with various sub-options and one of them was accepted in to the new Proclamation.

According to article 5 of Proclamation No. 1133/2019, the PM establishes an independent committee composed of eight representatives of religious institutions, trade unions, employer association, the national human rights commission, civil society and elders, who will prepare a shortlist of nominees for Board membership. The Committee then receives nominations from the public, political parties and civil society organizations and prepares a shortlist of nominees twice the number of vacant positions through transparent and

⁹ FDRE Constitution, n-3, Art.102.

¹⁰ Amended Electoral Law of Ethiopia Proclamation, Proc. No. 532/2007, Federal Negarit Gazette, 13th Year, NO.54, June 2007, Art. 6(2).

¹¹ Helena Catt et al, n-7, Chapter 4.

competitive processes and sends it to the PM. After that, the PM conducts consultations with representatives of competing political parties on the shortlist and presents nominees to the available position/s to the HoPR, by identifying the nominee for Chairperson and Deputy Chairperson, in case those positions are open. A nominee will be confirmed a member of the Board if s/he receives a majority vote of the HoPR. While some political party representatives were not satisfied that the law does not require their consent, rather than consultation, on the nominee to be presented to parliament and the super-majority vote proposed for HoPR's confirmation was not accepted, the process of appointment is as participatory as it could be within the appointment process defined by article 102 of the Constitution.

In terms of number of members of EMBs, while there is no formula or rule of thumb for determining the appropriate number, regard must be had to the scope of powers of such body. In practice, there is no direct relationship between the size of a country and the number of members or commissioners. For instance, India has a three-member electoral commission, while Seychelles, a small Island nation, has a seven-member commission. Larger commissions are more amenable to representativeness (e.g. of gender and diversity) than smaller ones. Smaller commissions enable more efficient decision-making processes, and may be less resource intensive. EMBs with larger members may consider establishing committees to ensure division of labor and specialization. It is important to not confuse the number of members of an EMB with the size of its secretariat.

Under Proclamation No. 532/2007, NEBE was constituted of nine members, of which only the Chairperson, and in later years the Deputy Chairperson, served on a full-time basis in practice.¹² The number of Board members is reportedly a result of political party negotiations after the disputed 2005 elections, the aim being to have representation of the nine regions of the federation. The other Board members held regular assignments in other institutions and their *ad hoc* involvement was considered to be one of the reasons why the Board had not been able to properly carry out its long list of responsibilities in practice.

The WG considered the following reform options: (1) making the position of all the nine Board members full time; (2) having a smaller (e.g. 5) number of permanent members that take responsibility for the various areas of work (as Directors of some divisions) of the Board; (3) maintaining a small number of (e.g. 3 or so) full-time members with the rest serving on part-time basis or making the positions of the rest full-time in electoral years. After consultations with political parties and experts in the area, a five-member permanent Board was proposed and accepted. The revised Proclamation provides for what it calls a

¹² There is nothing in the law that signifies that they are part-timers, except for the provisions on the rules of procedure of the Board that it holds meetings at least once a month (Proc. 532/2007, n-11, Arts 6(4) & 10(1)) adding that it may convene more frequent meetings during elections).

“Management Board” consisting of five members that serve fulltime and lead the various departments of the Board based on the decision of the Chairperson.¹³ The Board may establish subcommittees that may be necessary for the execution of its duties.

Finally, the criteria of selection of members of EMBs should be imbued with requirements of independence, impartiality, moral stature and competence. Under the previous law, Board members to be nominated by the PM are expected to be loyal to the Constitution, be non-partisan, have professional competence and be known for their good conduct.¹⁴ The composition of the Board should take into consideration nationality or ethnicity and gender representation, and at least one of the members shall be a lawyer. It was not clear if nominees or members were required to have election-related knowledge and skills. The criteria of good conduct needed to be defined more specifically and leadership skills were considered important.

After deliberations on the proposed eligibility criteria, the revised law provides that a person can become a Management Board member only if he/she is: a) an Ethiopian by birth and an Ethiopian national; b) not a member of any political party; c) has advanced professional qualification on matters related to elections, especially law, political science, public administration, statistics, information technology and other related fields; d) of good ethics and character; e) high leadership capacity that enables him/her to carry out the responsibilities assigned to him/her.¹⁵ The composition of board members was also to take into account ethnic and gender representation. The Proclamation further defined ethical (mis)conduct in terms of widely-held moral values and professional ethics.¹⁶ The WG had considered the inclusion of further requirements on non-partisanship, including number of years since leaving a political party, especially for those who held leadership positions, and minimum age requirements, both of which did not make it into the Proclamation as adopted.

1.2. Tenure and Removal of Board Members

The tenure of appointment of members of EMBs is a factor that affects their independence. Members of EMBs are often appointed for fixed terms, which may be renewable. The term of commissioners may range from three years, as in Rwanda, to seven years, as in South Africa, or to ten years, as in Botswana. In a few countries, members serve until they reach

¹³ National Electoral Board of Ethiopia Establishment Proclamation, Proc. No. 1133/2019, Federal Negarit Gazette, 25th Year, No. 71, 6th June 2019, Art.4.

¹⁴ Proclamation 532/2007, n-10, Art. 6(3).

¹⁵ Proclamation 1133/2019, n-13, Art. 6.

¹⁶ Proclamation 1133/2019, n-13, Art 2(10).

their retirement age, e.g. Ghana and Malaysia. A system where the term of the commission is the same as the term of the appointing parliament or government may systematically advantage the winning party in the appointment process. Reelection is often limited to specified terms, while some countries prohibit it altogether. The duration of the term of members should consider the need to ensure regular institutional renewal of EMBs, while allowing enough time to enable the development of needed experience. In this regard, a staggered replacement arrangement can provide a useful way of transferring and continuing useful institutional experience and smooth leadership succession while enabling regular renewal, as is the case in South Africa and Senegal.¹⁷

Under the previous law, members of NEBE were elected for a five-year term, renewable for only once.¹⁸ With the stature the Board had at the time of reform and the part-time nature of its members, some commentators observed that the five-year term of office, which coincided with the parliamentary term, enables winning parties to appoint members for each election. With a view to addressing this and other concerns, the WG proposed that Board members be elected for one 9-year term or a 6-year term, renewable once. In addition to the security of tenure that this period gives for at least two election cycles, the proposal included benefit packages upon the departure of a Board member and exclusion from senior governmental appointments for at least two years to avoid tit for tat. The WG further recommended that the replacement Board members should be staggered, with the time depending on the number and term of office of the members. The members to be replaced first could be determined by lot (at the beginning of their term) or determined upon appointment by the HoPR, excluding the Chair and Deputy of the Board.

The HoPR accepted the second option on the term of office and hence the new Proclamation provides that the term of office of Board members shall be six years, with a possibility of reappointment for an additional one term.¹⁹ It has unfortunately not accepted the proposal to stagger the period of appointment for the purposes of institutional memory and smooth transition. The Proclamation further provides that a Board member shall not be appointed to any high government office, which it defines as including the positions of Minister, State Minister, Ambassador, Commissioner and deputy Commissioner, for two years after finishing his/her term of office or resigning on his/her own accord.²⁰ On the other hand, article 18 of the Proclamation leaves the benefits of outgoing Board members to be determined separately. It is not clear who decides the benefit packages and how, and hence it appears that there is no benefits for outgoing members as of now. This may affect the

¹⁷ Helena Catt et al, n-7, 94.

¹⁸ Proclamation 532/2007, n- 10, Art.6(4).

¹⁹ Proclamation 1133/2019, n-13, Art. 12.

²⁰ Proclamation 1133/2019, n-13, Arts. 12(4) and 2(9).

prestige of the position, its attractiveness to suitable candidates and the integrity of its holders.

To ensure their independence and impartiality, members of EMBs should be protected from undue threats of dismissal or other disciplinary actions, such as cuts in their conditions of service. The grounds for removal must be clearly outlined and relate to gross misconduct, incompetence, and physical or mental incapacity. The process of removal should also be specifically outlined. The members of EMBs may enjoy the protection, status and positions equivalent to high level officials, such as the highest judges.

Under Proclamation No. 532/2007, the HoPR may terminate the term of a Board member if s/he resigns for personal reasons or if the House believes that the member is unable to properly carry out her/his duties due to illness, or s/he has committed serious misconduct.²¹ Although the ethical standards that members of the Board must respect in relation to partisanship, confidentiality and other acts that damage their credibility, impartiality and independence (art 12) may provide useful insights, what qualifies as “serious misconduct” remained unclear. Other than the right to be free from “any influence and interference” (art 11), the proclamation did not provide for specific legal protection, such as immunities, to the Board members. Under the new law, a NEBE member may be relieved of duty if s/he resigns on his personal accord or is removed by the HoPR because of inability to carry out his functions for health reasons, evident lack of capacity or competence, serious ethical misconduct, or absence from work for a consecutive period of six months.²² While these are generally accepted standards of removal, seen in the light of competency requirements for appointment of a Board member, the nature and temporal scope of evident lack of competence may raise issues. The Proclamation makes an attempt at defining “ethical misconduct” as actions that are contrary to the moral values that the majority of Ethiopians abide by as well as to principles grounded in legal and professional ethics. This is still broad, but it provides some insight into what qualifies as misconduct.

The procedure of removal should be strict enough to protect the independence and impartiality of the members. A number of countries create different layers of mechanism to insulate the process from political abuse. In Kenya, for example, petitions seeking the removal of a member of the electoral commission are submitted to the National Assembly. If satisfied that there are serious grounds for removal, the Assembly requests the president to establish an independent tribunal. The president is required to act in accordance with the decision of the tribunal. In the Seychelles, the Constitutional Appointments Authority is in charge of constituting a tribunal to determine whether a member of the commission should

²¹ Proclamation 532/2007, n-10, Art.6(5).

²² Proclamation 1133/2019, n-13, Art. 12(3).

be removed for inability to perform the functions of the office, whether arising from infirmity of body or mind or from any other cause, or for misbehavior. In South Africa, the mandate to ascertain whether the grounds for removal have been fulfilled belongs to a cross party committee of the National Assembly, subject to a resolution of the plenary of the Assembly approving the decision. Under the previous Ethiopian electoral law, while the procedure by which the HoPR makes its decision is not clear, once it decides on the removal of a Board member based on the criteria mentioned above, it instructs the PM to recommend another nominee in accordance with the Constitution.²³ The law does not clearly say if the PM needs to have “sufficient consultation” with political parties with seats in the case of replacement. The only relevant provisions of the previous law to the procedure of removal of Board members were those on recusal and submission of complaints for removal where a Board member is involved in matters or decisions in which s/he has (financial or any other) conflict of interest.²⁴

Considering the serious need to introduce an independent and credible procedure for the removal of Board members, the WG considered the following two options: (1) the Federal Judicial Administration Council (“JAC”) would receive complaints from any interested party, shall filter the application, seek expert advice as necessary to determine if a criterion of removal is met, hear the Board member, and present its recommendation to the HoPR, if it finds cause for removal; (2) JAC filters applications and if it finds cause for further investigation, it shall establish a panel composed of the Vice President of the Supreme Court, an expert qualified to assess the facts in respect of the particular ground for removal and the Human Rights Commissioner to investigate the matter. If the panel finds ground, JAC will pass its recommendation to HoPR. It also envisaged the possibility of suspending the Board member pending decision and proposed decision of removal to be taken with a qualified majority at the HoPR.

The HoPR rejected the proposal for the involvement of JAC but accepted the establishment of a committee to investigate application for the removal of a Board member. Accordingly, any interested person may submit an application for removal to the Speaker of the HoPR, who after a preliminary investigation may reject the application or ask the HoPR to establish a committee composed of committee composed of one Federal Supreme Court judge, a technical expert whose area of expertise is directly related to the matter at hand and one person representing the Ethiopian Human Rights Commission to investigate the matter.²⁵ The Committee will then present its recommendation to the Speaker of the HoPR and the House may decide to remove the member by majority vote. The Speaker may suspend the

²³ Proclamation 532/2007, n-10, Art. 6(6).

²⁴ Proclamation 532/2007, n-10, Art. 13.

²⁵ Proclamation 1133/2019, n-13, Art. 13.

member from his duties in the course of the investigation and the Board member shall have the right to be heard before the investigating Committee.

Proclamation No. 532/2007 did not define the status of Board members including in equivalence terms. The WG explored various country experiences, such as that of India where the commissioners enjoy the same status as Supreme Court judges with a view to provide security of tenure to the members of the commission. It proposed that members of the Board have the status and conditions of service of judges of the Federal Supreme court, with the Chair and Deputy having the status of the President and Vice-President of the Court, respectively. Alternatively, and considering that the conditions of service of regular judges of the Federal Supreme Court is not well defined in law, the WG recommended that of a Minister for the Chair and of State Minister for the other members. The new law does not provide for the status of the members of the Board even in terms of equivalence and leaves the determination of their salary and benefits for separate determination.²⁶ It is not clear if this is to be determined by executive order or a decision of the HoPR. Meanwhile, it leaves the position unattractive for high level experts. On the other hand, a Board member enjoys immunity from being arrested or prosecuted unless s/he is caught while committing a crime or the HoPR removes his/her immunity.²⁷

1.3. Mandate of NEBE

There are no hard and fast rules that determine the scope of powers of EMBs. However, the definition of their mandate should take into account the capacity of the EMB, the number of its members, whether or not it is permanent or temporary, and the need to clearly demarcate its mandate with other institutions that could perform election-related functions. It is also important to make sure that disagreements over non-essential election related functions, which may be politically sensitive, do not affect the performance and perceived credibility of the EMB in discharging its core functions. The existence of a separate entity to deal with political party registration and regulation (e.g. Kenya) or with the determination and regular revision of electoral constituencies (e.g. Botswana) could help ensure that disputes on related activities do not taint the credibility of the EMB in the administration of its (core) functions. As indicated earlier, Ethiopia established one institution to carry out all election-related functions in the country and hence NEBE runs the “political-tainting” risk in carrying out its responsibilities. However, as noted, the WG was not able to propose severing some of the functions and putting them under another institution because that would have require constitutional amendment.

²⁶ Proclamation 1133/2019, n-13, Art. 18.

²⁷ Proclamation 1133/2019, n-13, Art. 15(6).

NEBE has a long list of powers relating to its principal mandate of administering all forms of elections and referendum all over Ethiopia, ranging from preparing and distributing election materials to certifying and officially announcing election results. Under the previous electoral law, the mandate of NEBE includes providing civic and voter education, registering and regulating political parties, apportionment and control of state financial support for political parties, recruiting, training, supervising and protecting electoral officers at all levels, licensing election observers, resolving electoral disputes and taking cases of electoral offences to court, issuing election-related regulations and directives, evaluating periodic elections and electoral laws, proposing important reforms and ways of enabling Ethiopian Diaspora to participate in elections.²⁸ The mandate of the Board to study and present proposal on the list of constituencies for the approval and announcement of the House of Federation was provided for in a separate section of the law.²⁹ All these powers were to be carried out by the Board, but at least in relation to voter education, it may issue license to other institutions. The WG considered the mandate of the Board relating to constituency mapping too crucial not to be put under the article defining the mandate of the Board. As the name “Board” was used in the Proclamation to refer to the nine-member body as well as this body together with the Secretariat that is led by a Chief Executive and two deputies, the WG recommended that the functions to be carried out by the Board members as a whole be separated from those which are performed by the institution as a whole.

The new Proclamation separated the powers and duties of the Board as a whole and those of the now five-member body called “Management Board”. It defined the role of the Board in constituency mapping more clearly and sharpened its other powers and duties.³⁰ The Proclamation further defines the mandate of the Management Board as one of determining overall policy directions, adopting directives and making final decision on all election-related matters.³¹ One notable mandate is the power to appoint the Chief Executive and Deputy Chief Executive of the Secretariat, which was done by the HoPR under the previous law. As discussed later, this was essential to ensure the subordination of the Secretariat to the Management Board, which could be considered delegated by the HoPR on account of its members being elected by the House. Another notable change is the fact that the Board no more has power to adopt regulations, which it had under the previous Proclamation. While this was rightly the case because the Board is directly answerable to the HoPR and not to the Council of Ministers, which normally issues regulations, the fifth HoPR held the position that it is within its mandate to issue regulations for independent institutions that report to

²⁸ Proclamation 532/2007, n-10, Art. 7.

²⁹ Proclamation 532/2007, n-10, Art.20(1).

³⁰ Proclamation 1133/2019, n-13, Art. 7.

³¹ Proclamation 1133/2019, n-13, Art. 8.

it, despite arguments to the contrary. Consequently, under Proclamation No. 1133/2019, the Board can adopt only directives.

1.4. Financial Autonomy

In addition to the composition and tenure of members of EMBs, their independence also depends on their financial autonomy. Modern practice in relation to independent models of EMBs empower the commission to draft its own budget and submit the same either directly to parliament or through the ministry responsible for finance, which does not have the authority to make significant changes to the proposed budget.³² The EMB may be given the authority to directly make submissions to parliament on its proposed budget. The funds should be considered, approved and released promptly to enable the EMB to discharge its functions without delay. For instance, in Kenya, the secretary of the electoral commission prepares, with the approval of the commission, an estimate of its budget before the commencement of each year. These estimates are presented to parliament through the minister responsible for finance. In Nigeria, the recurrent expenditure of the Independent National Electoral Commission, including the salaries and allowances of the commissioners, is charged directly from the Consolidated Revenue Fund of the Federation. In Fiji, the electoral commission must submit to Parliament a multi-year budget for each electoral cycle of four years for planning purposes, and submits to Parliament on an annual basis an estimated budget for the following year, based on which the budgetary funding for the Fijian Elections Office for the following year will be determined.

Proclamation No. 532/2007 empowered both the Board and its Secretariat to prepare budget. Among the powers of the Board was to prepare its budget and utilize the same upon approval, while the Chief Executive of the Secretariat was also mandated to prepare and submit the budget of the Secretariat (along with its work plan) to the HoPR and implement the same upon approval.³³ The law also included a general provision to the effect that the Board shall prepare its budget and submit to the HoPR for approval.³⁴ In practice, the Secretariat prepared the budget of NEBE and, through the Board, submitted it to the Ministry of Finance and Economic Development (MoFED), which made final decision on the allocations. It is not clear if the budget allocations for the Board were clearly stated in the yearly budget law that the parliament adopted. According to key informants, the Board never received budget allocation that matched its plans and requests in timely manners, as

³² Yutaka Onishi, 'Electoral Management Bodies and Electoral Governance', [2012] 28(2) Japanese Journal of Electoral Studies, 68., <https://www.jstage.jst.go.jp/article/jaes/28/2/28_62/_pdf/>.

³³ Proclamation 532/2007, n-10, Arts. 7(13) & 16(6).

³⁴ Proclamation 532/2007, n-10, Art. 106.

MoFED almost always approved its budget with significant cuts.³⁵ In election years, the informants recount, MoFED often released the budget too close to elections for necessary disbursements, especially to ensure the advance recruitment and training of temporary electoral staff.

The WG recommended that NEBE defend its budget directly before the HoPR, which should allocate sufficient wring-fenced yearly budget for the Board to receive and administer with full autonomy, subject only to appropriate rules of accounting, reporting and audits. It also proposed the approval of a multi-year budget, such as for the two years before the date of election, to enable the Board to perform its tasks without delay. In addition, the Board may be allowed to receive grants subject to applicable rules. Most of these proposals were accepted and hence the new Proclamation provides that the budget of the Board directly submitted to and approved by the HoPR shall be credited to its account by MoFED within one month of the approval.³⁶ The Board may further request the HoPR to approve a three-year budget plan and accept gifts and aid from third parties in accordance with relevant laws.

1.5. Relationship between the Board, its Secretariat and Regional Offices

Independent model EMBs usually have two institutionally distinct bodies: the members of the electoral commission, and the secretariat. In some countries, such as Nigeria, the power to appoint the secretariat belongs to the commission, while in others the secretariat is appointed separately, sometimes by the political institutions. There are also countries where one of the members of the commission doubles up as the head of the secretariat (e.g. Australia).³⁷ The smooth, efficient and coherent relationship between members of election commissions and the secretariat is critical for the success of their missions. In principle, commissioners are in charge of setting broad guidelines in line with constitutional and legal requirements and overseeing their implementation, while the secretariat is in charge of ensuring the implementation of guidelines and the day-to-day running of the EMB. Nevertheless, fulltime commissioners tend to be more directly involved in the implementation of electoral standards than their part-time counterparts. To avoid confusion and possible clash of responsibilities, the relevant legal rules must clearly delineate the roles and responsibilities of each body and provide for default lines of hierarchy in cases of disagreement. It would in this sense be advisable that the secretariat and coordinating offices are subordinated to the commission or the Board in the case of Ethiopia. The

³⁵ Interview with Ambassador Samia Zekaria, former Chairperson of the NEBE, on 31 August 2018 and interview with Nega Dufisa, Head of the Secretariat of NEBE on 31 August 2018, NEBE office, Addis Ababa.

³⁶ Proclamation 1133/2019, n-13, Art.25.

³⁷ Norm Kelly, 'the Independence of Electoral Management Bodies: the Australian Experience' [2007] 59(2) Political Science, 17-32.

extension of the powers of appointing the secretariat to the commission itself can also reduce possibilities of friction.

As indicated above, Proclamation No. 532/2007 generally defines the powers of the Board without distinguishing what is to be carried out by the nine-member body and the rest of the Board, i.e., the secretariat and regional offices. The powers of the secretariat are not separately defined, except for that of the Chief Executive, which include servicing the Board, presenting matters for its decision and carrying out day-to-day electoral functions.³⁸ Both the Board and the Chief Executive were mandated to recruit and assign electoral officers and to supervise and discipline them in cases of misconduct. The absence of clearly delineated powers had resulted in situations of waiting one another to act in some cases and conflicts in the exercise of powers during elections.

The WG considered the appointment of the Chief Executive and the two deputies by the HoPR upon the recommendations of the Board and the accountability of the former to the Board to be useful in terms of defining hierarchy for the settlement of conflict. This became the new rule.³⁹ However, to ensure an effective line of accountability, it recommended that the constituting of the secretariat and the appointment of its leadership be left entirely to the Board. The WG further recommended that the heads of the regional offices be appointed or recruited by the Board rather than by the Secretariat.⁴⁰ Accordingly, the new law provides that the Chief Executive and the Deputy Chief Executive of the Secretariat as well as the heads of regional offices shall be appointed by the Management Board from among persons who fulfil requirements of independence and competence upon the recommendation of the Chairperson of the Board.⁴¹ The Proclamation further defines the powers and duties of the Chief Executive in a way that is subordinated to and supports the functioning of the Management Board and that of the regional offices in an equally subordinated and yet more detailed manner.⁴² The fact that the members of the Board shall be assigned by the Chairperson to lead various departments of the Board and its secretariat⁴³ increases the integrated functioning of the Board as a whole. The Board further has power to establish sub-regional coordinating offices, which may carry out continuous tasks such as voter education and preparation of electoral roll and support the organization of constituencies and polling stations in election year, taking into account the recommendation of the regional offices.⁴⁴

³⁸ Proclamation 532/2007, n-10, Art. 16.

³⁹ Proclamation 1133/2019, n-13, Art. 15.

⁴⁰ Proclamation 532/2007, n-10, Art. 18(2).

⁴¹ Proclamation 1133/2019, n-13, Arts. 20(1) & 23(2).

⁴² Proclamation 1133/2019, n-13, Arts. 21 & 24.

⁴³ Proclamation 1133/2019, n-13, Art. 4(2).

⁴⁴ Proclamation 1133/2019, n-13, Art. 7(8) & 24(2).

Staffing autonomy is another critical factor of independence and efficiency of EMBs. While standing EMBs often have some permanent secretariat staff at the central, regional and local levels, during election periods, they rely on large numbers of *ad hoc* staff members, some or most of whom may be co-opted from the regular civil service. The co-optation of civil servants may be achieved quickly, as the status, conditions etc. of the employees are already determined. Where the independence and impartiality of the civil service is questionable and the skill levels wanting, however, the EMB may seek to recruit its own *ad hoc* staff. For instance, in the 2011 and 2015 Nigerian general elections, the electoral commission decided to collaborate with the National Youth Service Corps to deploy youth members to work as polling agents.⁴⁵ Independent recruitment of staff could be a significant exercise that may stretch the capacity of the EMB. In all cases, independence requires that it has control over the recruitment process, including in selecting heads of local election offices.

Under the previous electoral law, NEBE had the power to employ and assign permanent and temporary electoral staff, including on secondment, for the conduct of elections, and the Chief Executive of the Secretariat administers the staff in accordance with civil service law and the regulations of the Board.⁴⁶ It has permanent offices and core staff at the head office and regional coordinating offices. While the Board could establish other permanent coordinating offices that are accountable to the regional offices,⁴⁷ in practice there have not been permanent structures below the regional offices. The election administration officers at the constituency and polling station levels were engaged temporarily, mainly upon secondment from the civil service, close to elections, partly because of low and late budget allocations from MoFED.⁴⁸ This is believed to have actually or potentially compromised the fairness and credibility of elections. According to the new Proclamation, it is the power of the Chairperson of the Management Board to hire and administer staff of the Board in general in accordance with special regulations to be adopted by government.⁴⁹ While the responsibility of hiring and administering all the staff of the secretariat and coordinating offices could be too much for the Chairperson, the law allows her/him to delegate this power to the Chief Executive of the Secretariat and the head of the regional offices.⁵⁰ The budget autonomy under the new proclamation would enable the Board to recruit necessary staff well ahead of election time and ensure their independence.

⁴⁵ Helena Catt et al, n-7, 133.

⁴⁶ Proc. 532/2007, n-10, Arts. 7(7) & 16(5).

⁴⁷ Proc. 532/2007, n-10, Art.18(3).

⁴⁸ Interview with Ambassador Samia Zekaria, and Mr. Nega Dufisa, n-35.

⁴⁹ Proclamation 1133/2019, n-13, Art. 9(5).

⁵⁰ Proclamation 1133/2019, n-13, Arts .21(8) & 24(12).

1.6. Proposals that were left out

Considering that election security can be a critical issue that affects the very occurrence, integrity or credibility of elections, the WG proposed that the law provides for the establishment of a joint election security cell or taskforce, including liaison officers from security and intelligence institutions, to be initiated and led by Chairperson of the Board. Such a structure would develop a common election security plan and execution mechanism and could be replicated down to constituency level. The proposal did not get buy in from both the government and opposition parties for different reasons. The former argued that the Board should not have such power, whereas the latter referred to past experiences of abuse of power by the security apparatus in favour of the incumbent. The new Proclamation retained only the part of the proposal that imposes on any federal or regional government body, which is presented with a lawful request from the Board, an obligation to cooperate and act upon the request at the pains of sanction.⁵¹

2. The Conduct of Elections – From Constituency Mapping to Vote Counting

Electoral rights are exercised through democratic elections. Broadly speaking, electoral rights are the political rights to participate in the conduct of public affairs, directly or by means of freely elected representatives. The right to vote and to run for elective office in free, fair, genuine and periodic elections conducted by universal, free, secret and direct vote; and the right to political association for electoral purposes are the basic elements of electoral rights. However, electoral rights remain hollow if they are not exercised together with other intimately related human rights and freedoms such as the right to freedom of expression, freedom of assembly and petition, and access to information on political-electoral matters. Thus, for an election to be considered truly democratic, electoral rights and the other intimately related rights and freedoms should be fully exercised throughout the electoral cycle, i.e., during pre-election, election, and post-election periods.

In keeping with the above basic principles, Proclamation No. 1162/2019 provides for fundamental principles of elections and attempts to regulate matters that play direct role in ensuring free and fair elections and the equal representation of the electorate at all levels. It declares that elections shall be conducted based on universal suffrage and by direct and secret ballot through which the voters express their will freely without any discrimination and that any Ethiopian whose electoral rights have not been restricted by law or the decision of a court shall be eligible to vote or to be elected.⁵² In order to realize the principle of every

⁵¹ Proclamation 1133/2019, n-13, Art. 27.

⁵² The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation, Proclamation No. 1162/2019, Federal Negarit Gazette, 25th Year No. 97, 16th October, 2019, Art. 5.

vote carrying equal weight, the new law requires that constituencies shall be comprised of comparable size of population and the disparity between them may not in any case exceed 15%.⁵³ There was no such guidance on constituency mapping under the previous law. Still in connection with equality of weight of votes, the electoral system design of the country, i.e., the mechanism by which the votes cast in an election are translated into seats won by parties and candidates,⁵⁴ was one of the most debated issues in the reform process. There was overwhelming support to changing the “first past the post” (“FPTP”) system, where electoral districts are won by the plurality of the votes cast, and the WG had conducted extensive study and discussion on the variety of options within majoritarian, proportional or mixed systems in the light of the country’s diversity that needs to be politically accommodated. However, the fact that the FPTP system was enshrined in both the federal and regional constitutions made it impossible to change the electoral system without constitutional reform and hence the new electoral law had to maintain the same system.⁵⁵

Proclamation No. 1162/2019 also departs from the previous electoral law of the country in two other important aspects. The first one has to do with its provisions on referendum. The previous electoral law did not say much about the conduct of referendum. This paucity of guidance gave way to haphazard implementation of past referenda in the country. The new Proclamation thus provides: “The Board shall, in consultation with the constitutionally authorized body, determine the polling date, the voters’ criteria to participate in a referendum, the choices to be put on the ballot paper and the types and contents of campaigns relating to a referendum”.⁵⁶ The law further authorizes the Board to enact a directive and provide details for its implementation.⁵⁷

Another noteworthy departure made in the new law relates to the necessary level of standard setting and exercise of supervision by NEBE and the national government on local elections. Although regional states have been allowed to regulate local elections through a delegated authority, the previous electoral law completely relegated the matter to regional governments’ decisions. The new law maintains the regime that the number of representatives elected for councils at various levels in a regional state be determined by regional laws;⁵⁸ it however introduced new standard setting provisions and possibilities. It thus mandates the HoPR to pass legislation related to local elections that sets standards

⁵³ Proclamation 1162/2019, n-52, Art.13(1)(b).

⁵⁴ Andrew Ellis, ‘System Design in the Context of Constitution Building’ [2018]International IDEA discussion paper,8, < <https://www.idea.int/sites/default/files/publications/electoral-system-design-in-the-context-of-constitution-building.pdf>>

⁵⁵ Proclamation 1162/2019, n-52, Art. 4(1).

⁵⁶ Proclamation 1162/2019, n-52, Art. 11(3).

⁵⁷ Proclamation 1162/2019, n-52, Art. 11(4).

⁵⁸ Proclamation1162/2019, n-52, Art. 8(2).

applicable to these elections”.⁵⁹ It further stipulates that regional laws pertaining to state council and local elections must be consistent with the relevant provisions of the Ethiopian Constitution and the Proclamation itself.⁶⁰ This means that regional governments would have to assess any of their laws relating to elections and embark on amendments in case their provisions are not compatible with the applicable federal laws. The law further empowers the Board to put in place standards for local elections by issuing a directive to that effect. Proclamation No. 1162/2019 lays down the principles, rules and procedures on the conduct of democratic elections.⁶¹ It guarantees broadly defined right to vote by providing only minimal restrictions. This is apparent from the provisions of the Proclamation which state that every Ethiopian of 18 or above years of age, who resided in the constituency for six or more months, and who is not deprived of his right to vote due to inability to make sound decision owing to mental illness or judicial decision has the right to vote.⁶² In order to make sure that these minimum restrictions are not posed as pretext to restrict citizens’ right to vote, the law provides sufficient guidance to election officials on how to carry them into effect. For example, regarding the ascertainment of the duration of residence, the law accepts not only residence ID cards but also many other identification documents and even sworn oral testimonies made by acquaintances, in case of undocumented voters.⁶³

Likewise, the law maintains minimum requirements for candidature. One of the most important achievements of the reform of the electoral law is the change made to the language requirement for candidacy that was maintained in the repealed electoral law, which prescribed knowledge of the language of the regional state or the area of his/her intended candidature as one of the requirements for candidature.⁶⁴ The removal of this requirement from the electoral law makes the law consistent with both the country’s Constitution and international standards.⁶⁵ Other requirements for candidature in the new law are citizenship, being 21 years of age at the time of registration and one year continuous residence in the constituency of intended candidature.⁶⁶ The law also removes the cap placed on the number of candidates that can be fielded in one constituency which was 12 in the previous election law. However, the new Proclamation introduced a requirement for

⁵⁹ Proclamation 1162/2019, n-52, Art. 8(3).

⁶⁰ Proclamation 1162/2019, n-52, Arts. 4(2) & 8(4).

⁶¹ Proclamation 1162/2019, n-52, Arts. 1-62.

⁶² Proclamation 1162/2019, n-52, Art. 18.

⁶³ Proclamation 1162/2019, n-52, Art. 21.

⁶⁴ Proclamation 532/2007, n-10, Art. 45.

⁶⁵ Article 38 of the Ethiopian Constitution provides that “Every Ethiopian national, without any discrimination based on color, race, nation, nationality, sex, language, religion, political or other opinion or other status “ has, among others, the rights “to vote and to be elected at periodic elections to any office at any level of government”. These provisions are modeled after art 25 of the International Covenant on Civil and Political Rights, to which Ethiopia is a party.

⁶⁶ Proclamation 1162/2019, n-52, Art. 31. But even the one year residence requirement allows for exceptions intended to broaden the right for candidature of those who intend to run in constituencies of their choice. See *ibid*.

endorsement signatures for political party candidates which were not the case in the previous election law.⁶⁷ It has also increased the number of endorsement signatures for independent candidates from 1000 to 5000.⁶⁸ These are meant to regulate candidature through stronger entry requirements than by capping the number of candidates per constituency, which would unduly limit the constitutional right to be elected. The provisions of the law that require the granting of leave without pay to civil servants who have registered as candidates⁶⁹ was met with a lot of resistance from some political parties, but it was maintained because of the need to prevent the abuse of public office for elections.

The new electoral law guarantees candidates and political parties taking part in elections robust protections and freedoms. For example, it provides that candidates registered for elections cannot be arrested or prosecuted until election results are officially known, unless he/she is apprehended *flagrante delicto*.⁷⁰ The law also guarantees candidate's right to campaign freely. Thus, a registered election candidate, on her/his own or through her/his supporters, has the right to call rallies and organize peaceful demonstrations without the need to request permission from the administration or municipality but by simply sending a written notification and respecting his/her legal duties.⁷¹ The law requires also that election campaigns shall be conducted by respecting the constitution and other relevant laws, the rights of voters and the right of other candidates to contest in a peaceful and democratic manner. Candidates also enjoy equal access to state-owned media such as radio, TV and newspapers.⁷² It unequivocally stipulates that government officials at any level shall have the obligation to create conducive conditions for candidates to utilize such facilities as radio and television stations, newspaper, and assembly halls under their respective authority without discrimination.⁷³ The new law's provisions regarding the composition and selection of electoral officials also need to be brought to attention. Again, with the purpose of shoring up the confidence of competing political parties in the electoral legal regime, professional competence, character, independence from political parties are made the requirements for the recruitment of the officials.⁷⁴ The right of participation given to political parties and independent candidates in the selection process of the electoral officials and the requirement

⁶⁷ Proclamation 1162/2019, n-52, Art. 32(2)., This requirement attracted much criticism from political parties and probably for that reason its application to the 2021 elections was suspended by a decision or amendment of parliament.

⁶⁸ Proclamation 1162/2019, n-52, Art.31.

⁶⁹ Proclamation 1162/2019, n-52, Art. 33.

⁷⁰ Proclamation 1162/2019, n-52, Art. 42.

⁷¹ Proclamation 1162/2019, n-52, Art. 43.

⁷² Proclamation 1162/2019, n-53, Art. 44.

⁷³ Proclamation 1162/2019, n-52, Art.45.

⁷⁴ Proclamation 1162/2019, n-52, Arts. 13 (3), (5), and 15 (8 &9).

for gender balance in the composition of the officials are other important additions made in the new law.⁷⁵

The law also pays specific attention to the processes of voting and counting and announcement of results in an election. It clearly lays down the requirements to keep polling stations secure in the lead up to the conduct of elections. It prohibits persons with guns or intoxicated individuals from being found within 500 meters radius of polling stations.⁷⁶ In the event of any security concerns, the polling station head can ask for assistance of police and that the police is obliged to cooperate and respond quickly in such instances.⁷⁷ The law also attempted to remedy the previous election law's gaps in the voting process. For example, it allowed persons who need assistance to vote to bring their own helpers.⁷⁸ Other improvements brought about in the new law relate to the ballot paper and ballot box. Thus, it requires that the ballot paper shall be of a quality secure against forgery and that they contain photos of the candidates. It also requires that the ballot paper be made up of transparent or translucent materials.⁷⁹

In regard to vote counting the new election law introduces some significant changes. A noteworthy addition is the requirement for the ascertainment of the existence of sufficient artificial or natural light before vote counting begins.⁸⁰ The law states that vote counting should take place at the polling stations where voting took place unless there are security problems in which case it can be moved to the constituency office of the area with members of grievance hearing committee, agents, and other election observers of the concerned polling station.⁸¹ The law also lays down specific requirements for vote counting and for results announcement from polling station level up to the declaration of final results by NEBE.⁸²

3. The Registration and Regulation of Political Parties

A political party is an association created by individuals who want to take part in the management and administration of public affairs of their country by assuming different public roles through democratic elections and various other ways.⁸³ For the purpose of

⁷⁵ Ibid.

⁷⁶ Proclamation 1162/2019, n-52, Art. 48.

⁷⁷ Ibid.

⁷⁸ Proclamation 1162/2019, n-52, Art. 55.

⁷⁹ Proclamation 1162/2019, n-52, Art. 56.

⁸⁰ Proclamation 1162/2019, n-52, Art. 58.

⁸¹ Proclamation 1162/2019, n-52, Art. 57.

⁸² Proclamation 1162/2019, n-52, Arts. 59-61.

⁸³ A similar meaning is given to 'political party' or 'political organization' in Proclamation 1162/201, (n 53) Art.2(13).

undertaking these tasks, political parties usually have political programs and a large number of members and supporters. As an important part of individuals' right to freedom of association, political parties can be created for all kinds of lawful purposes. Legal regulation of political parties is relatively a recent phenomenon even in the Western democracies.⁸⁴ The US, which seems to be the first nation to do so, started to regulate political parties in the second half of the 19th century.⁸⁵ But beginning from the end of WWII, legal regulation of political parties has become common practice.

Regulation of political parties is justified on at least two grounds. One is the fact that political parties are special types of 'public utility' associations whose purposes are among others to assume political power on behalf of the electorate, 'linking the citizen and the state'.⁸⁶ As succinctly articulated by Bogaards, political parties have two broad functions: representative function and institutional function.⁸⁷ Thus, the centrality of the role of political parties in the democratic process necessitates the establishment of some ground rules according to which all political parties function. The Second reason is the growing challenges in regard to political/party financing involving all kinds of irregularities, corruptions and scandals. Financial regulation of political parties has become almost the norm in most parts of the world now also because of the public funding of political parties. Political parties obtain substantial amount of money in public funding. The state therefore wants to make sure that the funding it provides are properly utilized and accounted for.

The legal regulation of political parties needs to observe certain fundamental principles, the underlying purposes of which are to allow parties to freely function within a society and obtain legal protection from unnecessary interference in their internal affairs. Thus, there is a need to balance the regulatory disposition with the freedom to associate for political purposes. A government's regulatory regime has to aim at creating conducive environment for those political associations that want to genuinely take part in public affairs while ensuring accountability of the parties in a manner acceptable to the members of the society in which the parties function.⁸⁸

⁸⁴ In Australia and Canada, for example, discussion on legal recognition of political parties began only in the 1970s. In New Zealand, legal recognition of political parties started in 1993 and in UK only in 1998; See Sara John, 'Resisting Legal Recognition and Regulation: Australian Parties as Rational Actors?' in Anika Gauja and Marian Sawyer (eds), *Party Rules? Dilemmas of Political Party Regulation in Australia* (ANU Press, 2016).

⁸⁵ Sara John, n-84, 40.

⁸⁶ Sara John, n-84, 37.

⁸⁷ Matthijs Bogaards, 'Comparative strategies of political party regulation' in Benjamin Reilly and Per Nordlund (eds) *Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development* (UN University Press, 2008) 49.

⁸⁸ See generally, Venice Commission of Experts, 84th Plenary Session 15–16 October 2010, 'Guidelines on Regulation of Political Parties' (2011, Warsaw/Strasbourg).

Proclamation No. 1162/2019 is consistent with the basic principles briefly outlined above. It reiterates that everyone has the right to form and be part of a political party, with the exclusion of limited group of persons it has identified. The expansion of the categories of public employees that are excluded from being members of political parties while holding their positions is noteworthy. In addition to judges, members of the defence force and police officers, the new law specifically mentions members of the intelligence and security forces, prosecutors, and officials and employees of the Board as persons that may not be members of political parties while holding their offices.⁸⁹ Attempt has been made to rectify the shortcomings of the previous legislation on political parties regulation. The new law also introduced some changes that are believed to make political parties more transparent in their decisions, and more accountable to the public and their members.

One area of significant change brought about by the new electoral law is the required minimum number of founding members for the establishment of a political party. Accordingly, ten thousand founding members are required in order to establish a national party, and such party must have at least 15% membership in five regions of the country and its members from any one region must not exceed 40% of the required number of founding members. In the case of regional parties, the law requires 4000 founding members, of which more than 60% should be permanent residents of the designated region.⁹⁰ The law also provides for the requirements to verify the truthfulness of the identity of the founding members during registration as well as after the party has been registered.⁹¹ Whether or not a national or regional political party has maintained the requisite minimum number of members needs also to be verified by the Board every two years based on the list of founding members that the party supplies.⁹²

Registration is a requirement for legality of political parties in Ethiopia.⁹³ But Proclamation No. 1162/2019 introduces the notion of provisional license to political parties, which was not part of the previous law on party registration, bestowing semi-legal personality on some founders. Thus, when a written request for registration; meeting minutes with 200 signatures for a nationwide party or 100 signatures for a regional party; the provisional name of the party to be established; a confirmation to abide by the election law and other relevant laws are submitted to the Board, it shall grant a certificate of provisional registration that

⁸⁹ Proclamation 1162/2019, n-52, Art. 63.

⁹⁰ Proclamation 1162/2019, n-52, Arts. 66 & 67.

⁹¹ Ibid.

⁹² Proclamation 1162/2019, n-52, Arts. 64(7) & 65(6).

⁹³ Proclamation 1162/2019, n-52, Arts. 66(1); some legal systems do not require registration as political party for an association to engage in political activities; See also Venice Commission guidelines, n-88.

could serve for up to six months for the purpose of undertaking activities required to get the party registered.⁹⁴

The new law also pays special attention to enhancing the participation of members in the governance of political parties. It further requires the parties to standardize their bylaws and function in keeping with the principles of accountability and transparency. The provisions of the law pay serious attention to ensuring the internal democracy of political parties.⁹⁵ The Proclamation provides thus that the bylaws of a political party shall include: details of the various organs of the party, the procedure for their election, their tenure and description of their respective functions; a stipulation that the quorum for the party's general meeting shall be constituted by at least 5 percent of the minimum number of founding members required in the Proclamation; a stipulation that the party's general meeting shall be held at least once every three years; the procedure for the nomination of party members for national and other various level elections; and the stipulation that the election of its leadership and other officials at all levels must be conducted in a transparent, free and fair manner, where secrecy of the ballot is protected.

An issue of serious debate in the legal reform process related to ways of increasing the role of women and vulnerable groups such as persons with disabilities in political organizations in particular and in elections in general. While rights groups advocated for a quota system to ensure the political representation and participation of such groups, there was resistance from political party representatives to the very idea of requiring women's representation in political party structures with the lame reason that they do not find interested women. In the end, the revised electoral law followed an approach of incentivizing the participation of women and persons with disabilities. It thus requires a political party to take into account gender equality in the list of its founding members.⁹⁶ Election to political party leadership positions should ensure gender representation.⁹⁷ The number of female members, leadership position-holders and nominated candidates are among the criteria that determine the amount of financial support that a political party is entitled to receive from government.⁹⁸ For persons with disabilities, the electoral law reduces the number of endorsement signatures that a private or political party candidate is expected to present in order to run for elections.⁹⁹ The number of political party members, persons in leadership positions and of candidates with disabilities also determines the amount a political party

⁹⁴ Proclamation 1162/2019, n-52, Art. 67 (3)-(6).

⁹⁵ Proclamation 1162/2019, n-52, Arts.71-74.

⁹⁶ Proclamation 1162/2019, n-52, Arts.64/6 & 65/5.

⁹⁷ Proclamation 1162/2019, n-52, Art.74/4.

⁹⁸ Proclamation 1162/2019, n-52, Art. 100/2.

⁹⁹ Proclamation 1162/2019, n-52, Art.31/3 & 32/2.

receives by way of state financial support.¹⁰⁰ These provisions may promote the participation of women and persons with disabilities in politics but they are not enough to ensure their effective representation considering the cultural and social barriers that exist within the society. The proposal of a quota system should have been studied more closely in light of the ethnic-based form of representation that Ethiopia's constitution promotes.¹⁰¹

Another area that can be characterized as a paradigmatic shift in the new law has to do with government funding and the regulation of the overall finance of political parties. The law introduces new set of criteria for government funding of political parties in the form of valid votes won in federal and regional parliamentary elections (as opposed to the previous criterion of the number of seats won), and also a matching fund element that encourages parties to raise their own funding for it to be matched by government grant.¹⁰² The law also states specific dates both for the parties to make requests for public funding and for the Board to disburse public funding for those that meet the reporting requirements.¹⁰³ This is believed to solve the previous complaints of political parties that disbursement of public funding often came at times when it was too late to utilize it for their purposes.

As mentioned earlier, the law also embraces provisions regulating sources of finance, auditing and reporting obligations of political parties that meet good comparative practices to control the evils of money in politics.¹⁰⁴ It allows political parties to engage in public fund-raising activities without requesting permissions from the federal, regional or local government authorities. The law also clearly stipulates the proscribed sources of finance for political parties and those that are allowed.¹⁰⁵

4. Electoral Code of Conduct

Codes of conduct for participants in the elections held around the globe are one of the notions that attract much attention in post-cold war world. These are reflected in, for example, the works of International IDEA.¹⁰⁶ Electoral code of conduct in which ethical standards are delineated in regard to political parties, their leaders, political party and

¹⁰⁰ Proclamation 1162/2019, n-52, Art. 100/2.

¹⁰¹ See Meskerem Geset and Tayechalem G. Moges, "Counting absence in Political Equality: A Preliminary Gender Analysis of the Electoral Law Reform in Ethiopia" in Meron Zeleke and Meskerem Geset (eds.), *Gender, Development and Women's Rights: Ethiopian Perspective* (Centre for Human Rights, AAU, 2020), pp 57-99.

¹⁰² Proclamation 1162/2019, n-52, Art. 100.

¹⁰³ Proclamation 1162/2019, n-52, Art. 103(3)-(4).

¹⁰⁴ Proclamation 1162/2019, n-52, Arts. 81-86; 100-113.

¹⁰⁵ Proclamation 1162/2019, n-52, Arts.105-113.

¹⁰⁶ International Institute for Democracy and Electoral Assistance, *Code of Conduct for Political Parties Campaigning in Democratic Elections* (International IDEA, 1999); International Institute for Democracy and Electoral Assistance, *Dialogues on Voluntary Codes of Conduct for Political Parties in Elections* (International IDEA, 2017).

independent candidates, members, and supporters of political parties is the other important part of Proclamation No. 1162/2019.¹⁰⁷ The provisions of the new law relating to electoral code of conduct are a condensed and more sharpened versions of the general principles of election code of conduct laid out in Proclamation No. 532/2007¹⁰⁸ and unpacked in details in the agreement between political parties that turned into the Electoral Code of Conduct for Political Parties Proclamation No. 662/2009. The new law opted for providing for the most important ethical standards, leaving most others to the political parties' own joint political platforms and agreements.

The code of conduct provisions of the Proclamation consists of four major components. The first component deals with ethical standards expected of political parties, their leaders, political party and independent candidates, members, and supporters of political parties.¹⁰⁹ The second part deals with what it calls 'responsibilities of stakeholders', in which the respective roles and duties of the Board, political parties, candidates, council or forums of political parties and other organs are set out.¹¹⁰ The third part deals with acts or omissions that amount to ethical violations.¹¹¹ The last part provides for measures to be taken by the Board and/or courts of law if and when ethical misconducts delineated by the law occur.¹¹²

5. Electoral Dispute Resolution Mechanisms

Provisions dealing with electoral justice are also entrenched in Proclamation No. 1162/2009. The settlement of electoral disputes in the Proclamation comprises both administrative avenues for settlements of major electoral disputes from the polling stations all the way to the Management Board of NEBE as well as judicial review of the administrative decisions. The new law leaves the Political Organizations' Joint Forum as a platform of optional and voluntary resolution of disputes relating to elections.¹¹³ The most noteworthy changes introduced in the new proclamation is the entrenchment of judicial review of the administrative decisions of various structures of NEBE by various levels of courts, including those of the Management Board.

The decisions of the Management Board on administrative matters, such as political party registration, can go on appeal to the Federal High Court whereas decisions relating to

¹⁰⁷ Proclamation 1162/2019, n-52, Arts. 127-147.

¹⁰⁸ Proclamation 532/2007, n-10, Arts. 101-105.

¹⁰⁹ Proclamation 1162/2019, n-52, Arts. 127-137.

¹¹⁰ Proclamation 1162/2019, n-52, Arts. 138-141.

¹¹¹ Proclamation 1162/2019, n-52, Arts. 142-147.

¹¹² Proclamation 1162/2019, n-52, Arts. 148-150.

¹¹³ Proclamation 1162/2019, n-52, Art. 151 (1-4).

electoral processes and results are appealable to the Federal Supreme Court.¹¹⁴ The new proclamation recognizes that the involvement of the Board administrative issues such as party registration and regulation may affect its other functions such as the conduct of elections and dispute resolution, one reason why in some countries, such as Kenya, the regulation of political parties and the conduct of elections and dispute resolution are placed under separate institutions. The law allows the Board to establish inquiry councils that investigate facts, collect evidence and provide recommendations for its decision.¹¹⁵

Regarding appeals from the decisions of Grievance Hearing Committees at the polling station, constituency and regional office levels, there was a debate as to whether regional courts can have jurisdiction over electoral disputes, except by way of delegation, considering that legislation on electoral and political party matters are within the exclusive powers of the Federal Government.¹¹⁶ However, this legislative jurisdiction was distinguished from adjudicative jurisdiction and hence regional courts of different levels have been authorized to consider cases on appeal from the grievance committees.

The law also attempted to deal with outstanding complaints by political parties on the previous legal regime regarding the composition and nature of the lower level administrative decision-making bodies, known as ‘grievance hearing committees’, which are unique to the Ethiopian election dispute settlement system. The Law disbanded the so-called “public observers” from which most of the members of the grievance hearing committees of various stages used to be selected.¹¹⁷ The grievance hearing committee members at the polling stations and constituencies are now directly elected from the voters who live in the respective constituencies. The law also requires that the members of the grievance hearing committee should not be members of any political party and be personalities known for their integrity and be representative of gender.

Other important changes are also made to ensure the fairness of the election dispute settlement system. For example, the law now requires not only that all decisions of the grievance hearing committees should be in writing, but also that the grievance hearing bodies shall give proof of receipt of complaints stating the date and time of application.¹¹⁸ This ensures the documentation of complaints and decisions to expedite appellate processes as well as avoid the abuse of power that may result from leaving things to oral complaints and responses. Aggrieved parties can go to the next higher level committee not only in

¹¹⁴ Proclamation 1162/2019, n-52, Art. 17.

¹¹⁵ Proclamation 1162/2019, n-52, Art. 151 (10).

¹¹⁶ FDRE Constitution, n-3, Art. 51(15).

¹¹⁷ During the drafting process of Proclamation 1162/2019, n-52, opposition political parties objected to the idea of public observers stating that such persons were ruling party members or sympathizers that lacked neutrality.

¹¹⁸ Proclamation 1162/2019, n-52, Art. 151(7-8).

objection to the decisions given but also when the concerned committee fails to give decisions within the time specified by the law. The higher level committee is now required to consider the indecision of the lower level as a decision against the complainant and proceed to settling the case within the time period specified by the law. The members of the grievance hearing committees are clearly empowered to summon any government official or other relevant person to provide information or testimony.¹¹⁹

The law also prescribed specific time for settlement of the disputes, including by the Board and the Federal Supreme Court that are required to hand down their decisions with ten days and one month, respectively, from the time of receipt of the complaints.¹²⁰ The prescription of time limit is meant to ensure the conclusion of election and formation of a new government within a predictable period of time and to avoid or shorten any possible period of uncertainty relating to the term of office of the incumbent. Nevertheless, the sufficiency of the one month time limit for the decision of the Supreme Court raised concerns considering that the Court is expected to review all necessary evidence,¹²¹ and not limited to considering the bases of decision by the Board, before reaching a final verdict. The possibility of consideration of cases *de novo* is in fact another addition to the electoral dispute settlement system. However, depending on the magnitude of complaints and breadth of evidence that may be introduced and reviewed anew, it is argued, one month may be enough for the decision of the Federal Supreme Court. The Court should endeavor to resolve disputes within this period of time by deploying mechanism of investigation that may include the deployment of commissioned experts. If the time still proves to be too short in practice, the provision may be considered for reform in the next possible opportunity.

Concluding Remarks

The reform of the electoral laws of Ethiopia to bring them in line with accepted standards of the fundamental right to political participation was long overdue, as they had a number of provisions that were bones of political contention. Accordingly, they were among the legislation that were prioritized for reform after the political changes that occurred in mid-2018. The process of reform saw an unprecedented involvement of independent experts, who identified critical issues for reform and conducted studies to provide evidence-based and comparative recommendations. The reform was also conducted under serious time constraints to allow the participation of stakeholders other than political party

¹¹⁹ Proclamation 1133/2019, n-13, Art. 151(14).

¹²⁰ See Proclamation No. 1133/2019, n-13, Art. 155(3) & (5).

¹²¹ See, for example, Proclamation No. 1133/2019, n-13, Art. 155(4).

representatives and to ensure detailed discussion on many of the proposed changes. Nevertheless, the reform has registered a number of positive changes.

The composition and independence of NEBE was one of the most critical issues that needed to be addressed by the legal reform process. The calls of political parties for reform extended to the very nomenclature of the electoral management body as a “Board”, arguing that it should be a Commission, to the process of nomination and appointment of the members. However, the legislative reform had to happen within the limits of the Constitution, which was not slatted for amendment itself, and hence a number of issues including the basics of the process of appointment of Board members had to be maintained. However, Proclamation 1133/2019 introduced steps that aimed at making the nomination and appointment of the members more participatory by requiring that a representative nomination body be established and the Prime Minister consults with competing political parties with a view to agree on the nominees. The Proclamation further introduced changes to membership requirements, privileges, terms and conditions of removal of Board members in ways that increase their independence and impartiality. In this connection, complaints for the removal of a Board member could have been handled by a more independent body, such as the Federal Judicial Administration Council, rather than the Speaker of Parliament because it risks being exposed to political abuse.

The legislative reform further made NEBE an autonomous and compact institution with sharper mandates. The Board is now in control of its budget preparation, which it directly presents to the parliament, and the management of whatever is allocated to it, subject only to applicable accounting and audit rules. It also has staffing autonomy, which enables it to attract and employ sufficient human resources. The relationship between the Board, its secretariat and the regional offices has also been redefined in a way that slims the bureaucracy, clarifies hierarchy, and avoids waiting for each other and increases efficiency and effectiveness. The idea has been that the independence of the five-member Management Board, which could be ensured by the new appointment procedure, can be cascaded to the secretariat and the regional offices, including in terms of the appointment and management of staff in decision-making positions. In this connection, the fact that the Board members are appointed full-time and that they serve as heads of the various departments of NEBE is a new addition that can improve its functioning.

Regarding the conduct of elections, Proclamation No. 1162/2019 has introduced many changes that help in making the legal environment more conducive for political competition and consistent with international standards in the area. Important changes have been introduced in relation to the rules and procedures of election. The new law lays down minimum legal standards to regional and local election-related issues that may be governed by regional laws pursuant to the delegation of the exclusive legislative power of the federal

government. It further clarifies the procedure and parameters of constituency mapping, including population size variations, and includes detailed guidance on referenda. The new law revised the procedure of appointment of electoral officials at the constituency and polling station levels in a way that increases their representativeness, independence, impartiality and competence. It also did away with public observers, which were a source of criticisms against the impartiality of previous elections, and opened the space for civil society election observers. The changes in the law regarding ballot papers and ballot boxes make it difficult for forgery and election fraud to occur. Provisions added in the new law regarding the safeguards put in place during voting, counting and tabulation of results could increase the credibility of election results.

In relation to political parties, the new law embraced new policy positions and provided clarifications. It requires more founding members for both national and regional political parties, increasing them from 1500 to 10000 verifiable signatures for national political parties. The previous law's cap of twelve candidates per constituency was lifted in favour of more serious regulation of entry into political competition. The new law therefore requires significantly more endorsement signatures for independent candidates (increasing it from 1500 to 5000) and additional endorsement signatures of political party candidates from voters in their respective constituencies, a requirement that was suspended for the 2021 elections. The law further regulates in greater detail the internal democratic disposition of political parties and, in this regard, requires them to meet certain minimum standards. It introduces a new arrangement in relation to public funding of political parties that will help reward the efforts and achievements of political parties. Basic principles of codes of conduct during elections have also been defined more concisely and clearly. Moreover, the election dispute settlement provisions of the new law have been re-aligned with the precepts of due process of law and they make judicial review integral part of dispute resolution. The new law subjects any final decision of the Board to judicial review. This lives up to international electoral standards that require that administrative decisions of electoral bodies should be reviewable by impartial and competent judicial body.

Some areas of proposed changes either could not happen without constitutional reform or were not accepted by stakeholders. First, while there was broad agreement to change the electoral system design from first-past-the-post ("FTPT") to a system that ensures more representation and avoids wastage of votes, this could not be achieved because it would have required amending the federal as well as regional constitutions, which have respectively provided for FTPT as the electoral system for the HoPR and the State Councils. The issue will very likely be revived in the next opportunity of constitutional reform. The procedure of appointment of members of the NEBE and of the mapping of constituencies, which are also provided for under the Federal Constitution, may also be considered for revision on such an occasion. Secondly, election security remains to be an important issue that the

revised legislation should have addressed, not only because of the current situations of sporadic cases of conflict and violence in some parts of the country but also for the long term. The proposal to establish an election security cell headed by the Board and involving the various security institutions of the country during elections was not accepted by the ruling as well as opposition parties. What remains in the law is the mandate of electoral officers to call upon any government authority to carry out election related responsibilities and the duty of such authorities to cooperate with the Board. This arrangement may work for relatively lower level security issues, but not to circumstances where the security threat requires the involvement of the broader security apparatus.

Advocacy groups had also argued for more robust mechanisms of representation and participation of women in politics and elections. Against the backdrop of resistance of some political party representatives and an appreciation of the compatibility of a quota system for women with the ethnic-based constituency that is constitutionally recognized, the new law opted to incentivise the participation of women in political organizations and electoral processes. This is an area that requires further consideration in the next possible instance of electoral legal reform. The issue of gender equality in elections also requires more work of sensitization targeting politicians.¹²²

The participation of civil servants in elections and the safeguards that should be put in place with a view to preventing the abuse of public office in election campaigns was one of the most contested issues in the course of the electoral legal reform. A proposal that a civil servant should temporarily leave office once he/she is registered as a candidate for election, with a right to return if he/she did not win, raised an outcry from opposition political parties which argued that the bulk of their candidates come from the civil service and cannot afford to run for office without their salaries. The deference of the new electoral law to the Federal Civil Service Proclamation No. 1064/2017, which provided for granting civil servants who run for office leave without pay during campaign and election period and the definition of civil servants to exclude holders of high political offices¹²³ could not change the position of many political parties. This is also another issue for further consideration in the context of future civil service and electoral law reforms.

Finally, the law as adopted has a number of stylistic and typographical issues. The language is not always easily accessible. There are mismatches between the Amharic and English

¹²² One intriguing instance in the reform process was where the plenary of parliament could not agree on a provision of the draft law, which had provided that where two candidates in a constituency get equal number of votes, a woman candidate would be declared winner.

¹²³ Proclamation No. 1162/2019, n-52, Art. 33 &2(29).

versions that sometimes go to substantive issues.¹²⁴ The laws further contain imprecise provisions that could potentially complicate their application in practice.¹²⁵ While the constitutional rule that the Amharic version is the governing version helps to some extent, there is a need to revise and “clean” the language of some of the provisions of the legislation.

¹²⁴ For example, under article 32(2) of Proc. 1162/2019, n-53, the Amharic version requires a political party candidate to present 2000 endorsement signatures whereas the English version puts that number at 3000.

¹²⁵ For example, according to article 152(8) of Proclamation No. 1162/2019, n-52, a party aggrieved by the (in) decision of the constituency Grievance Hearing Committee in relation to voter registration is entitled to take appeal to “the competent federal or regional court”. It is not clear which exact level of court would decide such cases, although one may surmise that it’s the Woreda court of the area or the Federal First Instance Court of the area.

Legal Reform towards Building an Effective National Human Rights Commission in Ethiopia

Meskerem Geset*

Abstract

The Ethiopian Human Rights Commission was established in 2004/2005 to spearhead the promotion and protection of human rights in the country. It is among the institutions that were identified for reform in the context of Ethiopia's political transformation that started in mid-2018. The article looks at the legislative reform undertaken to enhance the effectiveness of the Commission. Employing the Paris Principles effectiveness standards and drawing on comparative analysis, the study offers a systematic appraisal of EHRC's founding law of 2000 and its amendment in 2020. It elaborates and evaluates the contribution of the recent legal revision towards enhancing an effective national human rights commission in Ethiopia. The findings depict that the revised legislative framework – positioned within the broader institutional reform – addressed critical issues of relevance to the autonomy, credibility, and efficacy of the institution as a strong human rights actor. The piece further shows that the legal reform has left some areas that would require further examination and reform.

Introduction

The Ethiopian Human Rights Commission (EHRC or Commission) is one of the National Human Rights Institutions (NHRIs)¹ in Ethiopia operating since 2004 with a mandate to spearhead the promotion and protection of human rights in the country. It is among the institutions undergoing reform in the framework of Ethiopia's political transformation initiated in 2018. The amendment of relevant laws and the appointment of new leadership of the National Election Board of Ethiopia (NEBE), the Ethiopian Human Rights Commission, and the Institution of the Ombudsman are some of the measures taken to revamp these institutions with the view to strengthen their mandate and ensure their credibility and independence. These measures fall within the broader multi-sectoral

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¹ The Ethiopian Institution of the Ombudsman is another institution of similar feature.

reform towards political and economic liberalization, opening up democratic space, extensive legal reform, and reinforcing democratic institutions.²

This article aims to discuss the legal reform with respect to the EHRC that aimed at strengthening the mandate and independence of the institution and enhancing its effectiveness. In view of this, the institutional status of the EHRC in the founding legislation, the recent legal reform process, and the amendments introduced to the legal regime are discussed through the analytical framework of the Paris Principles. Accordingly, purposeful focus is devoted more to the normative framework and EHRC legislation and less to the institution's practice. It must, therefore, be noted that the article is not presented as a comprehensive effectiveness analysis of EHRC law and practice.

Methodologically, the bulk of this Article is based on legal or textual analysis. It mainly analyses the legal framework from comparative and international perspectives. While significantly relying on the international normative framework (the Paris Principles), international NHRI jurisprudence is referred to for the purpose of drawing comparative insights. The article also draws from the author's observations and participation in the legal reform process and the work of the institution under study. Admittedly, legislative framework is by no means the full guarantee for NHRI effectiveness; neither do the Paris Principles offer a comprehensive analytical framework.

The analysis begins with a brief background introducing NHRIs as human rights actors and moves to a brief description of the international standards for NHRIs set by the Paris Principles, which are used as analytical framework for the discussion. After this, the article offers analysis of the EHRC establishing law in light of the Paris Principles' effectiveness lens. The analysis proceeds to discuss the context, process and outcomes of the legal reform and culminates in highlighting areas for further reform.

2. National Human Rights Institutions: An Overview

NHRIs are state-based independent non-judicial bodies with a legal mandate to advance the promotion and protection of human rights in a national context. While the early global discourse on the establishment of NHRIs dates back to the post-Second World War period,³ the formalization of international standards that apply to them occurred in the

² For details on the political reform, see Jon Temin and Yoseph Badwaza, 'Aspirations and Realities in Africa: Ethiopia's Quiet Revolution' 2019 30 (3) *Journal of Democracy* 139.

³ The United Nations Economic and Social Council (ECOSOC) during its 1946 session called upon its Member States 'to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission of Human Rights' (ECOSOC Res. 2/9, 21 June 1946).

early 1990s with the adoption, by the United Nations (UN) General Assembly, of the Paris Principles (the Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights).⁴ In the African context, the formal recognition of the NHRIs can even be traced back to the early 1980s with the adoption of the African Charter on Human and Peoples' Rights (the African Charter).⁵ Article 26 of the African Charter obliges state parties to establish and reinforce appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.

The Paris Principles define the competences and responsibilities, composition and guarantees of independence, and methods of operation of NHRIs. Under the principles, NHRIs shall promote and protect human rights, and be given as broad a mandate as possible, set out in legislation or in the constitution. NHRIs should fulfill a range of responsibilities in relation to drawing the attention of government and other competent bodies to human rights violations through reporting, advising, and addressing individual complaints as well as increasing public awareness of human rights through information, education, and the media. The mandates outlined in the Paris Principles are generally applicable to all human rights and the underlying rationale behind the criteria pertaining to NHRIs' form, composition and functions is the promotion of independent and effective NHRIs for monitoring human rights at the national level.

NHRIs may take various forms. Most scholars distinguish between five types: human rights commissions, ombudspersons, hybrid institutions, consultative or advisory bodies, and research institutes or centers. The dominant model varies from region to region; while commissions are popular in Africa⁶ as well as Asia, common types in Europe appear to be consultative or research institutes, and in Latin America that of Ombudsman institutions.⁷ But there is no established nexus between their particular institutional type and performance.⁸ NHRIs also vary significantly in terms of size, structure, funding, priorities,

⁴ General Assembly Resolution 48/134, 20 December 1993, A/RES/48/134. It must be noted that the Paris Principles were crafted by NHRIs themselves during the first International Workshop on National Institutions for the Promotion and Protection of Human Rights convened in Paris in October 1991. For further on the evolution and formalization of NHRIs, see Lindsnaes and Lindholt, 'National Human Rights Institutions – Standard Setting and Achievements', in Lindsnaes, Lindholt and Yigen (eds), *National Human Rights Institutions. Articles and working papers* (The Danish Centre of Human Rights, 2000).

⁵ The African Charter on Human and Peoples' Rights was adopted by the Organization of the African Unity (OAU) in 1981.

⁶ 89% of NHRIs found in African states are commission types (see UNDP and NANHRI, *Study on the State of National Human Rights Institutions (NHRIs) in Africa* (UNDP 2016) 16).

⁷ See GANHRI <<https://ganhri.org/membership/>> accessed 21 January 2021.

⁸ Katerina Linos and Tomas Pegrar, 'Interrogating form and function: Designing effective national human rights institutions' (2015) *Matters of Concern Human Rights Research Paper Series* (The Danish Institute for Human Rights 2015).

context, and operating modalities. Not only their institutional and organizational structure but also their practices and influence on national and international human rights protection vary widely. Despite the variance, NHRIs' role has increasingly gained importance with regard to fostering respect for and monitoring of the implementation of human rights. They are more and more integrated into global and continental human rights systems to play active role in monitoring the domestic implementation of human rights treaties and have, consequently, formed a new category of international actors in the field of human rights.⁹

Even though NHRIs have been emerging around the globe since their early appearance in Europe in the late 1940s,¹⁰ the past few decades saw a considerable growth in the number of these institutions. More or less a hundred twenty seven NHRIs around the world have been accredited by the Global Alliance for NHRIs (GANHRI), the former International Coordinating Committee of National Institutions (ICC), an international independent entity set up to promote and monitor the establishment of NHRIs in conformity with the Paris Principles.¹¹ Notwithstanding the minimum international standards on which most NHRIs sought to be established, their level of performance varies widely as reflected in the different levels of accreditation by GANHRI in light of the Paris Principles assessment criteria. In the same vein, NHRIs are established in several African countries with varying mandates and modes of establishment. They are part of a regional network, the Network of African National Human Rights Institutions (NANHRI), in addition to being part of the global group (GANHRI). Currently, there are 46 African NHRIs, including the EHRC, that are members of NANHRI.¹²

The emergence of NHRIs in Ethiopia has taken several decades. The early sign of political will to establish an NHRI was during the drafting of a new constitution in 1974 that envisioned a transition to a constitutional monarchy. The draft constitution proposed the establishment of an independent Ombudsman with the power to investigate administrative malpractice accountable to the National Assembly.¹³ However, the

⁹ See Sonia Cardenas, 'Emerging Global Actors: The United Nations and National Human Rights Institutions' (2003) 9 *Global Governance* 23; Rachel Murray, *The Role of NHRIs at the International and Regional Levels: The Experience of Africa* (Hart Publishing 2007).

¹⁰ The French National Advisory Commission for Human Rights (CNCDH), the oldest NHRI in the world, was created in 1947. See Gauthier de Beco, 'National Human Rights Institutions in Europe' (2007) 7 (2) *Human Rights Law Review* 331,333.

¹¹ See membership and accreditation status of NHRIs <<https://ganhri.org/membership/>> accessed 21 January 2021. It must be noted that NHRIs are accredited with A and B status based on an assessment regarding their level of compliance with the Paris Principles. As of early 2021, GANHRI's profile show 117 members with 84 "A" status and 33 "B" status accredited NHRIs. It must also be noted that there are several that are not even part of the international accreditation system. There were formerly around 10 C status NHRIs.

¹² See NANHRI Members <<https://www.nanhri.org/>> accessed 19 December 2020.

¹³ See Draft Constitution of Ethiopia 1974, Articles 143-144.

envisaged Ombudsman could not materialize since the constitution-making process was aborted following the demise of the Imperial regime in 1974. The discussion to establish NHRIs in Ethiopia was opened up again only after two decades with the new constitutional dispensation of the mid-1990s, after the fall of the Derg regime. As the country was coming out of authoritarian rule characterized by human right crisis and democratic deficit, fostering democratic governance, rule of law and human rights were central part of the political transition agenda in which creating democratic institutions and human rights protection mechanisms suitably fitted.¹⁴

It must be noted that this period also overlapped with the global expansion of NHRIs following the Paris Conference, which is believed to have its own influence on national discourses. As a result, NHRIs have featured in the constitution making process and ultimately in the text of the new constitution that came with a solid bill of rights.¹⁵ The 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) bestowed the House of Peoples' Representatives (HoPR) with the mandate to establish a Human Rights Commission and an Ombudsman Institution and determine by law their powers and functions (Article 55(14)). In view of this, in 1997, the House organized an international conference on the establishment of an ombudsman institution and a human rights commission.¹⁶ Two years following the conference, the House promulgated separate pieces of legislation setting up the two institutions, i.e., the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 (EHRC Proclamation or founding Proclamation) and the Institution of the Ombudsman Establishment Proclamation No. 211/2000 (Ombudsman Proclamation). However, it took a few more years to finally inaugurate the institutions.

3. Analytical Framework for NHRI Effectiveness

The analytical framework used in this article for assessing effectiveness of NHRIs is the Paris Principles. The Principles have earned international acceptance to serve as the

¹⁴ See Mohammed Abdo, 'The Human Rights Commission of Ethiopia and Issues of Forced Evictions- A Case-oriented Study of its Practice', in Christophe Van der Beken (ed.), *Human Rights and Development: Legal Perspectives from and for Ethiopia, Proceedings* (Brill 2013) 4 (noting the same was apparent in the background document prepared by the *Legal Standing Committee of the House of People's Representatives* to elaborate the draft laws establishing the Commission and the Ombudsman). See also Haile Selassie Gebresselassie and Edmond Volker, 'Contextualizing the establishment of institutions of human rights protection in Ethiopia' in Kamal Hossain, Leonard F. M. Besselink, Haile Selassie Gebre Selassie, and Edmond Volker (eds.), *Human Rights Commissions and Ombudsman Offices, National Experiences throughout the World* (Kluwer Law International 2000).

¹⁵ See FDRE Constitution 1995, Chapter 3.

¹⁶ See details in Mohammed Abdo, 'Challenges Facing the New Ethiopian Ombudsman Institution' (2002) 6 *International Ombudsman Yearbook* 90.

minimum standards for NHRIs to qualify as legitimate and effective institutions, providing guidance on the formation and functioning of NHRIs. These institutions “could only make meaningful contribution if their establishment meets certain standards and principles governing their existence and performance.”¹⁷ Henceforth, the Paris Principles have prescribed “benchmarks against which proposed, new and existing NHRIs can be assessed.”¹⁸

In elaborating the analytical framework, the article draws on the interpretations of the Paris Principles as enshrined in the General Observations of the GANHRI Sub-Committee on Accreditation (SCA). It further explores practical insights by drawing on a rich empirical analysis developed by Linos and Pegram in their seminal study entitled “What works in human rights institutions?”¹⁹ Their investigation looks deeper into the key components of the Paris Principles effectiveness safeguards through an empirical examination of NHRIs across the globe.

Notwithstanding the non-binding nature of the Paris Principles under international law, their endorsement by the United Nations “legitimised the Principles as the normative standard for the establishment and strengthening of NHRIs”.²⁰ The GANHRI, hence, uses these Principles as a basis for accrediting NHRIs after assessing the extent of their conformity to the Principles. It must be acknowledged, at this point, that effectiveness could encompass a range of other practical elements as important as, but beyond, the explicit stipulations in the Paris Principles or the SCA General Observations.²¹ And certainly, it calls for much more than formal safeguards but studies have established that institutions with “formal safeguards are often more effective” than those without.²² The focus of this article is, thus, on formal institutional safeguards for NHRI effectiveness.

¹⁷ C. Raj Kumar, ‘National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights’ (2003) 19 (3) *American University International Law Review* 262.

¹⁸ Charles M Fombad (ed.), *Compendium of documents on National Human Rights Institutions in eastern and southern Africa* (PULP 2019) 8.

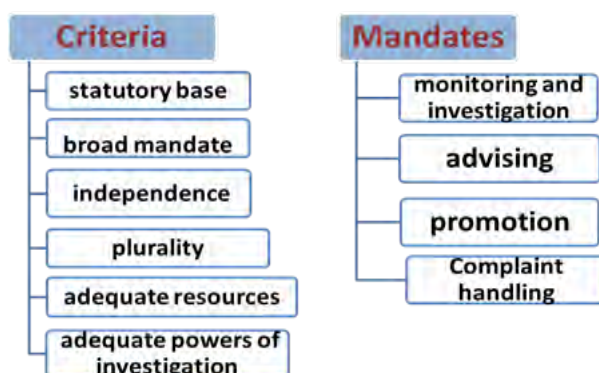
¹⁹ Katerina Linos and Tom Pegram, ‘What works in human rights institutions?’ (2017) 112 *Journal of International Law* 31.

²⁰ Fombad (18) 9. It must be noted that the Principles are not without limitation or criticism (See Gauthier De Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (CUP 2015).

²¹ De Beco and Murray (n 20) 141. See also Rachel Murray ‘National Human Rights Institutions: Criteria and Factors for Assessing their Effectiveness’ (2007) 25(2) *Netherlands Quarterly of Human Rights* 189.

²² Linos and Pegram ‘What Works in Human Rights Institutions’ (n 18) 4.

The Paris Principles Framework



4. The Ethiopian Human Rights Commission in light of the Paris Principles Effectiveness Framework

4.1. The Establishment and Functioning of the EHRC

The setting up of the EHRC is believed to be based on the professed vision of the 1995 Constitution to build a political community founded on the rule of law and to guarantee a democratic order, and the firm recognition to upholding respect for fundamental freedoms and rights (FDRE Constitution 1995, Preamble paragraph 1-2), which necessitates the establishment of independent institutions such as the EHRC. Accordingly, the Commission is set up to play a major role in enforcing the fundamental rights and freedoms guaranteed in the Constitution (Proclamation No. 210/2000, Preamble). The EHRC Proclamation states the specific objective of the Commission is to educate the public about human rights; to ensure that human rights are respected, protected, and enforced; and to ensure that necessary measures are taken in case of violations (Article 5). The EHRC was thus inaugurated as one of the human rights protection mechanisms in the aftermath of a new constitutional era, marking the State's commitment to fundamental rights and freedoms enshrined in the Constitution. In as much as the institution's establishment was met with high expectations about its positive contribution to human rights protection in the country,²³ some observers argued that the establishment of the

²³ Mohammed Abdo, 'National Human Rights Institutions and Access to Justice: The Role and Practice of the Human Rights Commission of Ethiopia in Advancing Access to Justice' in Pietro Toggia, Thomas Geraghty, and Kokebe Jemaneh (eds.), *Access to Justice in Ethiopia: Towards an Inventory of Issues* (Center for Human Rights, Addis Ababa University 2014) 6.

EHRC was a window-dressing exercise meant to counter criticism of the international community.²⁴

While the EHRC establishment proclamation was enacted in 2000, the Commission became functional in 2004/2005 upon the appointment of the first Chief Commissioner; and followed by the appointment of two other commissioners and the launch of the Council of Commissioners.²⁵ During the years 2011-2014, the Commission established its branch offices in different parts of the country, currently operational in eight branch offices located in major cities of Regional States.²⁶

Review of EHRC reports²⁷ demonstrates the institution's efforts to deliver on both the main functions of NHRIs, i.e., the promotion and protection of human rights. EHRC has been active in conducting extensive human rights promotion activities such as public education and awareness raising (holding seminars and workshops, moot courts, community-based initiatives), training public authorities such as parliamentarians, and police and prison officials, and information dissemination through publications and media events. EHRC's key activities in human rights protection include several monitoring activities (in particular prison inspections and election monitoring), investigation of events or government actions (e.g. public protests, conflicts, evictions, etc.), complaint handling of thousands of cases largely on civil and political rights, alternative dispute resolution, and supporting legal aid services.

The EHRC has been cooperating with national stakeholders as well as peer NHRIs from other countries and supra-national human rights bodies through the regional and global NHRIs networks and human rights platforms. It is a member of the Network of African National Human Rights Institutions (NANHRI) and the Global Alliance of National Human Rights Institutions (GANHRI); and has affiliate status before the African Commission on Human and Peoples' Rights. In terms of accreditation by GANHRI, the EHRC was granted B status in 2013– considered not to be in full compliance with the Paris

²⁴ Lamessa Gudeta 'The roles and function of Ethiopian Human Rights Commission. Critical Analysis in Promotion of Human Rights' (2016) <<http://independent.academia.edu/>> accessed 12 December 2020.

²⁵ Getahun Kassa, 'The Ethiopian Human Rights Commission' in Charles M Fombad (ed.), *Compendium of documents on National Human Rights Institutions in eastern and southern Africa* (PULP 2019) 297. According to Article 31 of the EHRC Proclamation (No. 210/2000), the Council of Commissioners is conferred with powers and duties to adopt relevant directives and by-laws for the implementation of the founding law, appoint department heads, discuss the budget of the Commission, adopt staff regulation, and settle internal administrative and disciplinary cases.

²⁶ i.e. Assossa, BahirDar, Gambella, Hawassa, Jijiga, Jimma, Mekele and Semera.

²⁷ EHRC, *Annual Report* (2014), (2015), (2016), (2018).

Principles based on the assessment at the time and no satisfactory documents have been submitted afterwards to change that determination.²⁸

EHRC has faced critics in the past for lack of action in several mandated areas such as monitoring and condemning controversial and repressive laws,²⁹ denouncing government's abuse of human rights, proactively investigating systemic human rights violations, publishing official reports, submitting alternative reports to international human rights bodies; and, at the same time, for shying away from contentious matters, and showing tendency towards defending government actions or reports.³⁰ Challenges impeding EHRC's performance over the past years included not only its independence but also securing adequate budget that influenced its access, infrastructures and staffing.

The question of EHRC's contribution to achieve concrete human rights gains remains an agenda for an extensive effectiveness analysis. This study places particular emphasis on the legal framework as a formal structure for facilitating institutional effectiveness.

4.2 An appraisal of EHRC Establishment Proclamation

This section examines the EHRC establishing law (Proclamation No.210/2000) in light of the Paris Principles normative framework. The six main criteria set out by the Paris Principles for NHRIs effectiveness are discussed in this section under broad categories.

4.2.1 Independence/Autonomy

One key dimension of NHRI effectiveness is independence. NHRIs need to be protected from interference or manipulation by the government and other social and political forces. They are expected to strike the delicate balance between their nature as a state institution and their required independence from government, both inherent in their unique making as NHRI. De Beco and Murray (2015) highlight that "the value of an independent body is

²⁸ See GANHRI, chart of the status of national institutions available at <https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20%2804%20March%202019.pdf>. Note that this was EHRC's first accreditation and has not been reviewed so far.

²⁹ See International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 19 - 23 November 2012* (2012) 14.

³⁰ See Kassa (n 25); and Wondemagegn T. Goshu, 'The Ethiopian [National] Human Rights Commission and its Contribution to Constitutionalism' (2015) 5 *Ethiopian Constitutional Law Series*, 30-32.

that its distance, conversely, enables it to act as a bridge or mediate between government and non-government entities – a partner – trusted yet separate from both”.³¹

As complex as NHRI independence can be, a range of benchmarks are set out in the Paris Principles. This includes broader independence and autonomy dimensions from institutional setup to operational and financial affairs, encompassing the various effectiveness elements. Hence, factors such as legal framework, composition, appointment, dismissal and tenure stability of members and staff, resources, and organizational design and operation are critical determinants of level of independence. The below table represents Linos’ and Pegram’s analysis of independence safeguards that are relevant to NHRI effectiveness as found in various NHRIs studied.

| Independence Safeguards | Rationale |
|--------------------------------------|---|
| Constitutional or Legislative Status | Establishment by constitution or legislation makes NHRI charter harder to amend, and NHRI more stable |
| No Dismissal Without Cause | Dismissal only for good cause helps safeguard NHRI independence |
| Immunity | Immunity from prosecution helps safeguard the independence of NHRI leaders |
| No Government Representation | Government representatives may compromise NHRI autonomy and independence |
| Not Designated by Executive | NHRI officials appointed by the executive may have limited independence. |

Table 1- NHRI independence safeguards. Source: Linos and Pegram ‘What works in human rights institutions’ (n 19) 9.

1.2.2.1 Statutory Base

It is a mandatory requirement under the Paris Principles for the mandate of an NHRI to be “clearly set forth in a constitutional or legislative text” (Principle A.2). The status of NHRI establishing law is vital for independence of the institution. Fombad illuminates that “[a] crucial feature of a credible, legitimate and effective human rights protection system is the legal framework on which it is based.”³² The prescription of NHRI mandate only in executive instrument, be presidential or ministerial decree or other, changeable at the

³¹ De Beco and Murray (n 20) 82.

³² Fombad (n 18) 3.

Executive's will, does not meet the Paris Principles' notion of a solid legal base sufficient to guarantee the independence and stability of the institution.³³

NHRI establishing laws in several countries are provided both in the constitution and in other legislation, while in Ethiopia, the Constitution simply reserves to HoPR the power to establish and define the mandates of the institution. Article 55 (14) of the FDRE Constitution prescribes that "It [the House of People's Representatives] shall establish a human rights commission and determine by law its powers and functions." In view of this, the creation, mandate or structure of the EHRC relies on ordinary legislation promulgated by parliament that can be revised through a parliamentary process. In sharp contrast with constitutions making no mention of the NHRI like Botswana and Mauritius, EHRC is certainly a statutory body with a constitutional foundation; whilst it may not be considered, in the strict sense, a constitutionally established body compared to other independent institutions stipulated in the Constitution.³⁴ No doubt that establishing an NHRI in a constitution is of the highest value to the institution as "constitutional entrenchment affords a greater safeguard against arbitrary change to the NHRI's mandate or structure".³⁵ The EHRC still enjoys an independent statutory base and legal personality as established by a separate Proclamation (No. 210/2000) and such a strong domestic legislation to support the Commission's status and mandate is advantageous as opposed to some NHRIs established by decrees or orders.³⁶ While this certainly guarantees EHRC's formal legitimacy, the public legitimacy, however, depends largely on the institutional practice of the NHRI that shape the perceptions about it.³⁷

2.2.2.1 Institutional Autonomy: Design and Operation

Autonomy is the most important aspect of the Paris Principles that set out various elements to guarantee NHRI independence (Principle A.1). Even though NHRIs are

³³ See SCA, General Observation 1.1 and Justification.

³⁴ The Council of Constitutional Inquiry, Auditor General, Electoral Board, and Central Statistics Agency enjoy distinct stipulations in the Constitution determining their nature, establishment and mandates (See Arts 82-84, 101- 103 of the FDRE Constitution). Some argue that the constitutional arrangement that entirely leaves the NHRI design to the HoPR could have far reaching implications on its autonomy, composition and mandate (Goshu (n 30) 13).

³⁵ Fombad (n 18) 12.

³⁶ For example, Algerian and Moroccan NHRs were created by presidential and royal decrees respectively. (see NANHRI, *A Mapping Survey of the Complaints Handling Systems of African National Human Rights Institutions* (NANHRI 2016)).

³⁷ Anne Smith. 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28 (4) *Human Rights Quarterly* 904, 906; Richard Carver, 'One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? -Lessons from the European Experience' (2011) 33(1) *Journal of Human Rights Practice* 1, 8.

institutions established and funded by the state, they need to enjoy “a degree of structural, procedural and functional independence” to ensure their effective operation without undue interference; this can manifest in their legal, operational, and financial autonomy assured both in law and actual practice.³⁸

Legal autonomy refers to the legal identity enabling NHRIs to function freely. This relates to the statutory base – “a key element here is the ability to have a legal personality distinct to enable it to establish how it will manage its own workload and the structure of its staffing and determine how it will exploit and implement its mandate”.³⁹ In view of this, being part of a government department is believed to encroach on this distinctness, and compromise independence and ultimately effectiveness.

The EHRC is established as “an autonomous organ of the Federal Government having its own juridical personality...accountable to the House [the HoPR]” (Article 3). The records of the Constitutional Assembly deliberating on the draft 1995 FDRE Constitution envisage that the vision, from the outset, was to set up such autonomous institutions.⁴⁰ Accordingly, the independent legal personality of the EHRC is provided both by the law and enforced in practice. This represents a good practice compared to NHRIs such as that of Eswatini, Malawi, and Tanzania that operate like a government department or a unit within an executive department.⁴¹

On the other hand, operational autonomy relates to the ability of the NHRI to conduct its day-to-day affairs independently. This includes the autonomy to decide on matters such as carrying out investigations, preparing and issuing reports, and making recommendations without interference from government (but also from other stakeholders).⁴² Best practice show NHRI legislation that provide clear and elaborate principles against political interference.⁴³ Ensuring autonomy, by maintaining proper distance and averting interference from both government and other interest groups, remains a major challenge for NHRIs in several countries. Until recently, the EHRC was among those experiencing manifest interference in the form of censorship of its reports by state authorities but also one known for exercising self-restraint from criticizing government actions. There were occasions in which some of EHRC's investigation reports were deferred to Parliament prior to making public, and, even more, some of the “sensitive reports” were never

³⁸ Fombad (n 18) 12. See also Smith (n 36).

³⁹ De Beco and Murray (n 29) 85.

⁴⁰ See *Minutes of the Constitutional Assembly*, Volume 4, November 1994, 129-131.

⁴¹ See Fombad (n 18) 12.

⁴² De Beco and Murray (n 20) 83 emphasized NHRIs' independence should be both from government and non-government actors.

⁴³ Fombad (n 18) 892.

endorsed or released.⁴⁴ The Commission has also showed timidity and tendency to avoid cases involving politically sensitive or controversial issues.⁴⁵ Further, the institution has been considered weak for lack of autonomy to make administrative decisions like opening branch offices without the approval of the HoPR as per Article 9.

Budget autonomy, closely linked to operational autonomy, requires that an NHRI must “not be subject to financial control which might affect its independence” (Paris Principles B. 2). This concerns not just the freedom to administer the resource but the ability to secure “adequate resources.” The EHRC Proclamation does lack sufficient formal prescription about both. This is discussed further in forthcoming section.

Clearly, autonomy does not refute NHRIs’ nature as an accountable public institution; operational and financial accountability shall be implemented in a manner that does not undermine their ability to work effectively and independently.⁴⁶ The problem is that the balance is not always respected as seen in EHRC’s practice both with its mandated activities as well as its budget administration.

3.2.2.1 Appointment and Tenure Security

Independence closely relates to the appointment and dismissal, tenure stability, and immunity of NHRI members. The SCA calls for a “clear, transparent and participatory selection and appointment process” that can ensure “merit based- selection” and “pluralism” of NHRI membership.⁴⁷ The integrity of both the appointment procedure (transparency, neutrality and participatory) as well as the outcome (autonomy, quality and diversity of members) is the hallmark of NHRI independence.

The EHRC proclamation provides for the method, criteria and duration of appointment, re-appointment, dismissal procedure, and privileges and immunity of members (Articles 10-12, 14-16 and 35). Accordingly, members of the Commission (Chief Commissioner, the Deputy Chief Commissioner, and other commissioners) are appointed by the Parliament (HoPR) for a five years term. Candidates for EHRC commissioner positions are primarily identified by a *Nomination Committee* that searches, screens and shortlists candidates.

⁴⁴ EHRC’s reports on investigations carried out on human rights violations in conflicts in Gedeo, Hawassa and Wolkite were not made public (see Kassa (n 24) 311).

⁴⁵ Mohammed Abdo, ‘National Human Rights Institutions and Economic, Social and Cultural Rights: An Examination of the Mandate and Practice of the Ethiopian Human Rights Commission’ in Eva Brems, Gauthier De Beco and Wouter Vandenhoe (eds.), *National Human Rights Institutions and Economic, Social and Cultural Rights* (Intersentia 2013) 144.

⁴⁶ See SCA, General Observation 2.8 and Justification.

⁴⁷ See SCA, General Observation 1.8.

The list of nominees from the Committee will be presented to the Parliament (HoPR) that has the final say through a two-thirds majority vote of the House. According to Article 11 of the EHRC Proclamation, the Nomination Committee comprises: speakers of the HoPR and the House of Federation (HoF), representatives from both Parliament Houses (seven from the HoF and two from HoPR), President of the Federal Supreme Court, and representatives from the Ethiopian Orthodox Church, the Ethiopian Islamic Council, the Ethiopian Catholic Church, and the Ethiopian Evangelical Church. NHRI appointment by parliament with the involvement of other actors normally represents a good practice in contrast to designation by the Executive, which is considered to compromise NHRI mandate-holders' independence (See Table 1 above).⁴⁸ It must be noted, though, that 11 out of the 16 members are from the parliament and none from CSOs. Though the Paris Principles as well as good practices dictate wide consultation and stakeholders' participation in the appointment process,⁴⁹ EHRC's legal framework does not provide formal requirements for an open process and the participation of civil society, among others. The nomination processes of previous years have witnessed not only lack of transparency and participation but also possible political manipulation due to the affiliation of several members of the Committee to the ruling party or government.⁵⁰

To be eligible for candidacy for EHRC commissioner position, one must be an Ethiopian national who is loyal to the FDRE Constitution; uphold respect for human rights; be above thirty-five years of age and in good health; be free from criminal conviction; be reputed for diligence, honesty and good conduct; and must be in possession of relevant educational qualification and experience (in law and other) (Article 12). Apparently, no clear requirements are entrenched for ensuring non-partisanship⁵¹ as well as pluralism in the institution's membership. Though most of the criteria stipulated are of general nature, the one-party domination in the nomination committee and the Parliament⁵² may have likely posed a serious challenge in ensuring the appointment of (actual or perceived) non-partisan commissioners. Reviews revealed that the profile of EHRC members largely demonstrate the appointment of individuals with affiliation to party politics or the

⁴⁸ For example, in Lesotho and Zambia, appointments are made exclusively by the Executive (See Fombad (n 18) 13).

⁴⁹ SCA, General Observation 1.8.

⁵⁰ Yemisrach Endale, *The Roles and the Challenges of the Ethiopian National Human Rights Institutions in the Protection of Human Rights in light of the Paris Principles* (Central European University 2010) 59 ; Goshu (n 30) 21; Gudeta (n 25). See also

⁵¹ SCA, General Observation 1.9 states that members of ruling political party or representatives of government agencies should not be in NHRI leadership. Rules against political party affiliation of NHRI mandate-holders are provided in several NHRI laws (see Fombad (n 18))

⁵² Note that parliamentary seats have been monopolized by the ruling EPRDF party since 2005 reaching almost 100% notably after the 2010 and 2015 elections. For authoritarianism and one-party monopoly in Ethiopian politics, see Lovise Aalen, and Kjetil Tronvoll, 'The 2008 Ethiopian Local Elections: The Return of Electoral Authoritarianism' (2008) 108 (430) *African Affairs* 111. See also Jon Abbink, 'Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath' (2006) 105 (419) *African Affairs* 173.

Executive in the absence of strong evidence if selections were merit based.⁵³ Generally, EHRC appointments have been put into question with respect to the actual openness, inclusiveness and neutrality of the process, as well as the integrity and qualification of the appointees.⁵⁴

Tenure stability or security, which involves issues of term of office, procedure of dismissal and immunity of commissioners, comprise essential markers of NHRIs' institutional independence, and therefore, their efficacy. EHRC commissioners are appointed for a term of five years (Article 14) and full-time,⁵⁵ which fits well within the SCA's recommended average terms of 3-7 years and full time tenure requirement.⁵⁶ In some jurisdictions, the NHRI legislation may lack clarity about the tenure of NHRI officials.⁵⁷ In this sense, it can be asserted that tenure stability is promoted by EHRC Proclamation through a fixed term appointment, which is further strengthened by protections related to dismissal and legal liability.

The dismissal of NHRI mandate-holders should occur only in serious cases of misconduct or incompetence and with appropriate procedural protections.⁵⁸ The EHRC Proclamation enshrines the "no dismissal without cause" safeguard by clearly specifying generally acceptable grounds for removal of commissioners and the designation of a Special Inquiry Tribunal mandated to review questions of dismissal (Article 15-16). The grounds include manifest incompetence, proven incapacity (illness) to properly discharge duties, or involvement in corruption or unlawful act, or an act of human rights violation. Presumably, "manifest incompetence" is broad enough to cover scenarios in which an appointee's independence or integrity is compromised. At face value, the provisions for dismissal are at par with expected standard, offering formal protections against arbitrary removal or re-assignment by executive or parliament. It must be noted that SCA requires that dismissal of NHRIs appointees should be "a decision of an independent body with

⁵³ Endale (n 50) 59-60; Kassa (n 25) 299.

⁵⁴ Goshu (n 30) 20-21.

⁵⁵ Despite the absence of express wordings about full-time tenure, the prohibition of Commissioners from engaging in other gainful work under Article 18 implies the full-time nature of the appointment. In some countries, like Bangladesh and South Africa, the institution is designed to have both full-time and part-time members (See The South African Human Rights Commission (SAHRC) Act 2013, s 5(2) and National Human Rights Commission Act of Bangladesh 2009, s 5 (2).

⁵⁶ See SCA General Observation 2.2.

⁵⁷ In Mauritius, the length of tenure of NHRI members is not defined calling for concerns about tenure guarantee (See Roopanand Mahadew, 'National Human Rights Commission of Mauritius' in Charles M Fombad (ed.), *Compendium of documents on National Human Rights Institutions in eastern and southern Africa* (PULP 2019) 542). In case of Eswatini the law lack guarantee for a full-time tenured members and all commissioners work only part-time (See Sabelo Gumedze, 'The Swaziland Commission on Human Rights and Public Administration Integrity' in Charles M Fombad (ed.), *Compendium of documents on National Human Rights Institutions in eastern and southern Africa* (PULP 2019) 274)

⁵⁸ SCA, General Observation 2.1: Justification.

appropriate jurisdiction”.⁵⁹ Nonetheless, the composition of the Tribunal remained contentious given its domination by parliamentarians, more importantly in the current configuration of both Houses lacking multi-party representation. Politicization of dismissal could be a great concern in this case. Even though the final decision of removal of an appointee rests on parliamentary votes, impartiality can be knotty where parliamentary seats have been monopolized by the ruling party as noted in earlier discussions.

Immunity is also one of the privileges ensured for commissioners under the EHRC Proclamation (Article 35). EHRC commissioners enjoy protection against harassment or intimidation through arrest or detention. It must be noted that the Commission's work is also generally protected from giving rise to liability for defamation (Article 41). In general terms, this reflects the Paris Principles standards as well as the independence safeguards and good practices found in NHRIs (See table 1 above). The SCA underscored the instrumental value of “including a clear provision in the enabling legislation of an NHRI to protect the members of the governing body from legal liability for actions undertaken in their official capacity”.⁶⁰ From this point of reference and NHRIs' good practice, however, the immunity granted under the EHRC founding Proclamation is too narrow to cover protections against any prosecution or legal action (administrative, civil, or criminal) by state or non-state actors for actions or decisions taken in good faith in the exercise of official duties. The SCA envisions similar immunity enjoyed by judges in order to warrant tenure security and freedom of NHRI members to undertake critical analysis on human rights issues.⁶¹

While emphasizing on the necessary legal protections (immunity, tenure stability, etc.) for tenure security; the SCA underscores the importance of financial safeguards (salary, benefits, etc.). At the minimum, NHRI members should be provided with remuneration packages matching with other appointees in similar independent state bodies an essential dimension of NHRI funding.⁶²

4.2.2 Pluralism or Inclusiveness

NHRIs are expected to reflect pluralism through representation and cooperation with diverse groups – procedures for ensuring diversity of membership and enabling effective

⁵⁹ SCA, General Observation 2.1.

⁶⁰ International Coordinating Committee (n 29) 14. See also SCA, General Observation 2.3.

⁶¹ Ibid.

⁶² SCA General Observation 10: Justification.

interactions with different social and political forces in the country are paramount.⁶³ Diversity in gender, language, religion, expertise, organizational background, etc. offer NHRIs competence and legitimacy that goes a long way for enhancing their effectiveness. Pluralism in representation is primarily ensured through the appointment of NHRI members while the recruitment of diverse staff is also crucial. On the other hand, NHRI's cooperation with and access to a range of experts and stakeholder is necessary to boost inclusiveness or multiplicity. As important as collaboration with government authorities can be, their representation in NHRI membership is deemed to compromise autonomy (See table 1 above).⁶⁴

1.2.2.1 Composition: Plurality and Quality

In most countries, NHRIs can attain their independence through pluralism—the recognition and inclusion of diverse groups in terms of gender, profession, geographic location, languages, religions and cultures. It is asserted that both members and staff of NHRIs “should be drawn from a broad cross-section of society, ensuring multiplicity of opinion,”⁶⁵ and this can be fairly achievable in NHRIs with bigger membership and staff sizes. Nonetheless, this has not been reflected in the EHRC founding Proclamation in any form. Regional comparisons show legislative stipulations for certain proportion of gender representation in NHRI members (e.g. Kenya, Rwanda, and Zimbabwe)⁶⁶ or general rules on “gender sensitive” and/or “regional and ethnic diversity” considerations in the appointment processes (e.g. Burundi, Kenya, Lesotho,) or a detailed list (e.g. Democratic Republic of Congo (DRC)).⁶⁷ In the absence of any formal requirement for pluralism, nominating or appointing bodies do not assume obligation to consider different forms of diversity as a determining factor in the nomination and appointment process. For example, review of the profile of the Commission depicts a nominal representation of women among the eleven commissioners, mostly assigned for the traditional female reserved position of the Commissioner for Women and Children. Moreover, there is no minimum number of commissioners required by EHRC Proclamation, but only an indication of “other commissioners” and “commissioners of branch offices” that may be appointed at the discretion of HoPR (Articles 8 and 21).

⁶³ De Beco and Murray (n 20) 67-69.

⁶⁴ The SCA emphasizes the same in its General Observation 1.9 which only leaves a narrow flexibility for representation of government agencies strictly in an advisory capacity and to the minimum.

⁶⁵ Smith (n 37) 928.

⁶⁶ See Kenyan National Commission on Human Rights (KNCHR) Act 2011, s 7; Zimbabwe Human Rights Commission Act 2012, s 17 1 (b); National Commission for Human Rights of Rwanda Law 2018, Article 5.

⁶⁷ See Independent National Human Rights Commission Burundi (CNIDH) Law, Article 8; Human Rights Commission Act of Lesotho (2016) Article 6; The Constitution of Kenya 2010, s 250 National Human Rights Commission of Democratic Republic of Congo (CNDH) 2013, Article 14.

In addition to pluralism, quality of membership and staffing are an important element in the composition of NHRI team which can greatly impact effectiveness and can be ensured by a robust recruitment procedure.⁶⁸ NHRIs require experienced, trained and skilled staff, and also require particularly strong, independent and effective leadership.⁶⁹ Some NHRI legislation follow a prescriptive approach with respect to qualifications while general criteria like EHRC are also followed by several. Examples of specific qualification requirements include strict rules applied to NHRI chairpersons – comparable experience or qualifications of high judicial officials (e.g. India and Zambia) , while some require considerable or some fixed years of experience in law and human rights for all NHRI members (e.g. Kenya and Tanzania).⁷⁰ To ensure qualities of members of the NHRIs, their selection should be based on proven expertise, knowledge and experience in the promotion and protection of human rights. They should have practical expertise and abilities as this relates to NHRI capability.⁷¹ In order to ensure this, the transparency, the participatory nature, and integrity of the selection process is important and there are areas for improvement in these regards in the EHRC proclamation as discussed above.

Moreover, though much focus has been given to commissioners, the composition – and particularly the diversity and quality – of staff is equally important for legitimacy and effectiveness of NHRIs which should also be ensured in NHRI laws and in practice. This largely relates to the provision of adequate resources as well as operational and financial autonomy; as much as availability of budget to afford qualified experts, the ability or freedom of NHRI to recruit its own staff without government interference is crucial.⁷²

2.2.2.1 Cooperation and Access

Inclusiveness as a key dimension of NHRI pluralism can be ensured through cooperation with and access of wider stakeholders and citizens. Inputs from diverse individuals and groups, both domestic and international, could help an NHRI identify and address pressing needs.⁷³ NHRIs' strong working relationships with CSOs is an important effectiveness factor which enhances public legitimacy as well as access to diverse and

⁶⁸ Craver (n 36) 8-9.

⁶⁹ Amnesty International 'National Human Rights Institutions: Amnesty International's recommendations for effective promotion and protection of human rights' (Amnesty International 2001) 8. <www.amnesty.org/en/documents/IO40/007/2001/en/> accessed 2 December 2020.

⁷⁰ See Protection of Human Rights Act of India 1993, s 3(2); Human Rights Commission Act of Zambia (1996) s 5(3); KNCHR Act 2011, s 10; The Commission for Human Rights and Good Governance Act of Tanzania 2001, s 7(1).

⁷¹ Linos and Pegram 'Interrogating form and function' (n 8). See also International Council for Human Rights Policy (ICHRP) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), *Assessing the Effectiveness of National Human Rights Institutions* (ICHRP 2005) 15.

⁷² Smith (n 36) 914.

⁷³ Linos and Pegram 'What works in national institutions?' (n 19) 12.

grassroots societal groups including remote and vulnerable groups.⁷⁴ Likewise, engagement with international organizations also aids interactions with the international human rights community. EHRC's Proclamation does not provide clear provision on cooperating with CSOs; and reviews show that collaboration between EHRC and CSOs has been very limited for most part of the Commission's work.⁷⁵ Participating in international meetings (Article 6 (9)) is the closest any possible cooperation at international level is implied which can perhaps address the Paris Principles' guidance for interaction with the international human rights system (Principle A.3.e). NHRIs should also cultivate constructive relationship with government agencies while keeping the challenging balance between independence and cooperation.⁷⁶

Another aspect of inclusiveness relates to accessibility to a range of groups and stakeholders. An NHRI's accessibility to partners, to complainants, to individuals or groups vulnerable to violations of human rights reflects its effectiveness.⁷⁷ This could be both about the physical access as well as the working process. While physical accessibility through regional or local offices remains very important, other modalities for accessibility of information and services should be available and mechanisms to reach to marginalized groups and minorities should be designed. Certainly, the level of accessibility is closely tied to adequate resources and autonomy as well. EHRC Proclamation provides for opening of branch offices which facilitates accessibility in different parts of the country (Article 9). Whereas, other relevant dimensions of access such as accessibility for persons with disability, marginalized groups, linguistic minorities, etc. are not reflected in the legislation.⁷⁸ On a related topic, highlighting the importance of ensuring NHRI's accessibility to persons with disabilities the SCA noted that EHRC "does not appear to have services for interpretation for those who are blind or deaf, nor are its premises accessible for persons with physical disabilities" and it should take steps to address these issues.⁷⁹

4.2.3 Mandate and Competence

Another key dimension of NHRI effectiveness is mandate and competence. It is imperative for NHRIs to have a broad and strong mandate and adequate competence in accordance

⁷⁴ Carver (n 36) 8-9; De Beco and Murray (n 20) 160.

⁷⁵ Kassa (n 25) 305.

⁷⁶ For a range of actors NHRIs should forge cooperation with and the cautions to be applied, see Smith (n 36) 935 and De Beco and Murray (n 20) 70-81.

⁷⁷ ICHRP-OHCHR (n71) 16-17.

⁷⁸ OHCHR-ICHRP (n 71) 16- 17; De Beco and Murraray (n 20)70. See also SCA General Observations 1.7: Justification.

⁷⁹ ICC (n 96) 10).

with international human rights standards. Conferring NHRs “as broad a mandate as possible” as prescribed in the Paris Principles (Principle A.2) could be closely linked to NHRI competence, though the later could mean more. According to Linos and Pegram, capability (competence) can broadly refer to an “NHRI’s statutory powers, organizational structure, and the range of mechanisms available to apply its authority effectively”.⁸⁰ They further elaborate that this capability dimension concerns design features like the scope of substantive mandate, the jurisdictional scope of the mandate, the investigative prerogatives, and complaint-handling (quasi-judicial) powers bestowed to an NHRI.

3.2.2.1 Broad Mandate

The Paris Principles provide diverse and wide responsibilities to NHRIs, but are non-exhaustive. The fundamental principle is that NHRIs should be given “as broad a mandate as possible” (Principle B (2)). In principle, an NHRI should be given an all-encompassing jurisdiction in terms of the rights, rights-holders, and duty-bearers they cover; the powers of investigation and adjudication,⁸¹ and the enforcement prerogatives (powers to monitor compliance with their recommendations).

Setting the boundaries of an NHRI’s substantive mandate is regarded as highly consequential, affecting both institutional independence and capabilities. ... Restrictive mandate scope restricts policy functions derived from the full range of human rights standards. ... A non-restrictive promotion and protection mandate gives the NHRI a wide range of prerogatives with a view to prevention and response to the full gamut of human rights.⁸²

The EHRC was established with a wider mandate to promote fundamental freedoms and human rights enshrined in the FDRE Constitution and international conventions ratified by Ethiopia. As clearly stipulated under Article 6 of the EHRC Proclamation, the EHRC is vested with broad powers to ensure that human rights and freedoms are respected by all citizens, organs of state, political organizations and other associations; these include the following detailed powers and duties:

- investigating human rights violations upon complaint or its own initiative;
- monitoring the compliance of laws as well as government decisions with human rights; and advising on the revision or adoption of new laws and policies;

⁸⁰ Linos and Pegram ‘Interrogating form and function’ (n 8) 11.

⁸¹ Even though complaint handling is provided as optional mandate under the Paris Principles (Section D) findings show that that complaint-handling contributes to NHRI effectiveness, (see Linos and Pegram ‘What works in human rights institutions’ (n 19) 14).

⁸² Linos and Pegram ‘Interrogating form and function’ (n 8) 17-18.

- educating the public about human rights, using the mass media and other means;
- translating into local languages and disseminating international human rights treaties ratified by the State;
- providing opinion on human rights reports to be submitted to international organs;
- providing consultancy services on human rights;
- participating in international human rights forums; and
- performing such other activities as may be necessary to attain its objectives.

In principle, this normative prescription of EHRC's mandate does not deviate from the dictates of the Paris Principles, enabling it to cover comprehensive NHRI prerogatives of monitoring, reporting, advising, adjudication, promotion, as well as the promotion and protection of a range of human rights broadly, including social, economic, and cultural rights and the rights of different groups such as children, persons with disabilities, and migrants. Moreover, the entrenchment of a catch-all mandate "other activities as may be necessary to attain its objectives" can be interpreted broadly to extend its mandate to other areas. The mandate of the EHRC also extends jurisdictional scope to any part of the country (Article 4(1)). The EHRC is hence considered to have non-restrictive powers in terms of substantive rights, jurisdictional scope, and methods of work as compared to formal mandate limitations seen in some NHRIs in terms of covering all rights or all individuals and groups or methods of work. For example, the formal mandate of NHRIs in countries whose constitutions lack socio-economic rights guarantees such as that of Australian, Canadian, and Mauritian human rights commissions may have limitation to deal with such rights narrow delineation. Others may face particular restrictions such as the case of the Mexican NHRI that was once prohibited from intervening in electoral or labor issues; the Chilean NHRI's complaint handling mandate that is formally limited to very grave violations; and the Philippine NHRI's promotional mandate that excludes advising on legislation or producing reports.⁸³ There are also general limitations inherent in restrictive or specialized mandate models in the typical equality and anti-discrimination institutions predominant in Europe (i.e. Equality Commissions, Sex Discrimination Commissions, Disability Commissions, etc.).

4.2.2.1 Strong Mandate/Competence

Together with the breadth of mandate, strong powers are desired for NHRI effectiveness. In this regard, for example, robust powers of investigation to freely and ably address questions of human rights are envisioned under the Paris Principles (Principle B). Because

⁸³ Linos and Pegram 'What works in national institutions?' (n 19) 12 and 37.

investigatory powers are important aspects of NHRI mandate, should be strengthened with the power to compel any information or evidence and visit any site or institution, as well as to compel enforcement of remedies or recommendations.⁸⁴ Lions' and Pegram's survey found the following important investigatory safeguards in most NHRIs that are useful for comparison with powers conferred on EHRC.

On this line, the mandate of EHRC to "undertake investigation, upon complaint or its own initiation, in respect to human rights violation" is of fundamental importance (Article 6(4)). A *suo motu* power to investigate is crucial to a NHRI as it enhances their much desired proactive role as opposed to the reactive role of the judiciary.⁸⁵ Furthermore, the power to hear individual complaints offers NHRIs additional power to investigate and adjudicate complaints, while it also gives individuals direct access to NHRIs.⁸⁶ The EHRC has full power to receive all complaints and carry out investigations on human rights violations. The only restriction on EHRC's investigatory power is when complaints of human rights violations are pending before the Parliament, the House of Federation, and Regional Council or before courts of law at any level (Article 7). The EHRC's investigative power is further complemented by not only a duty to cooperate (Article 38) and a power of *subpoena* (Article 25) -enforced by a penalty for failure to appear, respond, or cooperate without good cause - among the strongest powers NHRIs can enjoy (Article 41).

Table 2: NHRI investigatory safeguards

| Investigatory Safeguards | Rationale |
|----------------------------------|--|
| Power to Investigate | When NHRI can investigate on its own initiative, it can have proactive role, in contrast to reactive role of judiciary |
| Can Compel Evidence or Testimony | Strengthens investigation and complaint-handling powers |
| Security Facilities | The explicit power to oversee prisons allows NHRIs to monitor a site of potentially grave human rights violations |
| Can Refer Complaints | Facilitates access of vulnerable groups to courts |
| Individual Complaints | Power to hear individual complaints offers individuals direct access to NHRI |
| Enforcement Powers | Enforceable remedies help speed up implementation of any NHRI decisions |

Source: Linos and Pegram 'What works in human rights institutions' (n 20 above) 10

⁸⁴ SCA General Observation 1.2 and 2.10

⁸⁵ Linos and Pegram, 'What works in human rights institutions' (n 19) 10.

⁸⁶ Ibid.

While some NHRIs, such as those in India, Kenya, and New Zealand for example, have the express power to conduct public inquiries on systemic human rights violations, the EHRC does not. Though this does not necessarily preclude the EHRC from utilizing its investigatory powers to conduct public inquiries, express powers are instrumental to anchor this particular role, especially in cases of systemic and complex human rights violations. The value of an explicit entrenchment cannot be underestimated given the country's record of heightened and pervasive human rights violations that have not been matched with strong and active oversight; and EHRC's repute of being "too reactive and not proactive."⁸⁷ In the same vein, the explicit power to oversee security facilities seen in several NHRIs' mandate is not enshrined in the EHRC founding law. Moreover, the remedial and enforcement powers as well as referral linkages with courts need to be further strengthened through legislative stipulation. As indicated, referring complaints to courts can facilitate vulnerable groups' access to judicial mechanisms while enforceable remedies give force to the implementation of NHRI decisions (see table 2 above). NHRIs' role in litigation can also be paramount when needed to challenge constitutionality of laws or initiate protective actions or amicus interventions as widely practiced by other NHRIs.⁸⁸

4.2.4. Financial Capacity and Autonomy

Sufficient resources are instrumental to ensure institutional capacity as well as independent and effective operation. Drawing on the designation of Hyman and Kovacic, this dimension of institutional capacity refers to "the necessary critical mass of human talent and supporting resources to perform the assigned functions well".⁸⁹ The Paris Principles specifically refer to ensuring adequate funding for and safeguarding against financial control of NHRIs (Principle B.2). It must be noted that "adequate funding is not in itself a design feature,"⁹⁰ rather the scope of state financing which may also depend on the "national financial climate"⁹¹ As for the SCA, ensuring NHRI financial capacity requires the state to allocate sufficient amount of resources to cater for mandated activities, well-functioning infrastructures, accessible premises and regional offices, and proper remuneration for the leadership and staff.⁹²

⁸⁷ Abdo (n 44) 146.

⁸⁸ See Linos and Pegram, 'What works in human rights institutions?' (n 19); Fombad (n 18).

⁸⁹ Hyman, David A. And William E. Kovacic, 'Why Who What Matters: Governmental Design and Agency Performance', *The George Washington Law Review* (2014) 82(2), 1474, quoted in Linos and Pegram, 'Interrogating form and function' (n 8) 11.

⁹⁰ Linos and Pegram, *ibid.*

⁹¹ SCA, General Observation 1.10: Justification.

⁹² SCA, General Observation 1.10. It must be noted that the core funding of NHRIs should come from the state.

On the other hand, the budget of the NHRI should be guaranteed in a separate budget scheme that is not attached to a particular department or ministry and should be secure from arbitrary cuts.⁹³ What is more, the institution should reserve full autonomy to manage its funding according to its priorities combined with regular release of the budget in a manner that does not affect the institution's day to day running.⁹⁴ This is believed to safeguard against possible manipulation and interference by government.

The availability of sufficient funding and a large degree of autonomy for designing and proposing its own budget are key requirements for maintaining EHRC's independence from possible interference of government departments dealing with the state financial system. Both government budget and other sources grants constitute the financial base of EHRC as per Article 36 of the EHRC Proclamation. Article 19(2)(b) stipulates that the budget of the Commission shall be prepared by the Chief Commissioner and submitted to the Parliament for approval. Though the provision of a separate budget line can be inferred from EHRC's autonomous juridical personality, the EHRC Proclamation law falls short principles concerning state duty on ensuring budget autonomy and provision of adequate funding for the institution. In comparison, the Malaysian Human Rights Commission Act requires the government to provide the Commission with adequate funds for the performance of its duties.⁹⁵

Exercising autonomy and securing adequate funds is something the EHRC has been struggling with, heavily impacting on its effectiveness. EHRC expressed concerns regarding, not only is it an inadequate financial provision, but also its inability to influence its budget, and the control exercised by finance ministry.⁹⁶ It is observed that limited financial resources curtailed the Commission's ability to discharge its responsibilities properly throughout the country. This has also been demonstrated in its inability to attract and sustain staff, and to expand its branch offices and interventions while reliance on grants has affected the sustainability of some of the projects.⁹⁷

⁹³ OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (United Nations 2010) 41.

⁹⁴ SCA, General Observation 1.10

⁹⁵ The Human Rights Commission Act of Malaysia (1999) s 19(1).

⁹⁶ Ethiopian Human Rights Commission, United Nations Development Program: Strengthening the Capacity of the Ethiopian Human Rights Commission, (2008-2012), January 2008, 11, cited in Goshu (n 30) 19.

⁹⁷ Kassa (n 24) 304-305 and Goshu (n 29) 19. The SCA has noted staff turnover at the EHRC related to weak salary package affected the capacity of EHRC, and emphasised on additional funding to ensure adequate terms and conditions of service for its staff (See ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 18-22 November 2013* (ICC 2013) 10).

5. Legal Reform towards the Effectiveness of the EHRC

5.1 Context and Process involved in the Legal Reform

5.1.2 Repression, Revolution and Renovation

The aftermath of the controversial election and the post-election crisis in 2005 was the resolute turn of the Government of Ethiopia towards the “centralist control of civic space”.⁹⁸ The period since saw several repressive measures and political closure—suppression of freedom of expression, assembly, association; violent clampdown of public protests, critical voices and political dissent, arrest of opposition political party members and supporters, peaceful protesters, journalists, and human rights defenders; severe restrictions and backlash on media and civil society were all the trademarks of the regime.⁹⁹ The “restoration of law and order” heralded by a wave of legislative reform introduced suppressive laws governing civil society, anti-terrorism, election, and the media – all with common feature of restricting the legitimate activities of civil society, political parties, human rights defenders and journalists, and institutionalizing repression. The Government’s persistent tyranny and violation of international human rights standards was met by heightened concern and critics from international human rights bodies.¹⁰⁰

The authoritarian system was deepening, making impossible any changes through the formal political processes of election or parliamentary votes, as well as supposedly independent institutions like the judiciary or democratic institutions.¹⁰¹ Ethiopian courts have continuously been criticized for tainted independence. Likewise, EHRC and other democratic institutions were distinguished for legitimacy deficit. Human rights monitoring by local and international groups diminished and impunity reigned. The governance was characterized by manipulation and marginalization of the citizenry, which Abbink illustrates:

...the consultation and inclusion of citizens, the ‘broad masses’, is neglected, if not considered irrelevant, in view of the vanguard role of the dominant party and the intricate

⁹⁸ Abbink (n 51) 197.

⁹⁹ Saskia Brechenmacher, ‘Surveillance and State Control in Ethiopia’ in Saskia Brechenmacher, *Civil Society under Assault: Repression and Responses in Russia, Egypt, and Ethiopia* (Carnegie Endowment for International Peace 2017).

¹⁰⁰ See, for example, OHCHR, ‘UN experts urge Ethiopia to stop using anti-terrorism legislation to curb human rights’ <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E>; The Guardian, *Ethiopia’s human rights record poses awkward questions for its aid donors* <https://www.theguardian.com/global-development/poverty-matters/2012/feb/03/ethiopia-human-rights-questions>.

¹⁰¹ Abbink (n 52) 196.

political-economic power structure now established ..., the distance between the rulers and the ruled has increased to remarkable proportions.¹⁰²

For years, the government has ignored serious popular demands for change generating sustained resentments, widespread protests, and intensifying insecurity and instability, undermining the government's legitimacy and functioning. The growing frustration of the public over the repressive regime of the EPRDF, and the ever-deteriorating social and economic conditions which remained unaddressed, led to wide and sustained popular protests in 2015 that expanded and revitalized extensively through 2017. The period was marked by pervasive human rights crisis, protracted violence, mass killings and arbitrary arrests that have been on the spotlight.¹⁰³

During such time, EHRC was not seen condemning state behavior and actions. Its investigation work was rather branded by "a disturbing pattern" of discrediting victims, justifying government actions, and glossing over grave human rights violations. Classic points in case are EHRC's reports on protestor killings and prison conditions released in 2016 and 2017 deflecting on government's human rights obligations.¹⁰⁴ None of the tyrannical laws used for years as powerful tool of state suppression were subject to EHRC's scrutiny or disapproval despite the significant decry from local and international communities. Cognizant of its weak record, international human rights mechanisms have repeatedly called upon the Government of Ethiopia to take measures to ensure the independence and strengthen the mandate of EHRC.¹⁰⁵ Meanwhile, some have also argued that EHRC was already sabotaged as it was thrown into "a framework that is not favorable for such institution to be effective" which points to the need for a broader social and political reform.¹⁰⁶

In early 2018, the nation encountered an unprecedented democratic "breakthrough" with the ruling party's decision to make fundamental changes in governance followed by the

¹⁰² Ibid, 197.

¹⁰³ See Press Statement of the African Commission on Human and Peoples' Rights on the Human Rights Situation in the Federal Democratic Republic of Ethiopia' <<https://www.achpr.org/press/2016/09/d314/>> accessed 25 January 2021; UN experts call for international commission to help investigate systematic violence against protesters <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20663> accessed 25 January 2021.

¹⁰⁴ For further analysis of EHRC reports, see Amnesty International *Ethiopia: Human Rights Commission must be reformed to correct miscarriage of justice* <<https://www.amnesty.org/en/latest/news/2019/06/ethiopia-human-rights-commission-must-be-reformed-to-correct-miscarriage-of-justice/>> (accessed 12 January 2021).

¹⁰⁵ See the second and third cycles of the Universal Periodic Review (UPR) of Ethiopia <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/206/10/PDF/G1920610.pdf?OpenElement>>; <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/077/54/PDF/G1407754.pdf?OpenElement>>

¹⁰⁶ Mohammed Abdo, 'The Ethiopian Human Rights Commission and its Contribution to the Protection of Human Rights and Building Good Governance: Challenges and Prospects' in Wolfgang Benedek, Christian Pippan, Taddesse Woldetsadik and Solomon Yimer (eds.) *Ethiopian and wider African perspectives on human rights and good governance: research outcome* (Verlag 2014) 1.

launch of reformist measures that involved political and economic liberalization, the release of political prisoners, the return of exiled opposition politicians, and comprehensive legal and institutional reform,¹⁰⁷ Unambiguously, the political transformation has brought a shift in the socio-political landscape of the country with significant implications on the advancement of human rights and rule of law in Ethiopia.

The larger context of the recent legal reform was shaped by EPRDF's professed commitment to respond to the mounting popular demands by introducing "meaningful reforms", including the revision or repeal of laws that crippled democratic progress.¹⁰⁸ This heralded massive legislative reform in the country under the auspices of the Federal Attorney General resulting in the review of several laws including the infamous Charities and Societies Proclamation and Anti-Terrorism Proclamation.¹⁰⁹ In tandem with this, human rights actors have also called for the reform of EHRC which was labeled "unfit" to the nation's journey to "break with a repressive past"; hence the need for revamping it "in line with international standards and best practices to support and contribute to the new government's human rights agenda".¹¹⁰

Integral to the country's broader political reform and democratization process, the government recognized the need to build strong and independent human rights institutions and demonstrated the political will to take concrete measures in that direction. Notably, the appointment of a prominent human rights advocate as the new EHRC Chief Commissioner in August 2019 signaled seriousness about the reform of the Commission.¹¹¹ Positive measures, including legal reform, have ensued to ensure EHRC becomes well placed to play an important role in advancing human rights culture amid the persistent violations and widespread impunity.

In view of the above, the three key dimensions underlying EHRC's reform were guaranteeing independence, strengthening institutional capacity, and boosting legitimacy and credibility. Hence, the focus of major reform areas has internal and external dimensions of high importance to ensure independence, legitimacy and capacity which are

¹⁰⁷ Temin and Badwaza, 'Aspirations and Realities in Africa' (n 2). See also Jon Temin and Yoseph Badwaza, *Reform in Ethiopia: Turning Promise into Progress* (Freedom House 2018) <https://freedomhouse.org/sites/default/files/2020-02/policybrief_reform_in_ethiopia_0.pdf> accessed 20 June 2020.

¹⁰⁸ Temin and Badwaza *Reform in Ethiopia* (n 107) 2.

¹⁰⁹ See <<http://ljaac.gov.et/>>. An advisory Council (Legal and Justice Affairs Advisory Council) was established in June 2018 by Directive No. 24/2010 with a mandate to advise the Federal Attorney General's Office in matters of legal and justice system reform in Ethiopia.

¹¹⁰ Amnesty International (n 104).

¹¹¹ The Reporter 'Activist returns to lead Human Rights Commission' 6 July 2019 <www.thereporterethiopia.com/article/activist-returns-lead-human-rights-commission> accessed 29 January 2021.

fundamental features of effective NHRIs. The legal revision, accordingly, focused on revisiting internal structures, mandate and working methods, together with external influences such as appointment process, budget, etc.

5.1.2 The Legal Reform: Process, Scope and Limitations

The legal reform involved two key actors, the Legal and Justice Affairs Advisory Council (LJAAC) of the Federal Attorney General's Office, and the Ethiopian Human Rights Commission. The LJAAC's Working Group on Democratic Institutions (Working Group) was in charge of carrying out in-depth research, identifying areas for legal reform and proposing a draft law. In view of this, a diagnostic study was done by the Working Group appraising EHRC's legal framework and practice in light of the Paris Principles and international best practices.¹¹² From a preliminary assessment based on the diagnostic study, five key areas of focus have been identified for in-depth investigation of the EHRC Proclamation; namely the powers and functions of EHRC, independence, appointment and dismissal of commissioners, structure and rules of procedure, and enforcement and reporting power.¹¹³ Five sub-groups were established for each thematic area to undertake in-depth studies that identified areas for amendment within the five key areas. This was followed by the preparation of a proposed draft for each area. The team consulted international standards and practices, various NHRI legislations across the globe, literature in the field, and sought input from stakeholders and expert.¹¹⁴

The EHRC has also held its own diagnostic process to identify gaps and needs for reform, and had organized stakeholder consultations in January 2020 to discuss areas of institutional reform.¹¹⁵ The LJAAC Working Group and the EHRC had the opportunity to hold joint deliberations on the legislative reform, during which a decision was made to go for the amendment of selected provisions of the EHRC proclamation rather than doing a wholesale revision of the proclamation.¹¹⁶ The two sides coordinated their efforts which allowed the consideration and integration of different proposals from the Working Group and the EHRC in the draft amendment bill. After a final draft was prepared and discussed by the Working Group, it was presented to, and reviewed and deliberated upon by the

¹¹² LJAAC, *Diagnostic study on Ethiopian Human Rights Commission*, December 2019. Extensive discussion was held by the Working Group on the study and further examinations (*Minutes of the Working Group on Democratic Institutions (Working Group Minutes)*, Addis Ababa, 11 January 2020).

¹¹³ *Minutes of the Working Group on Democratic Institutions*, Addis Ababa, 25 January 2020.

¹¹⁴ *Working Group Minutes* (n 112). See also LJAAC, *Explanatory Notes for EHRC draft Amendment Proclamation*, (Background Notes), March 2020.

¹¹⁵ *Working Group Minutes* (n 113); Background Note (n 11) 1.

¹¹⁶ *Minutes of the Working Group on Democratic Institutions*, Addis Ababa, 15 February 2020.

LJAAC and the EHRC jointly and separately.¹¹⁷ A consolidated draft was tabled by the EHRC before the HoPR that was considered for a first reading in May 2020.¹¹⁸ A parliamentary hearing was held in June 2020 to receive expert and stakeholder submissions and deliberating on questions from the different parliamentary committees. This was followed by the final reading and adoption of the draft by the HoPR in July 2020, and the official promulgation of the *Ethiopian Human Rights Commission Establishment Amendment Proclamation No. 1224/2020* (EHRC Amendment Proclamation) in August 2020.

The decision to go for amendment of selected provisions than comprehensive revision was dictated by the fact that many of the provisions of the existing legal framework were in line with international standards, and that amendment accelerates the reform process to be completed in time for next elections.¹¹⁹ Driven by expediency as well as pragmatism, the legal reform process came down to the amendment of 13 provisions of the EHRC founding Proclamation. There was time constraint to hold wide-ranging consultations on the various drafts with all relevant stakeholders while the COVID-19 pandemic also presented another challenge to holding public consultations.¹²⁰ Moreover, procedural constraint, namely the legal drafting requirement by the Federal Attorney General was a factor – proposed revisions in a given draft amendment law shall not exceed one-fourth of the provisions of the original proclamation.¹²¹ Accordingly, the reform process had to prioritize and focus on selected critical areas.

5.2 Major Considerations and Outcomes of the Legal Reform

5.2.1 Mandate and Powers of the Commission

As discussed in the preceding section, the EHRC is grounded in a modestly broad and strong mandate. However, with the aim to strengthen investigatory safeguards in some areas that seem to be contentious in practice, it was considered important to add explicit

¹¹⁷ *Minutes of the Working Group on Democratic Institutions*, Addis Ababa, 29 February 2020. *Minutes of the Legal and Justice Affairs Advisory Council's deliberation on EHRC draft Amendment Proclamation*, Addis Ababa, 06 March 2020.

¹¹⁸ It was tabled as Draft Law No. 37/2012 and referred to the Sub-Committee on Legal, Justice and Democracy Affairs for thorough examination. See *Proceedings of the House of People's Representatives*, Addis Ababa, 29 May 2020 (*HoPR First Reading*) 3.

¹¹⁹ *Working Group Minutes* (n 116). The 6th national election that was due to be held in June 2020 was postponed due to the COVID-19 pandemic (<https://www.aljazeera.com/news/2020/3/31/ethiopia-postpones-august-elections-due-to-coronavirus>; accessed 2 December 2020).

¹²⁰ See *Proceedings of the House of People's Representatives, Report and Resolutions of the Sub-Committee on Legal, Justice and Democracy Affairs on EHRC Draft Amendment Proclamation*, Addis Ababa, 15 July 2020 (*Final Reading and Adoption*) 28.

¹²¹ *Working Group Minutes* (n 117).

provisions clearly stating the Commission's power to monitor human rights in specific situations. This includes monitoring human rights during election periods and during state of emergency as well as in detention, custodial and care facilities (amended Article 6(11) - (13)). Though the founding Proclamation does not necessarily impede the EHRC from exercising its powers in these circumstances, and such express provision is not imperative, the importance of broadly articulated formal mandate can be stark when contested.

One of the important mandates that were challenged, for example, was EHRC's work in monitoring the 2020 COVID-19 State of Emergency (SoE)¹²² despite the fact that NHRIs are actually expected to operate with a "heightened level of vigilance and independence" in the context of SoEs.¹²³ Government authorities were of the view that the Commission should distance itself from matters concerning SoE assuring the full mandate conferred upon the SoE Inquiry Board established under the law. Similarly, the parliamentary deliberations on EHRC draft amendment proclamation reflected concerns around the "overlap" between the mandates -conflict than complementarity- of the Inquiry Board and the EHRC.¹²⁴ By the same token, some observers were questioning the possible role of EHRC in electoral process and the anticipated overlap with the NEBE's mandate that was again echoed during the parliamentary debates over the proposed revision of EHRC Proclamation.¹²⁵ In view of this, reinforcing EHRC's mandate as a human rights monitor like no other would be instrumental by clearly stipulating its powers in particular settings where apparent overlap or intrusion was felt.

Moreover, explicit provisions may draw the attention of NHRIs to particular situations where human rights violations may likely prevail but escape scrutiny. In this regard, it is rightly emphasized that "the explicit power to oversee prisons allows NHRIs to monitor a site of potentially grave human rights violations."¹²⁶ Such a mandate was one of the strong investigatory mandate safeguards found in several NHRIs (see table 2 above). Few among several African counterparts that enjoy express powers to monitor detention or similar facilities include the DRC, Malawian and Ugandan human rights commissions.¹²⁷ In

¹²² See Ethiopian Insight 'Democracy in action amid authoritarian reaction' 23 June 2020 <www.ethiopia-insight.com/2020/06/23/democracy-in-action-amid-authoritarian-reaction/> accessed 2 January 2021

¹²³ SCA General Observation 2.6.

¹²⁴ See *Proceedings of the House of People's Representatives Sub-Committee on Legal, Justice and Democracy Affairs, Public/Expert Hearing on the Draft Amendment to the Ethiopian Human Rights Commission Establishment Proclamation*, Addis Ababa, 19 June 2020 (*HoPR Hearing*) 6 & 23-.24;

¹²⁵ *HoPR Proceedings* (n124) 6; see also *HoPR Final Reading and Adoption* (n 120) 33 & 40.

¹²⁶ Linos and Pegram 'What works in human rights institutions?' (n 19) 10.

¹²⁷ See Organic Law on the Creation, Organisation and Functioning of the National Commission on Human Rights of DRC (2013) Article 6 (3); Human Rights Commission Act of Malawi (1998) s 15(d); Constitution of Uganda, s 52 (1).

principle, NHRIs should be allowed to visit any institution even without explicit provision; a formal expressed power tactically strengthens the mandate and eliminates the risk of restraint by itself or others. The SCA, stressed that “the lack of a specific legal power to access and monitor places of detention has the potential to limit [its] capacity to undertake this important function”; hence recommended the amendment of the EHRC proclamation to incorporate such an explicit stipulation.¹²⁸ This resonates with the call upon the Government of Ethiopia by the UN Committee against Torture (CAT) to strengthen EHRC’s mandate to undertake regular and unannounced visits to places of detention, and to issue independent findings and recommendations on such visits.¹²⁹ In practice, EHRC has endeavored to galvanize prison monitoring and the express prison oversight mandate under the amended provision Article 6 (13) is believed to seal the developing practice by ensuring EHRC enjoys “unfettered and unrestricted access to places of detention”.¹³⁰ Equally, this particular legal provision further draws EHRC’s focus to other facilities – where its oversight power is paramount but less utilized in its monitoring work– such as camps, hospitals, schools, shelters, etc.

A vital addition that strengthens the investigatory powers of the Commission relates to witness protection. The amended Article 25 (4) provides that any witness or whistleblower for the Commission shall be provided the same rights and protections as crime witnesses or court witnesses. This may not directly expand the powers and functions of the Commission as the responsibility rests mainly on government authorities. But a solid witness protection mechanism is crucial for firming up the investigation mandate of the Commission. It is believed that this will encourage the participation of witnesses in EHRC’s investigation work.¹³¹

Parliamentary debates reflect suggestions for further specifications and strengthening of EHRC’s advisory, training, publication, research, and education functions, and the subpoena power; in contrast some warned against the “tendency of exhaustiveness” in favor of keeping the mandate stipulation general and flexible.¹³² Obviously, it is not possible to list all; rather NHRIs must proactively interpret their mandate in a broad manner. A few relevant proposals from experts such as concerning express and strong

¹²⁸ ICC (n 96) 10.

¹²⁹ See CAT, *Concluding observations of the Committee against Torture, Ethiopia*, CAT/C/ETH/CO/1, 20 January 2011, para 25. 19 August 2011, para 6

¹³⁰ ICC (n 96) 7.

¹³¹ *Explanatory Notes* (n 114) 4.

¹³² *HoPR Hearing* (n 124) 3.

powers on public inquiries, reporting, remedies/enforcement, referrals, and litigation remain unaddressed.¹³³

5.2.2 Composition and Structure of the Commission

The EHRC Amendment Proclamation introduced certain changes in the structure of the Commission. One is in the designation of thematic commissioners, and the other in the number of commissioners. The considerations during the legal reform process were, first, to bring a model shift from branch commissioners to thematic commissioners and, second, to determine the number of Commissioners (at least the minimum). Notably, no imperative structure is provided by the Paris Principles as long as plurality and independence are maintained.

5.2.2.1 Thematic Commissioners

The new arrangement introduced the appointment of thematic commissioners with powers and functions to lead particular thematic areas or departments. The idea of thematic commissioners may not be entirely alien to EHRC's composition as the Commission's original structure had a commissioner for Women and Children – the only thematic mandate explicitly designated by the EHRC proclamation. But for the most part, assignment of a commissioner was attached to a branch office. The original proclamation, as provided in Article 2, envisioned “commissioners of branch offices” in charge of exercising the powers and duties vested in the Commission in the respective local jurisdiction of a branch office and act as heads of a branch office. This, by default, has resulted in unintended informal arrangement of federal and regional commissioners given that branch offices were mostly established at regional level.¹³⁴ Moreover, practical problems were faced as the commission needed to open as many branch offices as possible in the regions in order to be accessible. It was therefore thought to be important to detach the mandate of commissioners and that of branch offices.

The clear designation of thematic commissioners in the amended law unambiguously stipulates their roles on thematic human rights issues than confined to local jurisdiction, be it a region or certain area falling within the remits of a branch office. A few thematic issues such as civil and political rights, economic and social rights, and disability rights are clearly identified in addition to the existing women's and children's rights while other thematic posts may be assigned as may be necessary (amended Article 2(1) and 19(2)(k)).

¹³⁴ From parliamentary deliberations, some might have still inclined to reinforcing the ‘regional commissioner’ arrangement goes well with the Federal system (*HoPR Hearing* (n 124) 20-21.

The role of thematic commissioners may be helpful to devote proper visibility and focus to thematic human rights issues and thus, enhances EHRC's effectiveness. A snapshot of NHRI profiles can easily show thematic deputies in the Bolivian Ombudsman Office, thematic commissioners in the Australian Human Rights Commission (sex discrimination, age discrimination, disability, children, etc.) and thematic sub-committees (civil and political rights, economic rights, etc.) in the Egyptian Human Rights Council.¹³⁵

Furthermore, the EHRC thematic commissioner for women and children is elevated to the rank of deputy [chief] commissioner (amended Article 2 (1)). There are now two deputies of the chief commissioner under the amended Proclamation – one with a general mandate of deputizing the Chief Commissioner and the other with thematic focus, that is, the deputy chief commissioner on women and children's issues. Although this was not part of the proposed draft, legislators were persuaded to confer prominent status to the mandate on women and children that covers significant majority of the population and wide-ranging human rights issues.¹³⁶ It is noted that the suggestions for additional deputy chief commissioner positions including multiple thematic deputies were not considered.¹³⁷

5.2.2.2. Number of Commissioners

With respect to membership, there was no limit or indicative number in the EHRC founding Proclamation but only a general reference to "other commissioners" (Article 8). At the time of the legal reform, the EHRC was functioning with eleven commissioners based at the headquarters and branch offices. It operated with three commissioners for long, until the opening of the regional branch offices in 2011. Repealing Article 8(2) (d) of the previous law, the new proclamation provides for "Not less than four Commissioners heading human rights thematic areas" [emphasis added]. This means, together with the Chief Commissioner and the two Deputy Chief Commissioners, the amendment envisions the EHRC to be composed of a minimum of seven commissioners – with no maximum number set. Whilst it was considered efficient to downsize the existing number of commissioners, the intention is to give an indicative minimum size, saving some room for the appointment of additional commissioners as may be needed.¹³⁸ Fixing the minimum is very important to guarantee, at least, a reasonable size of NHRI members desired for the efficient functioning of the Commission which will not be entirely left to parliamentary discretion. A slightly larger EHRC membership may have served better considering the

¹³⁵ See <https://www.defensiria.gob.bo>; <https://humanrights.gov.au>; <http://www.nchr.org.eg/En/home.asp>

¹³⁶ Discussions with Hon. Abebe Godebo, 05 June 2020; *HoPR Final Reading and Adoption* (n 120) 29.

¹³⁷ Meskerem Geset *Written Submission to the FDRE HoPR Sub-Committee on Legal, Justice and Democracy Affairs on EHRC Draft Amendment Proclamation, Addis Ababa, 15 June 2020* (Author's written submission), on file with author.

¹³⁸ *Working Group Minutes* (n 116); *Explanatory Notes* (n 114).

size of the country and the scope of intervention expected of the Commission.¹³⁹ Looking at the experience of other countries, we observe 9-11 members in several NHRIs, while there are also as lower 4 - 6 commissioners in countries such as Australian, Kenyan and South African, and as higher 20-27 commissioners in the Malaysian and Egyptian NHRIs.

5.2.2.3. Pluralism or Diversity

Another valuable contribution of the amendment in relation to the composition of EHRC is diversity or plurality consideration required during the selection of potential commissioners, calling for the representation of gender and that of different social groups. The amended Article 11(3) obliges the Nomination Committee to ensure "...to the extent possible, the list of nominees should take into consideration gender diversity and representation from different parts of the society" [emphasis added]. As general as this may seem, it is a milestone in terms entrenching pluralism requirements to be observed during the appointment process. Despite some advocacy, the amendment did not endorse some form of mandatory gender quota rule for the composition of the Commission,¹⁴⁰ comparable for example to the NHRIs of Kenya (no more than 2/3 must be from same gender), Zimbabwe (at least half must be women) and Rwanda (at least 30% must be women).¹⁴¹ It also still lacks clear stipulations about minority or marginalized groups, such as persons with disabilities, and linguistic or other minorities. The amended provisions are broad enough and can shape the nomination practice towards more diversity. On the other hand, one important pluralism dimension- the professional diversity of commissioners- is missing from the amendment proclamation.

5.2.2.4. Special Rapporteurs

The possibility of designating special rapporteurs that may serve the Commission as external experts whenever necessary is another addition introduced by the amending proclamation. The amended Article 19 (2)(n) provides the Chief Commissioner with the power to appoint special experts. Even though this does not increase the size and diversity of the commissioners, it is one way to secure the involve of academics and qualified experts in the work of NHRIs as provided in the Paris Principles (Principle A.1.c). By allowing flexibility to garner the assistance of various qualified experts in particular subject matters based on needs, the modality can boost the overall diversity and quality of expertise at the EHRC. This is important given the limited number of the Commissioners and the

¹³⁹ *Author's written submission* (n 137).

¹⁴⁰ A clear gender quota was proposed during the parliament hearing (See *HoPR Hearing* (n124) 20-21) and *Author's written submission* (n 137).

¹⁴¹ See n 66.

inflexibility of the legal framework to allow appointing additional part-time commissioners as practiced in some NHRIs. Comparative experience shows the designation of special rapporteurs at the Indian NHRI and of Working Groups at the Zimbabwe NHRIs to support the work of the commission in different thematic areas.¹⁴²

5.2.2.5. Organizational Structure

The Amendment Proclamation has broadened the powers of the Chief Commissioner and the Council of Commissioners with respect to internal organizational structure and affairs. The creation of branch offices is placed under the mandate of the Commission instead of the HoPR as was the case. It must be recalled that Article 9 of the EHRC founding Proclamation provided for the opening of branch offices as may be determined by the HoPR. EHRC was therefore not in a position to freely decide its areas of operation and the corresponding budget designation which has affected the operational autonomy as well as accessibility of the Commission. To remedy this, the amended Article 9 stipulates that “branch offices or centers at any place as determined by the Council of Commissioners” [emphasis added]. The rationale of the amendment is to reduce bureaucracy in enhancing access to the EHRC. It aimed to make the decision process simple, and allow the creation, in addition to full-fledged branch offices, of centers when necessary, dictated by geographic location and existing needs.¹⁴³ Without a doubt, the implementation of these provisions would have clear budgetary implications and relates to functional autonomy.

The Chief Commissioner is generally given broader powers to exercise in consultation with the Council of Commissioners. S/he is accordingly empowered to determine thematic areas, assign thematic commissioners, determine organizational structure, and appoint external experts (Special Rapporteurs), senior officers and heads of branch offices (amended Articles 19(2) (k-n)). The Council of Commissioners is also given additional powers on finance and administration including appointing internal auditor, issuing financial and administrative Directives and Rules, designing programmatic policies and strategies, adopting staff benefit packages, etc. (amended Articles 31 (3)-(8)). The amendment proclamation strengthens the powers of the Chief Commissioner, other commissioners, and the Council of Commissioners. This in general increases the operational autonomy of the EHRC by vesting it with explicit powers instead of deferring several decisions to the HoPR.

¹⁴² For India, see Justice B.C. Patel, ‘The Role of NHRC in Protecting and Promoting the Economic and Social Rights of Vulnerable Groups in India’ in Eva Brems, Gauthier De Beco and Wouter Vandenhole (eds.), *National Human Rights Institutions and Economic, Social and Cultural Rights* (Intersentia 2013) 90; For Zimbabwe, see Zimbabwe Human Rights Commission Act (2001) s 7.

¹⁴³ *Explanatory Notes* (n 114) 4.

5.2.3. Appointment

The appointment process is expected to ensure independence, competence, diversity, and a reasonable number of NHRI members. One of the main aims of the legal reform was ensuring the integrity and diversity of the nomination committee as well as that of the nominees.

5.2.3.1. Nomination Committee

The work of the Nominating Committee is an integral part of the appointment of commissioners by Parliament as per the procedure specified in Articles 10-12 of EHRC Proclamation. Importantly, the integrity of the Nomination Committee is vital for the legitimacy of the appointment process – to ensure the recruitment of independent and qualified appointees. It is for this reason that the Paris Principles apply the principles of pluralism and representation not only to the composition of the NHRI, but also to the mechanism determining the NHRI composition.¹⁴⁴ Accordingly, the nomination committee has received proper attention during the legislative reform.

As indicated in the preceding section, Article 11 of the EHRC Proclamation provides for a 16 member Nomination Committee comprised of mainly members of the HoPR and the HoF (accounting for almost 3/4 of the Committee) and representatives of religious institutions (1/4 of the membership) with a single representation of the Federal Supreme Court through the President. This composition of the Committee was one of the critical areas that attracted criticism on the legitimacy of the nomination process. A committee dominated by members of the ruling party or coalition that controlled both Houses of the Parliaments and that did not provide space for CSOs' participation was considered to lack independence.¹⁴⁵ Guided by relevant international standards and practices, the amendment aimed to minimize government representation and increase other stakeholder participations.¹⁴⁶ Under the amendment proclamation Article 11(1), representatives of civil society and the National Electoral Board have been added to the Nomination Committee while the representation from the HoPR the HoF and religious institutions has been reduced to three for the parliaments, and one for religious institutions.¹⁴⁷ The amendment also moved from a pre-determined exclusive list of four religious institutions (the Catholic, Evangelical and Orthodox church and the Islamic Council) to a more inclusive representation through the inter-religious council. This may not have satisfied

¹⁴⁴ De Beco and Murray (n 20) 67.

¹⁴⁵ Goshu (n 30) 21; Kassa (n 25) 299

¹⁴⁶ *Explanatory Notes* (n 113) 3.

¹⁴⁷ It is noted that the draft included a representation from the Ethiopian Science Academy (draft Article 11(1)(F) that was later replaced by a representative from the HoF (*HoPR Final Reading and Adoption* (n 119)30).

everyone. While parliamentarians consider the representation from HoPR to be small owing to EHRC's accountability to the House, members of CSOs echoed dissatisfaction with the small seat reserved for the sector given its vast and diverse nature and its greater stake in human rights. Some had advocated unsuccessfully for special quota for CSOs in the appointment and dismissal processes with special considerations for CSO working on human rights and democracy.¹⁴⁸

In the original EHRC Proclamation, the criteria applicable for the members of the Nomination Committee were not clearly stipulated. A revised provision is included to address this in the amended Article 11(2), which provides that the "Nominating Committee shall have independent and competent members who shall also fulfill the criteria, as appropriate, for appointment of Commissioner under Article 12 of the Proclamation" [emphasis added]. The revision included a remarkable step in guaranteeing the independence and competence of the Committee members, thus boosting the integrity of the appointment process.

5.2.3.2. Modality and Criteria of Appointment

With a view to addressing the lacunae in the founding Proclamation concerning a formal requirement for an open and inclusive process, the amendment requires the Nominating Committee to follow a "transparent and participatory public nomination" (Article 11 (3)). Additional discretion is given to the Committee to "use its own means" to identify and nominate suitable candidates. The fact that it remains "not guided by clear rules of procedure"¹⁴⁹ and that it still leaves broader discretion to the Committee was considered an undesired leeway for inconsistent practice.¹⁵⁰

The Nomination Committee employs criteria stipulated under Article 12 of the Proclamation to screen candidates. The revised Article 12(7) added a clear criterion for the Committee to ensure that a candidate is "not a member of a political organization." This in a way responds to Kassa's criticism that the normative criteria "fails to stipulate which persons do not qualify for appointment".¹⁵¹ For lack of such stipulation in the EHRC Proclamation, previous appointees were seen having political affiliation with the ruling political party, subjecting the Commission to heavy criticisms and legitimacy deficit.¹⁵² The incorporation of an additional criterion was thus imperative in order to enhance

¹⁴⁸ *HoPR Hearing* (n 123) 4, 26 & 28.

¹⁴⁹ Kassa (n 25) 299

¹⁵⁰ See *HoPR Hearing* (n 124) 4- 5.

¹⁵¹ Kassa (n 25) 299.

¹⁵² Gudeta (n 24). See also note 53 above.

efforts in guaranteeing the political neutrality and public legitimacy of the Commission.¹⁵³ On the other hand, the amendment removed the seemingly contentious health requirement under Article 12 that was feared to have discriminatory effect on persons with disabilities.¹⁵⁴

5.2.4 Remunerations and Restrictions for Appointees

Salary and benefits packages are determinant factors for attracting diverse and qualified human resource to an institution. They go a long way in providing the NHRI with sufficient resources needed for its proper functioning. Under Article 18 of EHRC Proclamation, Chief Commissioner, Deputy Chief Commissioner, and commissioners were entitled to similar benefits of Minister, Deputy Minister, and Director General, respectively. With the aim to open up possibilities for better packages, the amended Article 18(1) provides that commissioners shall be entitled to the benefits and privileges provided by the law for higher government officials, without necessarily confining them to specific positions. This gives the commission the liberty to explore better remuneration and benefits packages that may be available in accordance with, at least national best practices from comparable institutions. It can be applauded as an important step towards securing a relatively attractive package with a view to changing the poor record of the Commission in attracting and retaining qualified experts.

On the other hand, the law prohibits commissioners from engaging in any gainful work. This presumably is meant to ensure maximum safeguard against conflict of interest. It is important to ensure that commissioners or even personnel of NHRIs do not engage in any activity that compromises the independence and integrity of the institution in reality as well as in perception. Unlike Article 18(2) of the original EHRC proclamation that left some room for exceptions upon permission from the HoPR, the amended Article 18(2) states unequivocally and indiscriminately the prohibition of engagement in any gainful, public or private employment during one's term as EHRC commissioner. A draft proposal had intended to relax the earlier rules by providing that the Speaker of the House can authorize exceptions upon the recommendation of the Council of Commissioners. However, the proposal became one of the controversial issues during the parliamentary deliberations and was the only provision decided by vote.¹⁵⁵ It was feared that flexibility would relegate the Commission's work to a secondary status and was unequivocally emphasized that commissioners need to solely devote their time to the Commission. EHRC and other experts have offered explanation on the advantages of going for a non-

¹⁵³ *Explanatory Notes* (n 114)

¹⁵⁴ *Ibid* ; *HoPR Hearing*(n 124) 20.

¹⁵⁵ *HoPR Hearing* (n 124) 7 & 10; *HoPR Final Reading and Adoption* (n 120) 33-35; 38-42.

restrictive approach to attract prominent experts without having to leave their engagement in areas such as teaching or other academic work that may not necessarily pose issues of conflict of interest.¹⁵⁶ Moreover, this could facilitate the representation universities in NHRIs as envisioned by the Paris Principles (Principle A.1).

Such a strict rule may have detrimental implications on EHRC's search for well-qualified experts or specialists, unless some radical changes are introduced to the salary and other benefit packages of its staff. In several other countries, it is observed that commissioners continue their role as university professors or human rights experts without prejudice to their position in NHRIs,¹⁵⁷ whereas in some jurisdictions they have arrangements for part-time commissioners that already engage in other work.¹⁵⁸

5.2.5 Budget and Administration

The essentiality of adequacy of funding and autonomy in managing the financial affairs without undue interference cannot be overemphasized when it comes to the effectiveness of NHRIs. Considering that this was not properly ensured in the law and practice of the EHRC, it was one of the critical areas identified for legal reform.

The EHRC Proclamation provided for a modality of state management of the Commission's funding through the National Bank, requiring advance deposit of the quarterly portion of the available funding at the Bank (Article 36 (2)). Moreover, owing to the discretionary authority exercised by the Ministry of Finance on budget allocations and spending, the EHRC was suffering from lack of budgetary autonomy.¹⁵⁹ To remedy this, Article 36(2) of the amended law provides for "the approval by the House" of EHRC's annual budget based "on request from the Commission", and requires the duty of the Ministry of Finance to "deposit the 3 month quarterly budget in advance to the bank account of the Commission." Pushing the boundary for EHRC's budget autonomy and capacity, a proposal for a provision obliging the Ministry of Finance to deposit the annual budget to the Commission's bank account within one month of its approval by the House was proposed in the draft amendment (Article 36(2) of Draft Law No. 37/2012). Apparently, this was considered an unrealistic ask,¹⁶⁰ while exact arrangement was just

¹⁵⁶ *HoPR Hearing* (n 124) 16-17. The author also delivered expert testimony on this point drawing on the rationale and experiences from other countries. See also *Explanatory Notes* (n 113) 3) (explaining scenarios in which the appointee might be needed for teaching in higher education or academic research work).

¹⁵⁷ It is noted that most members in European NHRIs are drawn from academic institutions (See De Beco and Murray (n 20)).

¹⁵⁸ See n 55, for Bangladesh and South African experience.

¹⁵⁹ Kassa (n 25) 303.

¹⁶⁰ *HoPR Hearing* (n 124) 7 & 32; *HoPR Final Reading and Adoption* (n120) 31.

endorsed under Article 25 (2) of the new NEBE Re-establishment Proclamation (No.1133/2011).

Furthermore, an important autonomy clause was added to ensure the Commission's control over its finances. The new Article 36(3) of the amendment proclamation provides that the Commission "has full financial autonomy to administer its budget" administered "[i]n accordance with internal financial rules and Directives to be adopted by the Council of Commissioners." This aims to provide the EHRC full financial autonomy to administer its own budget including setting its own internal rules and procedures. Of course, such rules shall be compatible with other applicable financial rules applicable in the country. On the other hand, the need for strengthening the Commission's budgetary capacity through formal prescription largely remains unresolved.

5.3 Gap and areas for further Reform

This section attempts to highlight a few points where further legal revision might be needed for strengthening the EHRC.

5.3.1 Autonomy

Given the history of EHRC's challenges with intrusions and the limited understanding of state authorities about NHRI's unique status in a national system, a clear articulation of operational autonomy would have significant implications for enhancing EHRC's mandate. Most suitably, NHRI legislations should entrench formal safeguards against interferences of any kind. Comparable experiences from Kenya, South Africa and Zimbabwe, for example, lend insights on stipulation of clear principles against political interference.¹⁶¹ As importantly, not only the independence of NHRI appointees but that of the staff is vital for the NHRI independence. While it is important to leave details about staff recruitment and management for internal regulations, entrenchment of general principles for staff independence, criteria appointment/recruitment, and mode of operation should be part of the remits of EHRC legislation, particularly with respect to Directors and senior staff.

In addition, a strong framework for budgetary autonomy is desirable. Drawing on NHRI good practices and building on the recent positive gains with respect to NEBE, the proposition on budget should be revisited to ensure EHRC's financial autonomy and efficacy. Considering EHRC struggles with budget autonomy in the past, this should be an area for further critical examination.

¹⁶¹ Fombad (n 18) 892.

5.3.2 Mandates and Powers

Without prejudice to the catch-all provision for EHRC mandate under Article 6 (11) of EHRC Proclamation express powers and functions, however, remain indispensable to secure strong and broad institutional practices.

5.3.2.1. Remedies and Enforcement

Enforceable remedies help speed up implementation of any NHRI decisions,¹⁶² and contribute to the public legitimacy as well as the weight authorities give to the NHRI.¹⁶³ The remedies framework in the EHRC legislation is not strong and elaborate despite the great importance that should be attached to matter. In this regard, the UN Committee on the Elimination of Racial Discrimination (CERD) has noted the lack of clarity on EHRC's remedies.¹⁶⁴ To the most part, the remedies EHRC can render are not precise. General rules but only in relation to complaint handling mandate are provided under Article 26 of EHRC Proclamation that allow the Commission to resort to amicable settlements, discontinuance of violations, redress for injustice suffered, or any other appropriate measures. In some NHRIs it is observed that clear remedial mandates allow NHRIs to order payment of sufficient compensation, release of detainees, further investigation or prosecution, etc.¹⁶⁵

The EHRC's recommendations are not legally binding as is the case with many NHRIs. But it should be strengthened so that its decisions will not also be completely ignored. This is again very important given the truncated public legitimacy of EHRC in the past years. Though the penalty clause under Article 41 of the EHRC Proclamation can generally be invoked for persuading enforcement, the mechanism to follow-up and ensure enforcement of decisions and remedies would have paramount importance.¹⁶⁶ Some NHRIs are mandated to seek compliance to their decisions through the judiciary or another appropriate tribunal¹⁶⁷ For example; the Ghanaian Commission may take a matter to court for enforcement if any authority or person fails to comply with the recommendations of the Commission within three months.¹⁶⁸

¹⁶² Linos and Pegram 'What works in human rights institutions?' (n 19) 10.

¹⁶³ De Beco and Murray (n 20) 111.

¹⁶⁴ CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, CERD/C/ETH/CO/, 7 September 2009, para 20.

¹⁶⁵ OHCHR (n 9) 89-90.

¹⁶⁶ SCA, General Observations 2.10.

¹⁶⁷ De Beco and Murray (n 20) 116.

¹⁶⁸ See CHRAJ Act (1993) s 18(2), s 7(d).

5.3.2.2. Referral and Litigation

Referral linkage with courts, as found in NHRI studies, facilitates access of vulnerable groups to courts.¹⁶⁹ The EHRC, however, is not explicitly authorized to refer cases, or initiate or intervene in court proceedings either in its own name or representing victims of human rights violation unlike several NHRIs. In contrast, the EHRC Proclamation prohibits the Commission from handling cases of alleged human rights violations pending before courts of law at any level (Article 7). An NHRI would be expected to support or initiate litigation that would be “influential in advancing the protection of human rights.”¹⁷⁰ Amicus brief submissions and third party interventions provide opportunity for NHRIs to shape human rights jurisprudence and have been strategically used by NHRIs in Africa and beyond.¹⁷¹ Expressions of formal powers of NHRIs to litigate include: to initiate legal action on behalf of an individual or a group (South Africa), or challenge the validity of laws or seek remedy (Ghana), or to intervene in litigation (India).¹⁷² The role and expertise of EHRC in relevant court proceedings can be paramount in the Ethiopian context where human rights litigation is hardly used for challenging laws and state actions. This is not by any means to make EHRC a routine litigator but to allow it to spearhead strategic cases that can shape human right agenda.

It is also important to note that EHRC does not have a formal referral mechanism for further inquiry of a matter by another competent authority as may be necessary, save the duty to notify authorities about crime or administrative offence under Article 28 of the EHRC Proclamation which does not necessarily make EHRC well-positioned to refer human rights violations for further action by other entities. The Commission's limited power to refer a matter for prosecution or initiate prosecutions has been underscored by the Committee against Torture (CAT).¹⁷³ Turning to other NHRIs, the Canadian Human Rights Commission, for example, has the power to refer complaints to the Canadian Human Rights Tribunal for further inquiry the decision of which may be enforced by the Federal Court.¹⁷⁴

¹⁶⁹ Linos and Pegram ‘What works in human rights institutions?’ (n 19) 10.

¹⁷⁰ DeBeco and Murray (n 20) 117.

¹⁷¹ Fombad (n 18); Ibid.

¹⁷² See SAHRC Act 2013, s 7 (1) (e); CHRAJ ACT 1993, s 7(d); Indian Protection of Human Rights Act 1993, s 12(b).

¹⁷³ CAT (n 129).

¹⁷⁴ See Annette Nierobisz, Mark Searl and, Charles Thérout ‘Human Rights Commissions and Public Policy: The Role of the Canadian Human Rights Commission in Advancing Sexual Orientation Equality Rights in Canada’ (2008) 51(2) *Canadian Public Administration* 239, 20.

5.3.2.3. National Inquiries

The formal authority to conduct national inquiries – non-judicial often large-scale public hearings – appears to be among the most significant powers NHRIs can enjoy and is instrumental in allowing NHRIs to address complex and systemic human rights violations for which they are particularly well suited.¹⁷⁵ By facilitating an in-depth examination of issues from a human rights lens, inquiries can be influential tools for EHRC to “evaluate the broader implications of laws, policies, and public or private acts for the enjoyment of human rights”¹⁷⁶ through an open, dialogic and change oriented process.¹⁷⁷ Though general investigatory powers of EHRC can be used for conducting national inquiries, express powers can be highly empowering for the institution to develop this valuable methodology, thus, desirable to clearly establish in the EHRC legislation. Express inquiry powers, for example, in Australia and South Africa have proved to be powerful, and successful national inquiries have in particular shaped socio-economic rights monitoring and enforcement as seen in prominent cases from Africa and Asia-Pacific NHRIs.¹⁷⁸ An argument in support of formal inquiry power for EHRC is reinforced by the fact that not even single national inquiry has been conducted by EHRC. It can also be further argued that the inquiry methodology is much needed in the current context of the country’s complex human rights situation, the lack of proper socio-economic rights oversight, and EHRC’s endeavors to become the institution of the people.

5.3.2.4. Reporting

Human rights reporting constitutes one of the areas that deserve explicit stipulation as part of EHRC’s mandate under Article 6 of the EHRC Proclamation. The reporting obligation under Article 39 of the same Proclamation seems to have an ad-hoc status as is detached from the main powers and duties. Deducting from past experience, it may arguably risk being mainly associated with the Commission’s accountability to the HoPR rather than an integral part of its human rights mandate and accountability to the public. Reporting is a key function of NHRIs as indicated in the Paris Principles¹⁷⁹ and widely practiced by many NHRIs either in the form of thematic or special reports or general state of human rights reports. Recalling EHRC’s infrequent and unassertive practice of publishing reports

¹⁷⁵ Brian Burdekin (2007) *National Human Rights Institutions in the Asia Pacific* (Martinus Nijhoff 2007); Meg Brodie, ‘Uncomfortable truths: Protecting the independence of national human rights institutions to inquire.’ (2015)38 (3) *UNSW Law Journal*. 1215.

¹⁷⁶ Meskerem Geset Techane ‘Emerging Opportunities for Economic and Social Rights Adjudication: Exploring the Inquiry Procedure of National Human Rights Institutions’ 2019 20(1) *ESR Review* 11, 13.

¹⁷⁷ Brodie (n 175).

¹⁷⁸ Ibid; Meskerem (n 176).

¹⁷⁹ Paris Principles A.3 (A), SCA General Observation 1.11.

and the interferences experienced with its reporting mandate,¹⁸⁰ strengthening this mandate would serve a great deal.

Moreover, it is important to affirm EHRC's mandate to submit reports to human rights bodies. Not only is this rarely practiced by EHRC unlike its regional and global,¹⁸¹ but also the EHRC Proclamation (Article 6(7)) makes reference only to giving opinion on state reports to be submitted to international bodies.

5.3.4 Composition and Pluralism

Towards plurality, the consideration for a clear gender quota could be instrumental to ensure gender diversity. It must be recalled that the SCA emphasised on the participation of women in NHRIs to be essential for pluralism.¹⁸² NHRI legislations have also attempted to ensure that through rules on gender quota as highlighted discussed in previous section. The stipulation in EHRC legislation of a clear quota for gender representation would be useful to introduce an exemplary standard for pluralisms that can also inspire good practice in other domestic institutions.

Moreover, the age requirement for EHRC commissioner appointment, that one should be above the age of 35 years old (Article 12) also deserves scrutiny. Such age restriction– uncommon in most NHRI legislations reviewed– may be discriminatory to younger experts and may work against diversity with respect to youth representation in EHRC.

The absence of a rule for ensuring professional diversity of commissioners, as envisioned in the Paris Principles, is another area for further consideration.¹⁸³ Without prejudice to professional diversity, knowledge of or exposure to human rights should be a pre-requisite for an institution whose overall purpose is to promote and protect human rights.¹⁸⁴

The general considerations for NHRI diversity should also extend to its staff.¹⁸⁵ In view of this, rules should be entrenched that EHRC decision-making body as should ensure the diversity and independence of the staff.

¹⁸⁰ Kassa (n 25) 308-310.

¹⁸¹ See submissions from NHRIs in UN treaty bodies and UPR reporting process < <https://www.ohchr.org/en/hrbodies/upr/pages/NGosNhris.aspx> > ; < www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx >

¹⁸² SCA General Observation 1.7: Justification.

¹⁸³ See Paris Principles 1 (a); De Beco and Murray (n 20) 70-72. *Author's written submission* (n 137) 3.

¹⁸⁴ Smith (n 36) 926.

¹⁸⁵ SCA General Observation 1.7 and Justification.

5.3.5 Tenure Security

In spite of the importance of the dismissal process for independence of an NHRI, the amendment has not devoted much attention to it. Despite questions around the integrity and neutrality of the Special Inquiry Tribunal mandated to examine the removal of commissioners, desired revisions have not been introduced in this area. It is noted that proposals were forwarded by experts to incorporate some safeguards including the addition of judges, CSOs and other stakeholders in order to boost the composition and independence of the Tribunal or to consider replacing the Special Tribunal with Judicial Council.¹⁸⁶ In some countries, they have stringent procedures for dismissal. For example, in Kenya investigation by a tribunal chaired by Superior Court Judge; in Lesotho dismissal commissioners is considered by the Judicial Service Commission and in Ghana requires the applications of same procedure for removal of judges provided under the Constitution.¹⁸⁷

In the same vein, the immunity granted under the EHRC Proclamation begs reconsideration as it provides narrow protection for arrest or detention. Mindful that functional immunity is crucial for tenure security and reinforcing independence, the provision should be broadly crafted in a manner comparable to immunity enjoyed by judges, providing sufficient protections against any legal liability of administrative, civil, or criminal nature for claims related to the proper exercise of official duties.

5.3.6 Inclusiveness and Accessibility

While collaborations with stakeholders, in particular civil society, are relevant for NHRI inclusiveness and accessibility, this is missing from EHRC founding Proclamation. In addition, as indicated in earlier discussion, the cooperation gap in EHRC practice was visible in the past, given that only few activities have been carried out in collaboration with CSOs over the years.¹⁸⁸

Moreover, other accessibility issues such as reaching marginalized and minority groups, and making its services available in different languages should be an area for further examination. It is also recalled that EHRC was urged to take steps to improve its accessibility to persons with disabilities.

¹⁸⁶ See *Working Group Minutes* (n 116) 4). The author's written submission also suggested the inclusion of independent stakeholders other than parliament members (*Author's written submission* (n 137) 3).

¹⁸⁷ See, The Constitution of Kenya 2010, s 251; Human Rights Commission Act of Lesotho 2016, s 10 CHRAJ Act 1993, s 5.

¹⁸⁸ See Kassa (n 25) 309.

5.3.7 Gender Reference

As basic as it may sound, the amendment employs gendered language, with the use of male gender in all references. The possible explanation can be that as an amendment bill, it shall follow the languages of the original proclamation. However, as a legislative framework of a human rights champion institution, it should go far beyond traditional standards and do away with reinforcing gender stereotypes in legal drafting.

Conclusions

The EHRC being one of Ethiopia's democratic institutions that are going through a reform process, the article analysed the amendment to the original EHRC establishment proclamation that has been in force since 2000. To document and analyse the on-going efforts towards building an effective and independent human rights body, the Paris Principles were used as analytical framework focusing on key features, such as independence, statutory base, mandate and competence, pluralism, and financial autonomy. The process, the achievements, and the limitations of the legal reform as well as the areas for further consideration have been highlighted.

It should be pointed out that generally the scope of the legal reform was limited and shortcomings were observed in terms of employing a more participatory process. It is important to reiterate, at this point, that the process was influenced by two important factors, namely, the then fast-approaching national elections at the early stage, and the COVID-19 pandemic at the latter stage, both affecting the time and method employed in the reform process.

Overall, the evaluation finds that the legal reform strengthens the mandate of the Commission by addressing significant gaps with respect to the formal safeguards of institutional effectiveness. The notable achievements of the Amendment Proclamation, in relative terms, are the integration of an open and participatory appointment process and pluralism considerations for composition, formalizing certain monitoring/oversight functions, strengthening the powers and functions of the commissioners, allowing the creation of structures in a manner ensuring efficiency (thematic commissioners, rapporteurs, branch offices, directors or other) and improving financial autonomy of the Commission. These are all vital in terms of preparing the EHRC to respond to contemporary human rights issues in the country, and reinforcing the independence, legitimacy, and capacity of the Commission, thereby, improving its effectiveness. Although not a panacea for all the legitimacy and capacity gaps of the institution, the importance of the enabling legislation should not be underestimated.

Clearly, the amendment is not presented as a comprehensive legal revision and it still leaves some issues for further investigation and reconsideration in parallel with the embryonic reform in the institution's actual practice towards fully exercising its mandate. Accordingly, improving the status, independence, and effectiveness of the EHRC should be seen as a work in progress.

Finally, it is important to recognize that the promises and pitfalls of the broader political situation in the country will continue to affect the Commission and it is apparent that the institution is faced with challenges confronting nascent NHRIs in particular in transition context. And, unavoidably, the environment in which NHRIs operate continues to determine their effectiveness.

Ethiopia's new Organizations of Civil Societies Proclamation No. 1113/2019: Promises and Pitfalls

*Dunia Mekonnen Tegegn**

Abstract

Starting from the 1990s, civil society organizations (CSOs) have made significant contributions in promoting social justice and human rights in Ethiopia. Unfortunately, the work of CSOs in this area was not always received with open hands. In Ethiopia, the push back against the pro-democracy and pro-rights advocacy began intensifying following the 2005 elections and took concrete shape with the passing of the Proclamation to provide for the Registration and Regulation of Charities and Societies (CSP) in 2009. The claim that the 2009 CSP, and its associated directives, violated international human rights standards was one of the underlying reasons behind calls for the reform of the law. A call that would not be heeded until the recent political changes that swept the country in April 2018 and the subsequent passing of the new Organizations of Civil Societies Proclamation in March 2019. This article, based on doctrinal legal research and standards developed by the UN and African human rights systems, compares the two laws including by pointing out their peculiar features. Underlining the areas that merit further attention, the study concludes that the new CSO law is a step towards democratization and wider CSO engagement in the country.

Introduction

Freedom of association protects entities that are registered and not registered. These entities include “Religious associations, political parties, civil society organizations, cooperatives trade unions, and online groups.”¹ It further facilitates the gathering of diverse individuals to come in accord with a collective goal.² The right is recognized as a fundamental human right in major international and regional treaties.³ Ethiopia has

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¹ International Center for Non-Profit Law (ICNL), ‘Freedom of Association’ (www.icnl.org/our-work/freedom-of-association) accessed on 28 December 2020.

² Human Rights Council, ‘Rights to freedom of Peaceful Assembly and of Association, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’ A/HRC/41/41, Forty-first session 24 June–12 July 2019 (17 May 2019) (“Report of the Special Rapporteur”).

³ See the United Nations (1948), Universal Declaration of Human Rights, Art 20; UN General Assembly (UNGA), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UNTS, vol. 999, p. 171, Art 15;

ratified all international and regional treaties acknowledging this right which further strengthens the government's obligation to respect and enforce the right. It has also integrated the freedom of association in its Constitution, which further makes the treaties the country ratified integral part of national law.⁴

For a long time, Ethiopia has had a tradition of community-focused structures such as *idir*, *iqub*, *jama'ah*, *debo*, *afocha*, and *ezen* that operate at the local level and fulfill the interests of their members.⁵ Formal civil society—that is, organizations with legal character—are a recent phenomenon. The civil society sector is also defined as “voluntary sector”, “third sector” “non-profit sector” “informal sector” etc.⁶ Many people use “NGO” and “Civil Society” in identical way though the first is only one expression of the second. The United Nations has been commonly using the word “Non-Governmental Organizations” (NGOs) to differentiate civil society organizations from other governmental agencies.⁷ The World Bank describes NGO as “an association, society, foundation, charitable trust, nonprofit corporation, or other juridical person that is not viewed under the particular legal system as part of the governmental sector and that is not undertaken for profit. This definition does not embrace “trade unions, political parties, profit-distributing cooperatives, or churches.” Currently, an increasing number of NGOs choose to be called “civil society”, “because they dislike categorization as ‘non-governmental.’”⁸

During the Ethiopian empire rule, which expanded from 1137-1974, civil society organizations did not flourish well. The sector also took a gradual growth.⁹ From a historical point of view, formal CSOs including international organizations first start to appear in Ethiopia in the 1960s with the ratification of the law governing associations (1960 civil code of Ethiopia) during the imperial regime.¹⁰ The 1960 Civil Code introduced

UNGA, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS, vol. 1249, p. 13, Art. 7c; Organization of African Unity (OAU), African Charter on Human and People's Rights, Oct 21 1986, CAB/LEG/67/3, Art.10; OAU, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), Art. 8; African Union (2007), African Charter on Democracy, Elections, and Governance, Arts. 28, 27(2) & 12/3.

⁴ Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), 1995, Arts. 31 & 9(4).

⁵ Abadir M. Ibrahim, *The Role of Civil Society in Africa's Quest for Democratization* (Springer Int'l Pub 2015) 133-34.

⁶ Wondwosen Teshome B, 'Civil Society and Democratization in Africa: The Role of Civil Society in the 2005 Election in Ethiopia' (2009) IJHSS 4(2) 81.

⁷ Ibid.

⁸ Ibid.

⁹ International Center for Non Profit Law, 'Civic Freedom Monitor Ethiopia' (26 August 2020) <www.icnl.org/resources/civic-freedom-monitor/ethiopia> accessed on 31 December 2020.

¹⁰ Abe Chelkeba, 'Impact Assessment of the Charities and Societies Law on the Growth and Programs of Non-Governmental Organizations' (LL.M. Dissertation, Addis Ababa University School of Law July 2011).

a legal framework to regulate voluntary organizations.¹¹ This was supplemented by a regulation enacted in 1966.¹² These two laws were not able to adequately address the needs of the newly created CSOs that began to function starting from 1991. Attempts to revise the laws in the past were not successful.¹³

Contemporary civil society organizations first appeared as religious organizations in the 1930s, and social service organizations like the Red Cross started to provide services in Ethiopia beginning from the 1950s.¹⁴ The role of CSOs was insignificant under the hegemony of the Derg (a military junta) from 1974-91. Because of the 1973-1974 and 1984-1985 famines, a high number of CSOs who are interested in aid and charitable services come to exist. It was after the overthrow of the Derg regime in 1991 the number of NGOs considerably improved.¹⁵

The Transitional Period Charter of June 1991 integrated the Universal Declaration of Human Rights as part of Ethiopian law. A few voluntary associations also came into being and began activities that were new, such as human rights monitoring and education, and the promotion of democratization. Regional and ethnic-based associations also began to function without restraint and openly.¹⁶ Some of these associations were highly noticeable due to their leadership, such as the Ethiopian Human Rights Council.¹⁷

In February 2009, the Government promulgated the Proclamation to Provide for the Registration and Regulation of Charities and Societies (CSP), Ethiopia's foremost comprehensive legislation governing the registration and regulation of NGOs.¹⁸ As will be explained below, the 2009 CSP and its related directive infringed on international principles connected to the freedom of association.¹⁹ The law imposed organizational,

¹¹ Yitayew Alemayehu Taye, 'The State, Nongovernmental Organizations and the Making of the Charities and Societies Proclamation No. 621 of 2009 in Ethiopia – Historical and Institutional Perspectives' (Ph.D. Dissertation, the Law, Policy, and Society Program of the Northeastern University June 2010). (<https://repository.library.northeastern.edu/files/neu:1526>) accessed 13 December 2020.

¹² Tsehai Wada, 'The Regulatory Framework for Civil Society Organizations in Ethiopia, Civil Society at the Cross Road : Challenges and Prospects in Ethiopia' (2008) Forum for Social Studies, available at (www.academia.edu/1162441/) accessed on 31 December 2020.

¹³ Ibid.

¹⁴ International Center for Non Profit Law (n 9).

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Charities and Societies Proclamation, Proc. No. 621/2009, Federal Negarit Gazette, 15th Year No. 25, 13 Feb. 2009 ('2009 CSP'). This law will be contrasted with the Organizations of Civil Societies Proclamation, Proc. No. 1113/2019, Federal Negarit Gazette, 25th Year No. 33, 7 Mar. 2019 (in the fn. the '2019 Civ. Soc. L.').

¹⁹ The previous UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr. Maina Kiai, observed that, "The enforcement of these provisions has a devastating impact on individuals' ability to form and operate associations effectively, and has been the subject of serious alarm expressed by several United Nations

operational, and regulatory limitations against CSOs work in the country. It has especially affected CSOs that work on human rights and governance and those which advocate for a rights-based approach to development.²⁰

Before the actual endorsement of this Proclamation, the human rights work in Ethiopia was prolific. CSOs lobbied for a change of discriminatory laws, contributed to the enforcement of severe penalties on for example gender-based crimes, and facilitated access to justice through free legal aid centers. Some CSOs also provided legal representation in court.²¹ After the coming into force of the CSO law, many of the organizations changed their organizational strategic focus, completely shut down their offices, or restructured their programs. Some organizations such as the Ethiopian Women Lawyers Association stopped providing essential services for women who were deprived of the means to access justice on their own.²²

After the confirmation of Prime Minister Abiy Ahmed in April 2018, a Legal and Justice Affairs Advisory Council made up of 13 members was formed to evaluate a variety of laws.²³ The CSO law review process, which is only one of the many tasks of the Legal and Justice Affairs Advisory Council,²⁴ was led by the CSO Law Reform Working group which was composed of lawyers, human rights activists, civil society leaders, and academics.²⁵ The working group used its own rules of procedure, and undertook a comprehensive review of the CSP in light of international, regional and constitutional standards.²⁶ The working group conducted a number of consultations with civil society on the findings of the study, drafted a law on the basis of the assessment and the recommendations in the study as well as taking into account feedback from the different consultations it has

treaty bodies." Mr. Kiai went on to recommend that "the Government revise the 2009 CSO law due to its lack of compliance with international norms and standards related to freedom of association, notably with respect to access to funding" in International Center for Non Profit Law (n 9).

²⁰ Sisay Alemahu Yesanew, 'CSO Law in Ethiopia: Considering its Constraints and Consequences' (2012) [8] J. Civ. Soc. 369.

²¹ Dunia Tegegn, 'A New Hope for Ethiopian Women's Right CSOs' (7 September 2008); (<https://africlaw.com/2018/09/07/a-new-hope-to-ethiopian-womens-rights-csos/>>) accessed 22 September 2020.

²² Ibid.

²³ Legal and Justice Affairs Advisory Council of Ethiopia, 'Travaux Préparatoires for Organizations of Civil Societies Proclamation (Proc. No. 113/2019' (2020)) <http://ljaac.gov.et/UI_Assets/files/resources/84466e5a-6fb4-4004-88c7-63cdc4a20a13.pdf> accessed 28 March 2021.

²⁴ Ibid.

²⁵ In addition to myself, Its members included: Debebe H. Gebriel (legal practitioner and longtime CSO leader), Abdulatif Kedir (AAU-Center for Human Rights), Kinetibeb Kassa (former OSJE and UN High Commissioners Office for Human Rights), Blen Asrat (Directress, Ethiopian Civil Society Forum), Blen Sahilu (former lecturer of law, Addis Ababa University, founder of the Yellow Movement, then gender advisor at Care Ethiopia), Wongel Abate, legal consultant, former Director of APAP), Abebe Fite (drafting experts, AGO), Dr. Tadesse Kassa (Center for Human Rights, AAU).

²⁶ Interview with Kumlachew Dagne, Leading Member, CSO Law Working Group, Oct 6, 2020.

conducted with stakeholders including the Charities and Societies Agency, and Office of the Attorney General.²⁷

This article examines Ethiopia's new Organizations of Civil Societies Proclamation (Herein after new CSO law) based on accepted international standards on freedom of association and identifies the changes, bottlenecks, and promises of the law for human rights and democratization in Ethiopia. To do so, the author employed doctrinal legal research which includes an in-depth analysis of the legal doctrine with its development process and legal reasoning. For the purpose of collecting data, the author used both primary and secondary sources of information. The first part of the article presents an examination of the relevant international standards on freedom of association and compares the new CSO law and the 2009 CSP in terms their compliance with those standards. The second section of the article presents the major findings/conclusions of the analysis. The last section of the article proposes recommendations on the way forward. International human rights law recognizes a set of criteria to assess laws governing freedom of association.²⁸ The article will try to examine each criterion vis-à-vis Ethiopia's new CSO law and provides a comparative analysis.

1. Recognition and Protection of the Freedom of Association

The right of every individual to freely associate is a well-recognized right under international human rights law. This indicates that legislation that does not set specific limitations on individuals, including foreign nationals, conforms to international standards. Under the 2009 Proclamation to Provide for the Registration and Regulation of Charities and Societies (2009 CSP) an association can be established either by natural or legal persons.²⁹ They can establish an association of their choice whether a charity or a society. The law however categorizes CSOs based on the nationality of their founders and their source of funding limiting the areas they can be engaged in.

Whether the founders are Ethiopians or non-nationals and the amount of funds mobilized and the amount of funds mobilized by organizations from domestic and foreign sources was used to distinguish their areas of work and as a result their categorization as local and international CSOs. If a CSO consists of non- Ethiopian members or the percentage of

²⁷ The draft CSO law was presented for discussion at the Legal and Justice Affairs Advisory Council and subsequently defended at the Attorney General's Office, the Prime Minister's Office and the Parliament before it was passed into law.

²⁸ Report of the Special Rapporteur, (n 2).
(https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf>)
accessed 22 September 2020.

²⁹ 2009 CSP (n 18), Art. 55.

funds mobilized by organizations A CSO cannot work on areas that are clearly set aside for Ethiopian CSOs, if the percentage of funds raised from external sources is more than 10% of the annual budget, the CSO cannot work on sections that are clearly reserved for Ethiopian CSOs, which are fully controlled by nationals.³⁰ This means that the 2009 CSP limits the freedom of association as it relates to non-nationals through its definition of areas of work for CSOs they are involved in.³¹

The law included two exceptions to this rule: bilateral agreements that may exempt an organization from the applicable rules and mass-based organizations.³² Despite this, the Proclamation did not define what mass-based organizations are other than highlighting that it includes professional associations, women's associations, youth associations and the like.³³ Though membership organizations are excluded from the application of the law, membership-based organizations that focus on human rights were not.

Under international law the right to freedom of association is exercised for any cause an association wants to focus on, i.e., "for any cause or purpose" in as far as the activities are legal.³⁴ The explicit categorization of CSOs, into those that can promote human rights and those who cannot under the 2009 CSP, limits the right to associate for "any purpose" under the 2009 CSP. The categorization limits the purpose or a cause CSOs can freely choose to function in the country and is against the notion of "any purpose" that is provided under international human rights law particularly the International Covenant on Civil and Political Rights.³⁵

In addition to this, article 57 (6) of the 2009 CSP³⁶ stipulates that for an organization to have a legal personality as an association with the pertinent features of a federal level organization and taxonomy, it is mandatory that its constituency is composed of a minimum of five members from five regional states.³⁷ By doing so, the law interfered with the internal arrangement of CSOs and as result limited the right to freedom of association.

On the contrary, Ethiopia's new CSO law has broadly defined organizations of civil society under article 1.³⁸ It states that two or more persons can agree to voluntarily establish

³⁰ Debebe Hailegebriel, 'Sub-Saharan Africa Country Reports, Ethiopia' (February 2010) (available with author). (<www.icnl.org/resources/research/ijnl/ethiopia-3>), accessed 24 September 2020.

³¹ International Center for Non Profit law, 'Restrictions on Foreign Funding of Civil Society, Ethiopia' (May 2010), (<https://www.icnl.org/resources/research/ijnl/ethiopia>), accessed 25 March, 2021.

³² Dunia Tegegn (n 21).

³³ Ibid.

³⁴ UNGA, ICCPR (n 3), Art. 15.

³⁵ Ibid.

³⁶ 2009 CSP (n 18), Art. 57.

³⁷ Ibid.

³⁸ 2019 Civ. Soc. L. (n. 18), Art. 1.

organizations of civil societies for any purpose that is lawful in the country. This definition aligns with the minimum standards set by regional and international human rights law. Unlike the previous CSO law, article 16³⁹ of the new proclamation recognizes that civil society established under it is bestowed with the right to freely establish membership criteria for its organization.

The new CSO law clearly recognizes that all organizations registered under the law have the right to engage in any legal activity to achieve their objectives automatically outlawing the funding requirement that has been the primary challenge for most organizations in the past. The new proclamation, in fact expressly encourages CSOs particularly Ethiopian CSOs to engage in advocacy and lobbying of laws and policies that have significance to their goals or the activities they perform.⁴⁰

Broader protection and recognition of freedom of association however also means that organizations that have not been registered also enjoy the right. Individuals working with unregistered associations should indeed be permitted to implement activities, such as the right to hold and partake in nonviolent assemblies, and must not be subject to penalties. This happens especially in situations where the requirements to form an organization is very challenging and is based on authorization by administrative bodies. The issue with the requirement of registration is discussed in the following section.

2. The Right to Form and to Join an Association: Barriers to Entry

The UN Special Rapporteur on Freedom of association underlines⁴¹ that the right to establish and partake in an association is an essential part of the right to freedom of association. The Guideline of the African Commission on Human and People's Rights on Freedom of assembly and association under article 11⁴² indicates that 'States shall not oblige associations to register as a precondition for their being and also to function without stinting. Unregistered associations shall not be legally held accountable under the law or in practice because of their lack of legal personality.' The 2009 CSP made registration a precondition for forming an association, as a result, "any Charity or Society shall submit an application for registration within three months of its establishment."⁴³ The CSP also stated that the absence of compliance to the registration requirement within

³⁹ Ibid, Art. 16.

⁴⁰ Ibid, Art. 55.

⁴¹ Report of the Special Rapporteur, (n 2).

⁴² African Commission on Human and Peoples Rights, *Guidelines on Freedom of Association and Assembly in Africa* (2017) (<https://www.achpr.org/presspublic/publication?id=22>) accessed 22 September 2020.

⁴³ The previous law under Art. 68 requires all charities and societies to register. It further requires foreign organizations to obtain a letter of recommendation from the Ethiopian Ministry of Foreign Affairs.

the designated time for registration is a basis for the cancelation of the formed Charity or Society.⁴⁴

Similarly, under article 57 of Ethiopia's new CSO law, an organization to be recognized as an association needs to be registered by the agency for civil society organizations. This requirement is cumbersome as discussed also in many of the recommendations by the Special Rapporteur on freedom of association because it limits the right to associate. The proclamation under article 59 underlines that the agency can reject registration in the absence of required criteria. This is vague and contravenes existing legal frameworks at the regional and international levels. The ACHPR Guideline⁴⁵ for example focuses on a notification regime.⁴⁶ The Guideline stipulates that registration shall be administered through a notification process rather than sanctions regime, such that an organization will acquire legal personality upon acceptance of notification. The Guideline also underlines that the registration agency can refuse applications, based on an apparent legal basis, in compliance with regional and international human rights law.⁴⁷ Experience in many countries shows that notification is made achievable using a written application that contains various information clearly defined in the law. However, this is not a condition for the survival of an association and for an association to be bestowed with legal recognition.⁴⁸ The purpose of this process is only to offer data as to the establishment of an association by way of documenting such information. This notification procedure is used in a number of countries.⁴⁹ The previous Special Rapporteur on freedom of association also takes into account as a best model, process that is uncomplicated, less burdensome, or even free.⁵⁰ He further underscores that the establishment of other branches of associations, international associations, or unions or groups of associations, both at the international level, and regional level should be subject to identical notification systems.

Another area that is of concern for CSOs who were registered under the 2009CSP is the requirement for re-registration set under article 88 of the new proclamation.⁵¹ The article requires all CSOs registered under the previous proclamation register again, with the exception of those operating in one region. This procedure is not in line with what is recognized under the AHCPR Guideline. The Guideline elaborates on requirements for

⁴⁴ Human Rights Watch, *Analysis of Ethiopia's Draft Civil Society Law* (13 Oct 2008) (www.hrw.org/news/2008/10/13/analysis-ethiopia-draft-civil-society-law) accessed 20 September 2020.

⁴⁵ African Commission on Human and Peoples Rights (n 42).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Report of the Special Rapporteur, (n 2).

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ 2019 Civ. Soc. L. (n 18), Art. 88.

registering twice or renewals.⁵² On a positive note, the registration requirement gave an opportunity for organizations to revise their statutes and do away with restrictive provisions that were inserted to comply with the old repressive regime, including revising their objectives, changing their names, etc.

The re-registration under the new law enabled development CSOs to redefine their objectives and approaches towards a rights-based approach to development, but the strict requirements also create problems due to the time frame provided for registration and the documentation required for re-registration under the new CSO law.⁵³ If article 88 is strictly followed, a large number of CSOs who did not register again within the time provided under the new CSO law will be banned limiting the exercise of their freedom of association. This could be more challenging for human rights defenders as they are often required to register their organization again following slight changes to their statute, management, or membership, which results in an unfairly long process and diverts human and financial resources away from activities that focus on human rights. Particularly for CSOs who were registered in the past and do not want to make any major changes to their objectives, structure, and procedures, the re-registration requirement is cumbersome and unnecessary. A simple notification procedure should have been adopted.

While modifications essential to the survival of CSOs must call for re-registration, international human rights law standards recognize that slight alterations such as revisions in address, membership, administration, rules governing the association, etc.⁵⁴ that do not transform the nature of an organization should be governed through an easy notification process. The registration agency should take into account the past subjugation and complex operational environment for CSO actors to help assist in smooth transition under the new CSO law.

3. The Right to Operate Freely and to be Protected from Undue Interference

The right to freedom of association calls on states to undertake affirmative action to build and keep a safe environment.⁵⁵ It is critical that individuals exercising this right can operate without restraint and fear that they may be subjected to any intimidation, acts of pressure or hostility, summary or arbitrary executions, forced or involuntary

⁵² African Commission on Human and Peoples Rights (n 42), Art.17.

⁵³ The author has learned from the Charities and Society's Agency that 2960 CSOs are currently registered with the agency out of this 435 is foreign CSOs.

⁵⁴ UN General Assembly, *Human Rights Questions: Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms* (1 October 2004) (<https://undocs.org/en/A/59/401>) accessed 15 September 2020.

⁵⁵ UNGA, ICCPR (n 3), Art. 15.

disappearances, arbitrary arrest or imprisonment, torture or brutal, ruthless or humiliating treatment or penalty, search and seizures.⁵⁶ Under international human rights law, the government is required to fulfill its positive obligation and create an enabling environment for CSOs to thrive instead of creating difficulties for them to exist.

The 2009 CSP included challenges to CSOs operational activity, in the form of a ban, and also by creating insidious administrative supervision. First, the 2009 charities and societies agency Article 14 confines involvement of CSOs in areas such as the enhancement of human and democratic rights, the improvement of equality of nations and nationalities and peoples of Ethiopia, gender and religion, the security of rights of people living with a disability, and child rights, the advancement of peace building processes or reconciliation processes, and the improvement of rights related to the competence of the justice and law enforcement sectors to Charities and Societies that are established as Ethiopian.⁵⁷ This meant, charities and societies in search of ways to achieve these objectives are prohibited from getting outside financial support that equals to or is more than 10% of their total income. Second, the CSP granted almost unrestrained authority to the Agency to oversee charities and societies.⁵⁸ No procedural practical safeguards such as judicial review for the charity or society or its staff are provided.⁵⁹

In November 2011, the Ethiopian Charities and Societies Agency promulgated the 'Guideline on Determining the Administrative and Operational' Costs of CSOs, which is pertinent to all charities and societies (international and domestic). During their undertaking, all Ethiopian Charities also have the burden to ensure at least 70% of their budget is expended in the execution of their programs and the remaining 30% for administrative expense. Administrative expense is defined as "costs incurred for emoluments, allowances, benefits, purchasing goods and services, travelling and entertainments necessary for the administrative activities of a charity or society". Moreover, Ethiopian charities are obliged to keep proceedings of their financial records.⁶⁰ These records should specify the daily financial dealings of the organization as well as the aim of the transactions including assets and debts of the organization and information on the source of their money. They are also required to provide activity and financial reports to the Agency annually in line with criteria provided by it. Moreover, they have to inform the Agency about their financial records per annum or when requested. The Agency has

⁵⁶ Human Rights Watch (n 44).

⁵⁷ 2009 CSP (n 18), Art. 14(j-n).

⁵⁸ For instance, Section 7 (Arts. 84 – 94) provides the agency practically boundless authority to exercise power over the activities of a charity or society.

⁵⁹ Ibid.

⁶⁰ Fasil Mulatu Gessesse, and Rubiyat Mohammed Seid, 'Revitalizing the Role of Non-Governmental Human Rights Organizations in Ethiopia' (2014) 2 *Eth. J. of Hum. Rts.* 69-70.

been given the power to examine the activities of Ethiopian Charities as needed. Also, the Agency can request information regarding any aspect of an organization and search the document. During such investigation, if the Agency is persuaded that there has been maladministration of the resources, it can take actions such as suspending the guilty person or command the organization to change its system of management.⁶¹

Under the 2009 CSP,⁶² the Charities and Societies Agency also had a role of overseeing and administering the registration, reporting, and other activities of CSOs and had broader power over their termination, as well as a variety of decisions affecting their day-to-day activities. The Agency was seen by many as red tape, ineffective, and not favorable for civil society work.⁶³ There were different articles that permit or call for the intrusion of the Agency in the domestic affairs of the organization. For instance, societies must alert the authority, in writing, of the time and place of any gathering of the General Assembly of a Society no later than seven working days preceding such a meeting. No Charity or Society may also use expatriates unless a work authorization is approved per the relevant law.⁶⁴ The Agency may also request the suitable organ of the Charity or Society to get rid of an officer who did not satisfy any of the requirements indicated under Article 70 of the proclamation and to delegate another person as an officer.⁶⁵

Similarly, under the new CSO law, particularly articles 57 and 58 require documents that could create challenges and violate the right of organizations to operate freely. The requirement calls for documents proving the goals of a given association.⁶⁶ As long as founders and members determined their objectives within the boundaries of the law, there should not be a requirement calling for documents proving such goals. International human rights law dictates that there should be an assumption in support of the creation of associations, as well as in support of the legality of their formation, objectives, charter, aims, goals, and actions. Unless demonstrated otherwise, the state is expected to presume that a given association has been formed in a lawful and adequate manner, and that its activities are lawful.⁶⁷

⁶¹ Ibid.

⁶² 2009 CSP (n 18), Art. 57.

⁶³ Dina Townsend, 'Ethiopia's New Civil Society Law' (11 March 2019) (<https://includeplatform.net/blog/ethiopia-new-civil-society-law/>), accessed 20 September 2020.

⁶⁴ Ibid.

⁶⁵ Debebe Hailegebriel, (n 30).

⁶⁶ Ibid.

⁶⁷ European Commission for Democracy through Law (Venice Commission) OSCE office for Democratic Institutions and Human rights, Joint Guidelines on Freedom of Association ([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e)) accessed 25 November 2020.

International law obliges oversight bodies to respect the right of associations to privacy.⁶⁸ In this regard, oversight bodies should not be at liberty to form any decision on the activities of the association; topple the election of board members; establish the validity of board members' deliberations on the attendance of a government agent at the board assembly or ask for an in-house decision be inhibited; request associations to give annual reports in advance, and enter association's buildings without prior notice.⁶⁹

The Special Rapporteur on freedom of association does recognize the right of autonomous bodies to inspect the associations 'proceedings'⁷⁰ as an instrument to secure transparency and liability, but such a process should not be random and must respect the principle of non-discrimination and the right to privacy. Otherwise, it can put their freedom of association and the safety of their members in danger.

The mandate of the agency is extensive under the new CSO law.⁷¹ Article 77 for instance permits the Agency to examine the activities of an association "on the basis of information the Agency got from government organs, funding organizations or the public, and information gained by the Agency during the execution of its actions." In practice, it is not visible how this will be implemented. The absence of accurate and restricted grounds for investigation will produce difficulty in practice. The agency may call for deferral of operation or termination of an organization, although the new CSO law includes some procedural safety under Articles 77-78.

The new CSO law, under article 74 also allows the agency to provide CSOs their yearly reports on activities they have undertaken "or other documentations kept back by the Agency" to the general public when it is required by "any relevant body or members of the association". In addition, under article 75 of the proclamation, written endorsement of the agency is compulsory to own a bank account. Financial institutions are required to provide the organization's financial information to the agency when requested. These supervision powers of the authorities should have been cautiously restricted, as they lean to obstruct the right to privacy.

International and regional standards dictate that associations shall not be requested to convey comprehensive information such as the proceedings of their meetings, lists of their members, or personal identifiers of their members to oversight bodies.⁷² For instance the previous Special Rapporteur recognizes the right of 'independent bodies' to investigate the

⁶⁸ UNGA, ICCPR (n 3), Art.17.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ 2019 Civ. Soc. L. (n 18), Art. 6.

⁷² Report of the Special Rapporteur (n 2).

associations” proceedings as a means of ensuring transparency and liability, but such a procedure should not be random and must align with the principle of non-discrimination and privacy right as it would otherwise put the autonomy of associations and the wellbeing of their members in danger.

One of the registration requirements under Ethiopia's new CSO law however is the minutes of the formative meeting including the names, addresses, and citizenship of founders for registration.⁷³ The initial submittal of such information is permitted under international and regional laws.⁷⁴ However, precaution should be taken as far as requiring similar records and documentation as part of the oversight mandate of the CSO agency. The submission of founding minutes should not warrant frequent requests for similar types of records by the CSO agency as it is against the right of privacy of CSOs.

As it stands now, the law allows the CSO agency to investigate, if it finds “sufficient reason”. This is a vague term that could result in arbitrary interference.⁷⁵ Though the new CSO law states that investigation should take place within a short period of time and without hampering the day-to-day activities of the organization, it is not clear how this will be implemented in practice. While the Agency may require having access to limited information to secure accountability, this needs to be weighed against the right of individuals and organizations to privacy. Any restriction on this right should be narrowly interpreted and should be vital and proportional to achieving a legitimate aim. Furthermore, the law did not offer judicial oversight of any examination, in line with the ACHPR Guidelines on Freedom of Association and Assembly in Africa which states that “inspections of associations by oversight bodies shall only be allowed following a request by a judge⁷⁶ in which case unambiguous legal and accurate basis justifying the need for examination are presented. For the aforementioned reasons, Article 77 of the new CSO law⁷⁷ is not in line with the broader protection association is bestowed with including that of their right to privacy.

⁷³ 2019 Civ. Soc. L. (n 18), Art. 58.

⁷⁴ European Commission for Democracy through Law (n 67).

⁷⁵ Luke Kelly, *Legislation on non-governmental organizations (NGOs) in Tanzania, Kenya, Uganda, Ethiopia, Rwanda, England and Wales* (21 August 2019) (https://reliefweb.int/sites/reliefweb.int/files/resources/656_NGO_Legislation_East_Africa.pdf) accessed 24 September 2020.

⁷⁶ African Commission on Human and Peoples Rights (n 42), Para. 34.

⁷⁷ 2019 Civ. Soc. L. (n 18) art 77

4. The Right to Access Funding and Resources

The ability of associations to access financial support is an essential element of the right to freedom of association.⁷⁸ The previous Special Rapporteur on freedom of assembly and association cite the ILO principles⁷⁹ which underlines that provisions which provides oversight bodies the right to limit the freedom of a trade union to manage and use its finances as it needs are irreconcilable with the principles of freedom of association.⁸⁰ Likewise, registered or unregistered associations have the right to search for and get financial support from local, and international entities, including individuals, business organizations, NGOs, CSOs, governmental organizations, and international organizations.⁸¹

Nevertheless, the Special Rapporteur warns with alarm that, in some countries, only associations who have legal recognition are permitted to raise financial support. It is therefore indispensable that regulations governing the creation of associations conform to the aforementioned recognized best practices to allow all types of associations registered or unregistered to access funding and resources.⁸²

In many countries, local-level funding is very restricted or absent leading associations to depend on overseas assistance to operate their programs. The Special Rapporteur concurs with the suggestion commended by the previous Special Representative of the Secretary-General on the status of human rights defenders who avowed that governments must permit access by NGOs to international funding as part of international alliance, to which civil societies are at freedom to the same degree as Government. The same notion should apply to associations irrespective of the goals they elected.⁸³ Legislation should not lay down the endorsement of the authorities before getting domestic and foreign funding. The barriers to foreign funding vary from an undue delay in the authorization of funds to the requirement of obtaining prior authorization from the authorities.⁸⁴

The 2009 CSP for example barred human rights organizations from getting more than 10 % of their total resources from overseas sources.⁸⁵ This was the most restrictive feature of the 2009CSP because it made the application of the right to freedom of association practically impossible because the law establishes the nationality of a given CSO based on

⁷⁸ Report of the Special Rapporteur (n 2).

⁷⁹ International Labor Organization (ILO), Freedom of Association and Protection of the Right to Organize Convention (9 July 1948) (<https://www.refworld.org/docid/425bc1914.html>) accessed 22 September 2020.

⁸⁰ Ibid.

⁸¹ Report of the Special Rapporteur (n 2).

⁸² African Commission on Human and Peoples Rights (n 42).

⁸³ Report of the Special Rapporteur (n 2).

⁸⁴ Ibid.

⁸⁵ 2019 Civ. Soc. L. (n 18), Art. 2.

its source of income, and at the same time makes Ethiopian nationality (or corporate citizenship) a requirement for engaging in governance and advocacy activities.⁸⁶ Organizations that get more than 10% of their income from external sources are barred from working on the improvement of human rights, advancement of the rights of children and people with disability, gender equality, nations and nationalities, good governance and conflict resolution, as well as on the efficacy of the justice system.⁸⁷

Ethiopian charities and societies can work on the promotion and advancement of human and democratic rights under the 2009 CSP, if they can raise 90% of their annual budget locally. This restriction practically silenced CSOs in the country by starving them of resources for human rights and advocacy activities.⁸⁸ In addition, the 2009 CSP restricted local funding by limiting charities and societies from raising money and property that is more than 50,000 Ethiopian Birr (4000 USD) before registration. Public mobilization of funds was also not permitted unless allowed by the Agency. Charities or societies were only able involve in income-generating activities that are related to the achievement of their purposes. As a result of the funding restrictions under the previous legal regime international contact was limited for CSOs operating in the country.

On the contrary, Ethiopia's new CSO law under article 63 recognizes that resources can be mobilized from any legal source. This article also contrary to the previous CSO law recognizes resource mobilization as a right.⁸⁹ It also removes the limitation in financial support that was enforced on any CSO carrying out human rights work. This will permit local organizations to amplify their work on human rights and raises expectation for human rights defenders who worked with NGOs and who were out of the country to return back to Ethiopia.⁹⁰ However, the proclamation set an 80/20 ratio for program level and administrative level work creating a challenging environment for organizations.⁹¹ This requirement can be replaced with a non-mandatory restriction to avoid undue interference in the internal affairs of organizations and protect the right of associations to privacy. As it stands now, it imposes certain limitation on CSOs' financial independence and could be construed as an unnecessary intrusion in the affairs of CSOs.⁹² It will also affect the

⁸⁶ International Center for Non Profit Law (n 31).

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ 2019 Civ. Soc. L. (n 18), Art. 63.

⁹⁰ Association for Human Rights in Ethiopia could be mentioned as one. Yared Haile Mariam Human Rights Defender, who served as a lead investigator at the Ethiopia Human Rights Council (HRCO) was forced into exile in the aftermath of the 2005 election. After an enabling environment is created through the new CSO law he is closely working with local actors.

⁹¹ 2019 Civ. Soc. L. (n 18).

⁹² The right to access funding and use shall be subject only to the requirements in laws that are generally applicable to customs, foreign exchange, the prevention of money laundering and terrorism, as well as those concerning

decision-making power of CSOs on activities they want to be involved in including their priorities, projects, and human capital creating an environment that is not favorable to their mandate.⁹³

Even when this is planned to ensure funds benefit beneficiaries, in practice, the distinction between administrative and programmatic costs is subjective and could vary from one CSO to another. More importantly, restriction on expenditure appropriation goes against established norms under international law, including as reflected in the ACHPR's Guidelines that underline that "the law shall visibly state that associations have the right to search for, accept and utilize funds freely in agreement with not-for-profit aims" "While it is encouraging to see that the law removed limitations on getting foreign financial support, this stipulation would place needless control on the use of resources by setting administrative costs at 20% of income compared to the 30% that was in the 2009 CSP.

One excellent improvement under the new CSO law is the fact that the law describes what constitutes an administrative fee such as the income of administrative staff, property lease, bank charges, and attorney fees to name a few. It also plainly stipulates that it does not include training, research, networking, and other charges that fall under administrative activities under the previous CSO law.⁹⁴ The 2009 CSP defined administrative activities widely⁹⁵ including an extensive variety of expenses that would usually be considered as part of the cost of implementing an organizational program. This produced huge obstacles in the area of training, research, access to justice and capacity building. Even with the improvements discussed above, one cannot deny that there is still a continued state oversight on spending that is not in line with best practice standards that are included under the African guideline right of CSOs to seek, receive and use funds as enshrined under international and regional human rights law.

5. The Right to Take Part in the Conduct of Public Affairs

Internationally accepted standards provide that the law must protect both individuals participating in the activities of an organization and the organization as an independent entity must be able to participate in public decision-making process. This would mean CSOs should not have limitations in terms of their areas of work.

transparency and the funding of elections and political parties, to the extent that these requirements are themselves in line with international human rights standards.

⁹³ Human Rights Watch, 'Joint Letter on Ethiopia's New Draft NGO Law', (<https://www.hrw.org/news/2018/11/29/joint-letter-ethiopia-s-new-draft-ngo-law>) accessed 22 September 2020.

⁹⁴ 2019 Civ. Soc. L. (n 18).

⁹⁵ 2009 CSP (n 18).

The 2009 CSP under its article 14 states that “activities such as the advancement of human and democratic rights, the promotion of equality of nations and nationalities and peoples and that of gender and religion...” should only be undertaken by Ethiopian charities and societies.⁹⁶ The same notion is introduced under article 62 of Ethiopia’s new CSO law⁹⁷ which states “organizations that are established by foreign citizens who reside in Ethiopia and who have established foreign organizations or local organizations are prohibited from lobbying political parties, voter education and election observation.” Though issues related to election observation and voter education are addressed under the country’s election law⁹⁸ the prohibition of lobbying by Foreign CSOs contravenes existing regional and international human rights standards.

CSOs, irrespective of being local or international, should be permitted to take on activities geared towards prompting political parties’ positions and programs particularly that relate to the elevation and safeguard of human rights, women’s rights, and child right in Ethiopia. Though the law presents that foreign citizens can bypass the restriction by forming CSOs together with Ethiopian citizens, this stipulation contravenes the right of individuals to establish foreign CSOs and has a chilling effect on freedom of association. The restriction which as it stands now is blanket could tend towards restricting the operations of foreign CSOs. Moreover, it is also vague which lawful purpose – from among the firmly acceptable grounds recognized under international human rights law the rule intends to protect by limiting the right of foreign associations to engage in lobbying activities targeting political groups. Even if this test is met, and the limitation falls under one of the barred grounds, the limitation does not meet the necessity aspect set under international human rights law. Hence, there is a need to clarify if the restriction is necessary and if it is necessary, that it is proportional and that there were no other alternatives to achieve the intended objective.

Lobbying activities include a variety of legitimate and crucial activities that foreign CSOs must do in relation to human rights work including training, conducting background researches, coordination work, publications, and public relation campaigns contributing to policy decisions of political parties and their members. CSOs, whether they are national or foreign, should be permitted to undertake actions aimed towards shaping political parties’ positions and programs that contribute to the promotion and protection of human rights including women, and children right in Ethiopia.⁹⁹

⁹⁶ Ibid, Art.14.

⁹⁷ 2019 Civ. Soc. L. (n 18), Art. 62.

⁹⁸ The Ethiopian Electoral, Political Parties Registration and Election’s Code of Conduct Proclamation, Proc. No. 1162/2019, Federal Negarit Gazette, 25th Year No. 97 (16 Oct. 2019).

⁹⁹ Report of the Special Rapporteur (n 2).

The restriction also creates constraints in the work of human rights defenders contravening article 5 of the declaration on human rights defenders and article 22/2 of the ICCPR. This is mainly because it is also not clear as to which legitimate aim it purports to achieve.¹⁰⁰ Hence, there is a need to clarify if the restriction is necessary and if it is necessary, that it is proportional and that there were no other alternatives to achieve the intended objective. This provision should also be seen in light of the current context in Ethiopia where an open space for political dialogues and healthy competition among political parties is extremely needed including on human rights issues. Contrary to the past, it is important that the intention of this provision is not to limit and shut down political opposition.

6. Termination, Suspension, and Dissolution of Associations

The right to freedom of association applies from its establishment to its dissolution.¹⁰¹ The suspension and spontaneous dissolution of an association are the most dangerous types of restrictions on freedom of association.¹⁰² For this reason, it should only be doable when there is a clear and immediate danger against existing national law, and in compliance with international human rights law. It should be firmly relative to the genuine aim followed and employed only when lesser measures would be inadequate. The special Rapporteur identifies as best practice model a legislation that stipulates that such severe measures be taken by independent and impartial courts. Under the previous legal regime, the termination of Ethiopian charities and societies could result from a judgment of the Federal High Court, the termination of Ethiopian resident charity or society or foreign charity was determined only by the judgment of the Agency, with no judicial oversight. No other resort was provided to the aggrieved party. This infringes on the right to fair trial and due process of law which is guaranteed under the FDRE constitution.

Under the newly enacted CSO law, an association can be dissolved¹⁰³ when it is decided by the board of the agency, by a competent organ of an association per its internal rules, and by the court. This is a positive development as all organizations that are formed under the new CSO law have the right to take their cases to the federal court for any decision by the board of the Civil Society Agency as far as termination, suspension, or dissolution is concerned.

¹⁰⁰ The grounds that are used to limit this right under the proclamation should only be based on Art. 22(2) of the ICCPR and those clearly discussed under the FDRE constitution.

¹⁰¹ Report of the Special Rapporteur (n 2).

¹⁰² Ibid.

¹⁰³ 2019 Civ. Soc. L. (n 18), Art. 83.

It is the obligation of states to establish reachable and efficient grievance systems that are capable to independently, rapidly, and carefully examine allegations of human rights violations or abuses to hold those liable accountable.¹⁰⁴ Where the rights to freedom of association are overly limited, the victim(s) should have the right to get justice and to fair and adequate reparation.¹⁰⁵ The new CSO law under article 9¹⁰⁶ included a complaint mechanism for rights violations and the right to appeal decisions made by the agency's administration. This is an excellent move and was not the case under Ethiopia's 2009 CSP. The right to appeal was sternly limited and was not extended to the resident or "foreign" CSOs.¹⁰⁷

Conclusions

Ethiopia has recognized the right to freedom of association under the FDRE Constitution and ratified the relevant international and regional treaties. The regulation of CSOs through positive law goes back to the 1960's Civil Code of Ethiopia. This, however, was not adequate enough to address the issues raised by the varieties of CSOs that started to flourish in the country. Looking at the historical developments in the country, partly adopted to close the gap in legal framework, the 2009 CSP of Ethiopia was the most repressive legislation as it contravened international, regional, and national standards relating to the freedom of association.

Ethiopia's new CSO law is a breakthrough as it has addressed most of the limitations that were created by the previous legislation. It is progressive including in terms of the structures it established to translate the new CSO law into practice including but not limited to the Council of Civil Society Organizations, and Board of the Agency. The creation of the Civil Society Fund is also a step in the right direction given the challenges in domestic resource mobilization as widely observed in the past. The comparative examination of the previous and the new CSO law identified a number of positive developments including the removal on sectoral limitations, the removal of restrictions on sources of funding (both domestic and foreign), and the opportunity to participate in income-generating activities which were constrained under the previous legal regime. There are, however, certain limitations that need the attention of the legislator if the

¹⁰⁴ UN Human Rights Committee (HRC), *The nature of the general legal obligation imposed on States Parties to the Covenant General comment no. 31 [80]*, Para 8 (26 May 2004) (<https://www.refworld.org/docid/478b26ae2.html>) accessed 22 September 2020.

¹⁰⁵ Ibid.

¹⁰⁶ 2019 Civ. Soc. L. (n 18), Art. 9.

¹⁰⁷ 2009 CSP (n 18), Art. 104 provides that the decision of the Board is final on the administrative level, and only organizations classified as Ethiopian Charities or Societies have the right to a judicial appeal of the decision of the Board. Ethiopian Residents or Foreign CSOs do not have the right to recourse.

promise and aspiration of the FDRE constitution on freedom of association is to be realized.

The new CSO law's requirement of registration, rather than the well-accepted standard of notification, is one of those limitations that existed in the previous legal regime and remains unaddressed under the new proclamation. This, as the article discussed in depth, has its own ramifications on CSOs that registered under the previous proclamation but are unable to do so this time for reasons that could still be connected to the previous legal regime. The requirement for re-registration is cumbersome and might not resonate with the obligations the country has undertaken with respect to the freedom of association. Lobbying activities include a variety of legitimate and crucial activities that foreign CSOs must do in relation to human rights work including training, conducting background studies, coordination work, publications, and public relation campaigns contributing to policy decisions of political parties and their members. CSOs, whether they are national or foreign, should be permitted to undertake actions aimed towards shaping political parties' positions and programs that contribute to the promotion and protection of human rights including women's and children's right in Ethiopia.

The right to freedom of association obliges states to create a favorable environment for CSOs. It is also important that individuals are able to use this right without arbitrary intrusion. As it stands now, the law allows the civil society agency to investigate a CSO, if it finds "sufficient reason". The term sufficient reason is a broad term that could lead to arbitrary interference. There are occasions whereby the agency needs to find out some information about organizations to guarantee transparency and accountability, however, this needs to be seen vis-à-vis the right of privacy.

International human rights law stipulates that the capacity to request and utilize resources is decisive to the successful operation of CSOs and to the growth of civil society. While it is optimistic that the new CSO law detached limitations on getting overseas financial support, this prerequisite would place needless control on the use of resources by setting administrative costs at 20% of income compared to the 30% that was in the 2009 CSP would place unnecessary limitation in the use of resources. Particularly, limitation on spending goes against recognized norms under international law, including as reflected in the ACHPR's Guidelines that underline that "the law shall clearly state that allow associations to seek, receive and use funds freely in compliance with not-for-profit aims."

Based on the aforementioned analysis and the conclusions arrived, the author recommends the following:

The House of People's Representatives should reconsider the re-registration requirement that is provided under article 88(3) of the new CSO law and provide a more conducive environment for CSOs that were registered under the 2009 CSP. A new call for notification or an extended time frame for registration could be considered as a temporary measure to mitigate the challenges the registration and re-registration requirement posed. This is in line with article 2 of the ICCPR that requires states to create a positive environment for the realization of human rights.

The House of People's Representatives should reconsider article 62/5 of the new CSO law that limits lobbying activities by foreign organizations and foreign citizens residing in Ethiopia. This provision violates the right of foreign CSOs to freedom of association. Though the law provides that foreign citizens can avoid the restriction by establishing CSOs jointly with Ethiopian, citizens, limited involvement in lobbying for human rights agenda should be considered through an enabling regulation or another subsidiary law that deals with lobbying political parties on human rights agendas.

As it stands now, the purpose of the 80/20 allocation of CSO funds is not clear under the new CSO law and violates the rights of organizations to privacy. The 80/20 requirement could have been made voluntary and included under a code of conduct developed by the CSO Council. Its insertion under the CSO law is an unnecessary intrusion in the affairs of CSOs. As an alternative, a directive or code of conduct that clarifies the purpose of this provision and how it translates in practices should be developed.

While the author appreciates the reform process of this law and the significant revisions made to the legal regime, it is important to end with a word of caution. Since the practical contribution of the law can only be measured through the right it promotes in practice, much care ought to be taken to ensure that the progress made on paper is not thwarted in practice.

አባድር መሐመድ*፣ ረድኤት ባዬ** እና ሃዊ ከፋለ***



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የኦዎ ከፍ የፍትህ ከውሃ
ሙሼ ከፍ የሰር የተሸሙረው?



ንዳፍ፤ ከሺ ዓመታት የነበሩ የሃገር ሙንግላትን ያደረጉትን ከውሃ ሁኑ ክፍፍ ናው ማክት ናው? ታሪክ ማተክ ከሕመር ያላ ገህት ዘውዱን ከንግሥው! ያከዘዩ ከዘመናዊ ብሔራዊ ሙንግላት ምላሱት በጎኑ ከንዳህ።

በርግጥ ከዘመናዊ ብሔራዊ ሙንግላት ከሕመርን ከዳ ሚኒኪክ ብሔራዊ ከሰላላላ ከንዳህ ማንነት ከንግሥት። ከንዳህውም ያሞ ከሁሉ ያርቀክ። የግብፅ ከግብፅ ተሰብላለው "ሚኒኪክ ሸሞ ሕግ ከቀቀብን" ከሁሉ ዘመን ከምንዳህም ከ1950ዎቹ የኦዎ ከፍ ፍትህ ማዘመን ሂሳቱ ከዳ ከንዳህ።

በ50ዎቹ ከግብፅ ከፍ 7ፍ የከንዳህ ደረጃ ተማሪ ከፍ። ሃክ የሁከተና ደረጃ ተሙረ ከፍ። ክፍ።



ግን seriously የሕግ ት/ቤት
የተማሪነት በዛ በጠባባ ጊዜ ነበር።
ትውልዳዎ ተከታይ፤ የውጪ ሃገር
ማምረቻዎ ከከቆዩም ሄዱ።

ክን ነህ ዛግ፤ ያ ክላዛን ጊዜ! PHOTOS
ፋሽን ንግድህ ማግኘት ነበር። ለርግ
ተቃዋሚዎችን ያገዳህ፤ ተቃዋሚዎች
ከርሶ በከርሶ ያገዳህ፤ ለርግ ከሌላ
ውላግ አውላግ ያገዳህ፤ ነባሩ ጊዜ!

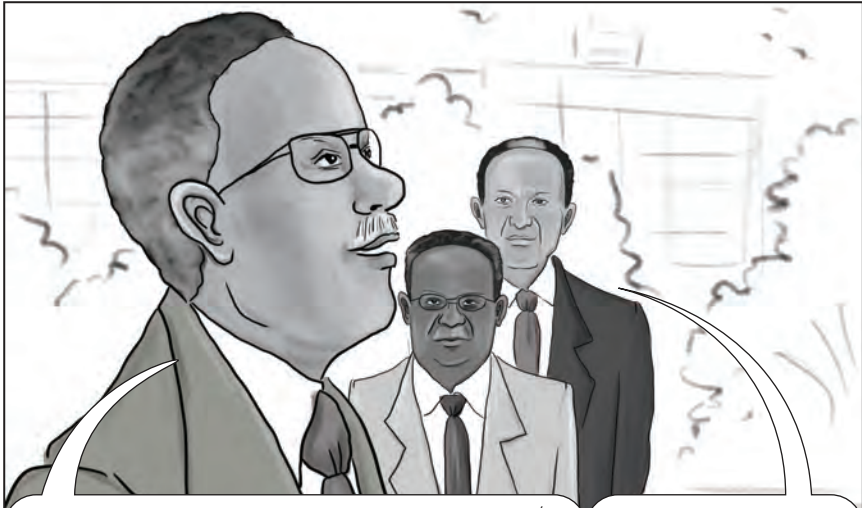


ክንዳ ነገር ግን፤ ቀዳም ዛግ የከተማ ንግድህ፤ ገቢህ ለም ለከመጣህቸው ያው በዛው
ጭናክ! ንግድህ በነሱ ዘመን ከላከህ ነገር፤ ንግድህ በሁሉ ብቻ ለማምረት ዳኝነት ካልገኘ
ንግድህ ገባ መለማማት ንግድህ ነፃ። ያሁን ዳኝ ለክላርነት በዘመነ።



ንግድህ ሁለተኛ ማህተም ያከበሩ የፍትህ ተቋማት ክፍርላ
ፍ/ቤቶችን ከክዲላ የመጀመር ክብር ነው። በ1950ዎቹ የነበሩ
ዳኞች በዘመናዊ ሕግ ያከተሉት ሲሆኑም ሕግ ለርዳቱ ሊቀየር
ከፈተነውም። በምን ያህል ፍጥነት ከክዲላ የሕግ ሥርዓት ጋር
ከንግድህ ማህተም ማዋቅር በጣም ያለገርበት። ያሁን የተሰጠው ዳኝነት
ብቻ ያገዳል። የዘመናዊ የዳኝነት ብቻ ስህተት ነገር ...

ከዳኝነት ወደ ማህተም ንግድህ ያደረገውም ነገር ያሁን
ነው። ጥሩ፤ ጥሩ ዳኞች ከፍተኛ ተባብረው
ጊዜ አቀፉ ከዚያ በኋላ ከሕግ በሆኑ ነፃ ትክክለኛ
በሚቀበሉ ዳኞች ፍትሕን ማስጠበቅ ተጀመረ። በፍትህ
ሥርዓት ካልገኘው ምሬት የጨመረበት ነፃ የተሰጠ
መቀጠል ለማህተም የተገለጸው በዚህ ምክንያት ነው።



ከዚህ ካዕማ ከግብ ልምድ ካገኛኩትሁ። ከሃዲግ ሊገገ ከተለኑ ክሉት የጠቅሙ ፍ/ቤት ዳኞች ክንዲ ነን። ዳኝነት ታዳዖ የከዳሚ ዘመን ሀውልት ከግብ፡፡ ሄሚዲ ዳኝ ሆኖ የምክትል ጠቅላይ ዐዲህ ሕግነት ሾመት ተበርካቅክን ከዳኝነት ወደዚህ ወርሃው ወርሃው ነው ብዬ ትቼ ነበር። ከሁሉ ዳኝነት ተራ ሆኖ የዬምዶ ቅብብሎኝ ከፍ ማህዲሊ ተውለታ ለከክው የ25 ዓመት ወጣት በ1950ዎቹ የወጡትን ሕጎች ክንዳ ክዲሊ የሚተረጎምበት Jurisprudence የክስት ክንዳ ሆኗል። ከተረጎሙ የተማርነው ፍርድ ቤት ብቻ ክዳዲህም በክፍልዎ የጥበቃና ሀውልት ነጻነት ምክትል ዘጠኝ ነው። ፍትህና ሕግ የሚያነግሉ ከውሃ ደመጣክ ማከት ዘጠኝ ነው።

ከሃዲግ ከገገ በኋላ ክንዳ ሁከት ክመት ነው በዳኝነት የቀጠላኩት። ጊዜውን ከምን ጊዜም የብሉ ሁኔታ ነው ገንዘብም፤ የፍትህ ወርሃውም ክንዳደውም ብረተማ ዘመንም ክክነቢም። ክላፊዎች ፍ/ቤቶችን ክንዳዲህም የሚያስገቡኩትም ከሆነ ፍትህ ከፍ የሕግ የሕግ የሕግ ክንዳ ነው።



በምን ሕግ?
በምን ማለፊያ?



ፀረ-ሕግደቱ
ጸጸደሪ
ፍጥረት
ክፍል
በርካታ
የፍርድ
ፋክስት
ጥፋ
ጠግብ
ፋክስት
ፀረ-ሕግደቱ
ፀረ-ግንባራ
ፀረ-ገንብ ጠግብ
ፀረ-ሕግደቱ
የፍርድ ሕግ
ተገንብ
ፀረ-ሕግደቱ

ድሕረ - ጽሁፍ

የዚህ መጣጥፍ ዋና አላማ የህግና ፍትህ ጉዳዮች አማካሪ ጉባኤ ከመቋቋሙ በፊት ኢትዮጵያ ውስጥ የተካሄዱ የፍትህ ስርዓት የማዘመን ሂደቶችን በማጥናት ጠቃሚ ልምዶችን ማስቀመጥ ሲሆን ሁለተኛ አላማው እናም ልዩ የሚያደርገው ደግሞ በመስኩ የቅርብ እውቀት ላለቸውም ሆነ ለሌላቸው ተደራሽ እና ሳቢ በሆነ መልኩ ለማቅረብ መሞከሩ ነው።

የጥናቱን ዋነኛ አላማው ለማሳካት የተጠቀምነው ቀዳሚ የመረጃ ምንጭ የቃለ መጠይቅ የጥናት ዘዴ ነው። ጥናቱ ታሪክ ጠቀስ ቢሆንም ዓላማው ተለምዶዎችን መሻት ወይም ከታሪክ ምክርና ጥበብን ማግኘት ስለሆነ በህግ ሙያ አንቱ የተባሉ እና የታወቁ የሞያውን ቀደምት ባለሙያዎች አናግረን አንኳር ያልናቸውን ሃሳቦች አካተናል። ፕሮፌሰር ጥላሁን ተሾመ፣ ፕሮፌሰር ዘካሪያስ ቀንኦ እና አቶ ታምሩ ወንድምአገኝ ከግልና ሙያዊ ህይወታቸው አዋዝተው ተሞክሯቸውን አካፍለውናል። ነገር ግን በህትመቱ የተጠቀምናቸው ምልልሶች በሶስቱ ቃለ መጠይቅ አድራጊዎች ባገኘንው ግብአት ቢጻፉም ከነርሱ የተወሰዱ ጥቅሶች ግን አይደሉም። ሶስቱ የህግ ባለሙያዎች/ምሁራን አንድ ላይ ተቀምጠው ውይይት ባያደርጉም ለመጣጥፉ ፍላጎት ሲባል ይዘቱን በሶስቱ መካከል እንደተደረገ ውይይት አድርገን ጥናቱን ግኝቶችና ድምዳሜዎች አቅርበናል።

ከቃለ መጠይቅ ቀጥሎ የጥናቱ ሁለተኛ የመረጃ ምንጭ የጥናትና ምርምር ስራዎች ዳሰሳ ነው። ጥናቱ የእውነታና የታሪክና የቲዎሪ ግድፈት እንዳይኖረው ለማረጋገጥ በኢትዮጵያ የህግ ስርዓት ማሻሻልን የሚመለከቱ ወደ ሃያ ሶስት የሚጠጉ ህትመቶችንና የተወሰኑ ያልታተሙ ጥናቶች የዳሰስን ሲሆን ለጥናቱ ቀጥተኛ ግብአት የሆኑ ሁለት ምሁራዊ ስራዎች በግርጌ ተጠቅሰዋል።¹ እነዚህ ጥናቶች የጥናታችን ይዘት ላይ በቀጥታ ከመንጸባረቃቸው በተጨማሪ የቃለመጠይቅ ጥያቄዎቻችንን በምንቀርጽበትና መጣጥፉን በምናዘጋጅበት ጊዜም ተጠቅመናቸዋል።

¹ የጥናቱ ዋና ዋቢ የፕሮፌሰር ጸሃይ ዋዳ Tsehai Wada Wourji, 'Coexistence between the Formal and Informal Justice Systems in Ethiopia: Challenges and Prospects' (2012) (5) Afr. J. of Leg. Stud. 269. ሲሆን በሁለተኛነት የተጠቀምነው የዶ/ር ኃይለገብር ኤል ፈይሳን Hailegabriel G. Feyissa, 'The Ethiopian Civil Code Project: Reading a 'Landmark' Legal Transfer Case Differently' (Ph.D. Dissertation, University of Melbourne Law School Nov. 2017) ነው።

የጽሑፉ ሁለተኛ አላማ ለማሳካት የህግ ጥናቶች እና ህትመቶች በጽሁፍ ሳይሆን ስለላዊ በሆነ መንገድ የሚገለጹባቸውን መንገዶች ፈትሸን ከነዚህ አንዱን በስራ ላይ አውለናል። የሕግ ጽሑፎችን በስለላዊ መግለጫ ደግፎ ማቅረብ አዲስ ሀሳብ አይደለም፤ ምናልባትም በ1960ዎቹ ድረስ ተመልሰን በውጭ ሃገር የህግ ጥናት ህትመቶች ላይ እናገኛለን። የኛ ህትመት ስራ-መሰረቱና ነሻጣናው የመጣው በደቡብ አሜሪካ የሕግ ሥርዓት ለውጥ እና ታዋቂ/ህዝባዊ ባህልን ወይም ጥበብን (popular culture) በማገናኘት ከተሰሩ ስራዎች ሲሆን፤ በተለይ Proyecto ACCESO² በሚባለው ድርጅት አቀናባሪነት ከተሰሩ ስራዎች ግብዓቶችን አግኝተናል። በተጨማሪም የፕሮፌሰር ጄምስ ኩፐር በህግ መጽሔት ህትመቶቹ ያደረገው ጥናት ለዚህ ስለላዊ ህትመት ቀጥተኛ አስተዋፅኦ አድርጓል።³ ጄምስ ኩፐር የህግ ምሁር እና ባለሙያ ሲሆን፤ ህግ፣ የህግ ለውጥና ታዋቂ/ህዝባዊ ባህል መሃል ያለውን ግንኙነት ከማጥናት አልፎ በሁለቱ መደቦች መሃል ኡደት መፈጠሩ ለፍትህ ስርዓት ለውጥ አላማ መሳካት ከፍተኛ አስተዋጽኦ ሊኖረው እንደሚችል ይከራከራል። የዚህ ህትመት የሥነ-ጽሑፋዊ ፃታ በዚህ ኡደት ስር የሚጠቃለል ሲሆን እንደዚህ አይነት ስራ በተለይ የእውቀት መስኮችን የሚሻገርና በተለያዩ መደቦች መሃል ትብብርን ከማበረታታቱ አንጻር እንዲለመድ ሳናበረታታ አናልፍም።

ጥበብን ተጠቅመን ተደራሽነትን የማስፋት ያደረገው ጥረት በኢትዮጵያ የህግ መጽሔቶች ታሪክ ያልተለመደ ቢሆንም ጥበብን በዚህ መልኩ መጠቀም ለኢትዮጵያ የመጀመሪያ ወይም አዲስ እንዳይደለ ግን ሊወሳ ይገባል። ይህን ለማረጋገጥ ደግሞ ወደ ኦርቶዶክስ ቤተ-ክርስቲያን መንፈሳዊ ጥበብ መመልከት በቂ ነው። የተለያዩ አብያተ-ክርስቲያናትና ገዳሞችን ከሚያሸበርቁ የስእል ስራዎች በተጨማሪ ብዛት ያላቸው የቤተ-ገድል እና የመልከዐ ስራዎች ከህግ እና ፍትህ ጋር የተያያዙ ጉዳዮችን እንደሚዳስሱ ይታወቃል። ስለዚህ ይህ ህትመት ስለላዊ ጥበብን ለህግ መጽሔቶች ከማስተዋወቁ ውጭ ለኢትዮጵያ የህግም ሆነ የጥበብ ድርሳነት መስክ ግን አዲስ እንዳልሆነ መገንዘብ ይቻላል።

² የድርጅቱን ድረ ገጽ <http://www.proyectoacceso.com> ይመለከታል።
³ The Orthodoxy of Format: Some Sketches on Legal Scholarship; William J. Aceves, James M. Cooper, Alejandro González and Pedro Egaña Marshall | Journal of Legal Education, Vol. 56, No. 4 (December 2006) Pages 656 – 656; James Cooper, 'Proyecto ACCESO: The Use of Popular Culture to Build the Rule of Law in Latin America' (2008) 5(2) Rutgers J. L. & Pub. Pol'y 378.

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