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MESSAGE FROM THE EDITORIAL BOARD

The Editorial Committee is delighted to bring Volume 12. No. 1 of Bahir Dar University Journal of Law. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors who did the painstaking editorial work of this issue.

Bahir Dar University Journal of Law is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. The Editorial Committee appeals to all members of the legal profession, both in academia and in the world of practice to contribute scholarly manuscripts. It is time for us to put our imprints on the legal and institutional reforms that are still underway across the country. It is commendable to conduct a close scrutiny of our age-old laws and new laws. The Bahir Dar University Journal of Law is here to serve as a forum to make meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the Bahir Dar University Journal of Law will engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country in general.

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The views expressed in this journal do not necessarily reflect the views of the Editorial Committee or the position of the Law School.

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The Place of Bolar Exception under Ethiopian Patent Law: The Need for Reform

Alemu Balcha Adugna*

Abstract

The basic principle of patent law is that once the term of a patent has expired, the protected subject matter becomes part of the public domain. This allows competitors to enter the market immediately after such term expiry, eventually lowering prices for consumers and increasing welfare gains. However, Pharmaceutical products cannot be marketed without the prior authorization of a competent regulatory agency. This would negatively affect the right to public health (access to medicine). In response to such problems, many countries have recognized the Bolar exception that endows the third party with the right to use the patented invention without the right holder's consent before the patent expiry to develop information to get market approval. The purpose of this article is to ascertain whether the Bolar exception is recognized under the Ethiopian patent regime or the research and experimentation exception under the Patent Proclamation can be broadly interpreted to justify the Bolar exception.

To meet this objective, the study employed doctrinal research methodology along with comparative exploratory tools. The research findings showed that Ethiopia recognizes neither the Bolar exception nor the research and experimentation exception envisaged under the national patent regimes justifies the exception through interpretation. The historical, theoretical, and empirical lessons from other countries show that most countries facilitate access to medicine by incorporating a Bolar exception into their domestic law. Ethiopia should, therefore, incorporate in its pertinent legislation an exception that allows the competitors to experiment with a patented invention to achieve market authorization on the day of or immediately after the expiry of the patent protection.

Key words: *Patent, Bolar Exception, Human Rights, Public Health*

Introduction

Protections over one's innovation (patent protection) and the right to public health have long been recognized under different international and regional instruments such as the Universal Declaration of Human rights (UDHR)[1], International Covenant on

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[1] Universal Declaration of Human Rights (UDHR), United Nations General Assembly, (1948), (hereinafter, UDHR), Art.27 (1)).

Economic, Social and Cultural Rights (ICESCR)[2], Trade-Related Intellectual Property Rights (TRIPS) Agreement[3] And African Charter on Human and Peoples' Rights (ACHPR)[4]. Besides, the World Intellectual Property Organization (WIPO), United Nations Human Rights Council (UNHRC), the Committee on Economic, Social and Cultural Rights, the World Health Organization (WHO), and the Food and Agriculture Organization are now aware of the human rights dimension of the intellectual property, considering both patent rights and right to health as human rights.[5]

Despite the above facts, there were contentious relations between these two rights which can be traced back to the patent's historical background. For instance, recent studies by WTO, WIPO, and WHO have indicated that the essential but tricky balance between the two rights (patent rights and the right to health) is a contentious issue.[6] Patents are intended to offer some guarantee of a return on investment, but the patent system is also designed to balance the interests of inventors with those of the public. Balancing the interest of the patentee and the public is one of the legislative and policy imperatives for governments and this could be attained by ensuring access to medicine.

According to ICESCR, the right to health care includes the right to emergency care, health facilities, goods and services. Access to medicines is the core content of the right to health, both as the treatment for epidemic and endemic diseases and as part of the medical attention in the event of any sickness.[7] Consistent with these intents, General Comment 14, in interpreting Article 12 of the ICESCR, mentioned availability, accessibility (affordability), acceptability (medical ethics), and quality of medical services as four minimum elements to fulfill the right to health. Further, it embodies the provisions granting the right to essential medicines as one of the state's minimum core duties.[8] In addition, Resolution 12/24, adopted by the Human Rights Council in 2009, recognizes that "access to medicines is one of the fundamental

[2] International Covenant on Economic, Social and Cultural Rights (ICESCR), United Nations, 1976 (hereinafter, ICESCR), Art. 15 (1) (c).

[3] The trade-Related intellectual property rights agreement, world trade organization, 1994(hereinafter TRIPS), Arts.1 (1), 7 and 8.

[4] African Charter on Human and Peoples' Rights (ACHPR), Organization of African Unity, (1982) (hereinafter, ACHPR), Art.16 (1) & (2).

[5] Laurence R. Helfer, *Human Rights, and Intellectual Property: Mapping the Global Interface*, 1st edition, Cambridge University Press, 2011), p.1

[6] *Id.*p.21

[7] ICESCR, Art. 12.2(c)(d)

[8] General Comment 14 in interpreting Article 12 of the ICESCR, The Right to the highest attainable standard of health, UN Economic and Social Council, adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on August 11, 2000, available at https://www.refworld.org/pdfid/4538838d0.pdf,(last accessed on 30 June 2021)

elements in achieving the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[9] It particularly stresses the responsibility of States to ensure access to all, without discrimination, of medicines that are affordable, safe, effective, and of good quality.[10] With a consistent stance, the Doha declaration grants member states the right to make institutional moves targeting the protection of public health. As such, it re-affirms the right to establish or maintain marketing approval procedures for generic medicines or apply summary or abbreviated marketing approval procedures based on earlier marketing approvals for equivalent products for developing countries.[11]

While governments and the public are granted such space of right to such medicines, this is made with a reasonable protection of the rights of inventors (Patentees). Patentees enjoy an exclusive right of the monopoly of benefits from their invention for a specific time. The basic principle of patent law, regulating rights to benefit from such inventions, states that once the term of a patent has expired, the protected subject matter becomes part of the public domain. Hence, it can be freely used, including for commercial purposes, without interference by the former patent owner. This allows competitors to enter the market immediately after the expiry of such time limits, eventually lowering prices for consumers and welfare gains.[12]

Yet, it is important to note that pharmaceutical products cannot be marketed without the prior authorization of a competent regulatory body. Such authorization is conditional on submitting and approving an application that usually has to be accompanied by specific pieces of information.[13] Further, as the patent protection restricts the use of the relevant patent for clinical trials and tests, it would delay the release of generic medicines.

Hence, to balance patent protection and access to medicines by allowing the third parties to use the patented product for market approval before the expiry of the patent,

[9] Resolution on access to medicine in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Human Rights Council, A/HRC/RES/12/24, adopted by the Human Rights Council at 12th session,2009 available at https://digitallibrary.un.org/record/668398?ln=en(last accessed on 30 June 2021)

[10] *Id.*

[11] Anthony Tridico, Jeffrey Jacobstein & Leythem Wall, facilitating generic drug manufacturing: Bolar exemptions worldwide, WIPO Magazine, 2014, available at http://www.wipo.int/wipo_magazine/en/2014/03/article_0004.html(Last accessed on 13 August 2021)

[12] Carlos. M Correa, *the Bolar Exception: Legislative Models and Drafting Options*, research paper, south Centre, Switzerland,2016, p.1

[13] *Id.*

the "early working" or "Bolar exception has emerged."[14] The central idea of a Bolar exemption (also known as regulatory review exception)[15] is to allow competitors to experiment with a patented invention to achieve market authorization for a generic or biosimilar on the day of or immediately after the expiry of the patent protection. Looking into the Ethiopian legal regime, one could see that it recognized these rights at the constitutional level.[16] To this effect, the FDRE Constitution, under Articles 41(4) & 90(1), urges the government to provide all Ethiopians access to public health and education, clean water, housing, food, and social security.[17] It also entitles every Ethiopian citizen to the right to private property ownership, including any intangible product produced by the creativity of an individual citizen.[18]

Yet, balancing such rights to public health and patent protection remains one of the major duties of legislative bodies. The patent laws of Ethiopia have adopted various exceptions to balance the right to health and patent protection, and the emphasis of this paper is to assess whether the competitors are allowed to use the patented product to make an experiment to get the market authorization immediately after the expiry of patent protection. This would inevitably beg for such questions as: Is a Bolar-type exception recognized under the Ethiopian patent proclamation? If so, under which conditions? What is the scope of the Bolar exception? Specifically, is it limited to drugs, or does it also apply to other products, including biological products, research tools, etc.? Suppose, the Bolar exception is not recognized under the Ethiopian patent proclamation. Will the use of an invention without the patentee's consent to obtain approval of a generic product be covered by the research and experimentation exception?

Answering such questions would inevitably require further exploration. To the best of this author's knowledge and access, there is no research that explicitly answered the perplexities that underlie the Bolar exception. Yet, some authors have mentioned Bolar exemption issues in their works, though they failed to sufficiently explore it. For example, Fikre Markos, in one of the few works on the law of intellectual property in this country, demonstrated the instrumental role of Bolar exemption in ensuring the right to access medicine. The writer particularly stressed the WTO panel decision on

[14] *Id.*
[15] *Id.*
[16] The FDRE constitution has explicit provisions on both patent rights as property rights and the right to health. For patent rights, see Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, *Federal Negarit Gazetta*, 1st Year No.1, 1995 (hereafter FDRE Constitution), Arts. 40 (1) & (2), 91(2), and for the right to health, see arts: 41 (4), 90(1) of the same constitution.
[17] *see* FDRE Constitution, Article 41(4) & 90(1)
[18] *see* FDRE Constitution, Article 40(1,2) & 91(2)

Canada pharmaceutical cases as a major illustration concerning Bolar exemption and stockpiling.[19] Yet, he left the issues open by questioning whether the Ethiopian regimes have the same exemption or not. In another work outlining the mechanisms of Ethiopia's Accession to the World Trade organization, Michael Tilahun pointed out that the country needs to use TRIPS flexibility as a way to facilitate access to medicine.[20] As such, he identifies the possible avenues to ensure access to medicine under WTO regimes and compares the Ethiopian patent regime in light of TRIPS flexibilities. However, his work has not ascertained whether Article 25 of Patent Proclamation No. 123/95[21] can be invoked to justify Bolar exemption.

Further, Israel Begashaw, in his work examining the compatibility between the Ethiopia patent regime and TRIPS Agreement, argues that the Bolar exception is not recognized under the patent regimes of Ethiopia. However, his work has not addressed whether the research and experimentation exemption may be interpreted to justify the Bolar exemption like the case in some countries which extend research and experimentation exemption to Bolar exception.[22] Further, his work does not show whether the Bolar exception may be a blessing or curse for Ethiopia and what ought to be done by Ethiopia to accommodate this exception in pertinent legislation.

Therefore, this article aims to examine and assess the place of the Bolar exception under the Ethiopian patent regime, identifying its shortcomings and exploring opportunities for proper regulation. To meet this objective, the study employed doctrinal research methodology along with comparative exploratory tools. Accordingly, the article investigates the pertinent provision of the Ethiopian patent proclamation with the primary objective of ascertaining whether the Bolar exception is recognized or the research and experimentation exception under the Ethiopian patent regime can be broadly interpreted to justify the Bolar exception. Finally, the paper explores the experiences of the USA, India, and South Africa to r draw a lesson for Ethiopia. These countries are purposively selected as they have good experiences in integrating Bolar exceptions to their domestic laws.

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[19] Fikre Markos Marso, The Ethiopian law of intellectual property rights: copyright, trademarks, patents, utility model and industrial designs, Addis Ababa University, school of law, 2012, pp. 255–257.

[20] Michael Tilahun, Ethiopia's accession to World Trade Organization (WTO): The Need to Reform Ethiopian Patent Law to Facilitate Access to Medicine, Abyssinia law,(March 14, 2018) available at https://www.abyssinialaw.com/blog-posts/item/1799-ethiopia-s-wto-the-need-to-reform-ethiopian-patent-law-to-facilitate-access-to-medicine (last accessed on June 20, 2021)

[21] A Proclamation Concerning Inventions, Minor Inventions and Industrial Designs, 1995, proc. No. 123, *Neg. Gaz*, Year 5, No. 25(hereinafter Ethiopian patent proclamation), Art. 25,.1(b)

[22] Israel Begashaw, The Ethiopian Patent Regime and Assessment of its compatibility with TRIPS Agreement, Unpublished LL.M thesis, Addis Ababa University, (2010), p.66

The article is organized into four sections. The first section uncovers the origin of the Bolar exemption and its compatibility with the TRIPS agreement. The second section presents the experiences of selected countries concerning the Bolar exception. The third section critically analyzes the place of the Bolar exception under the Ethiopian patent regime. Finally, the article ends with concluding remarks.

1. Origin of Bolar exception and its compatibility with the TRIPS agreement

Health has long been and is increasingly a concern of all people as citizens of the world and citizens of sovereign nations. The right to health is a fundamental part of our human rights and of our understanding of life in dignity. This has been recognized by several international human rights and policy documents. For example, the *Alma-Ata* Declaration, which was adopted nearly 30 years ago, noted that "Health for All" would contribute to both a better quality of life and global peace and security.[23] Consistent with this, the World Health Organization (WHO) Assembly has given legal recognition to the right to health as an indication for a government to improve access to essential medicine.[24]

Yet, people living with various diseases and other populations in desperate need of life-saving drugs are increasingly unable to access the existing preventative, curative, and life-prolonging treatments. The reasons behind the lack of access to medicines are numerous and include infrastructure, research and development, and the costs of medications.[25] Most of the findings indicate that the cost of medication has taken the lion's share as the high prices of patented drugs often make them unaffordable for the people and governments in the developing world.[26] In response to such a problem, the WHO recommends that generics competition and differential pricing contribute substantially to the affordability of medicines in low-income countries.[27] However, the medical patent right, which has been protected for decades as one of the Intellectual Property Rights, severely restricts generic manufacture and reverses the accessibility to

[23] World Health Organization, Report on health Systems Financing: The path to Universal Coverage, 2010, available at https://apps.who.int/iris/bitstream/handle/10665/44371/9789241564021_eng.pdf?sequence=1&isAllowed=y(last accessed on June 23, 2021)

[24] Hans V. Hogerzeil & Zafar Mirza, Access to essential medicines as part of the right to health,2011, available at http://digicollection.org/hss/documents/s18772en/s18772en.pdf(last accessed on June 23, 2021)

[25] *Id.*

[26] *Id.*

[27] World Health Organization, Report on Health Systems Financing: The path to Universal Coverage, 2010, available at https://apps.who.int/iris/bitstream/handle/10665/44371/9789241564021_eng.pdf?sequence=1&isAllowed=y(last accessed on June 23, 2021)

medicines. To overcome this problem, many countries have put the *Bolar exception* in place.

The Bolar exception was first introduced by the US in Hatch Waxman Act, following a ruling by a US Federal Circuit court over *Roche Products, Inc. v. Bolar Pharmaceutical Co*.[28], one of the landmark cases in this regime of case law. The ruling which gave birth to the exception had the intent of striking a compromise between the so-called 'innovator' and generic pharmaceutical producers.[29]

The case involved a dispute related to the manufacturing of generic pharmaceuticals. Roche was a brand-name pharmaceutical company that made and sold Dalmane. This product was protected by patent. Bolar was a generic drug manufacturer and had an interest in manufacturing generic versions of Dalmane after the expiry of the patent. Before patent expiration, Bolar had used the patented chemical in experiments to determine if its generic product was bioequivalent to Dalmane to obtain food and drug authority (FDA) approval for its generic version of Dalmane. Then, the Roche pharmaceutical company took the issue to court for the infringement of patent protection. Bolar argued that its use of the patented product was not infringement under the experimental use exception to the patent law.

The Court of Appeals for the Federal Circuit rejected Bolar's contention holding that the experimental use exception did not apply as Bolar intended to sell its generic product in competition with Roche's Dalmane after patent expiration and, therefore, Bolar's experiments had a business purpose.[30] Bolar argued that public policy favoring the availability of generic drugs immediately following patent expiration justified the experimental use of the patented chemical because denying such use would extend Roche's monopoly beyond the date of patent expiry.[31]

Through the examination of the pertinent laws and the argument of the two parties, the court came to see an apparent policy conflict between statutes namely, the Food and Drug Act and the Patent Act. Further, the court held that disputes arising from such

[28] *Roche Products, Inc. v. Bolar Pharmaceutical Co*. United States Court of Appeals for Federal Circuit, No. CV 83-4312, (April 23, 1984)

[29] Christopher Garrison, An exception to patents in developing countries, UNCTAD – ICTSD, (October 2006),p.14, available at https://unctad.org/system/files/official-document/ictsd2006ipd17_en.pdf
(Last accessed June 25, 2020)

[30] Reference document on the exception for obtaining regulatory approval from authorities, WIPO, 2017, available at https://www.wipo.int/edocs/mdocs/scp/en/scp_27/scp_27_3.pdf (Last accessed June 25, 2020)

[31] *Id.*

policy conflict should be redressed by Congress, not by courts.[32] Unfortunately, this decision delayed the entry of generic drugs into the marketplace by delaying the availability of generic drugs by allowing a patentee to maintain market exclusivity for some time after its blocking patent(s) expired.[33] While the court rendered its judgments, it recommended that Congress should make such policy decisions. Accordingly, Congress did pass a law permitting the use of patented products in experiments to obtain food and drug authority (FDA) approval through the Drug Price Competition and Patent Term Restoration Act of 1984, often referred to as the "Hatch-Waxman Act."

This marks the beginning of the Bolar exception. The general view of the congress was that it was not appropriate to prevent generic pharmaceutical manufacturers from starting to prepare and obtain regulatory approval for their generic products before the expiration of patent protection since it would delay the entrance of generic medicines on the market for a substantial period and extends the effective protection period beyond the patent term.[34] Following this, many countries of the world have incorporated the Bolar exception into their domestic patent regime.

Despite such moves of incorporating Bolar exception into domestic patent laws, the scope of the exception or the types of products upon which the exemption applies vary across jurisdictions. In many countries, the Bolar exception applies to "any products" that require regulatory approval. In Albania, Canada, India, South Africa, Hungary, Israel, Italy, Jordan, Malaysia, New Zealand, Pakistan, Portugal, and Vietnam, the Bolar exception applies to any products that need regulatory approval.[35] On the other hand, in some countries like Austria, Chile cost Arica, and Thailand, the scope of the Bolar exception exemption is limited to pharmaceutical products.[36] Further, in other countries like Bosnia Herzegovina, Netherlands, and Croatia, the scope of the bolar exception is limited to Human or veterinary drugs or medical products.[37] Again, in China, the scope of the Bolar exemption is limited to patented drugs or patented medical apparatus and instruments.[38] In Finland, Greece, Lithuania, Poland, Denmark, Kenya, Slovakia, and turkey, the scope of the Bolar exemption is limited to medicinal products. Finally, in countries like El Salvador, Peru, and Latvia, the scope of the

[32] *Id.*
[33] *Id*.
[34] *Id*.
[35] World intellectual property organization, Exception for obtaining regulatory approval from Authorities,https://www.wipo.int/edocs/mdocs/scp/en/scp_27/scp_27_3.pdf (last accessed on June 25, 2021)
[36] *Id*., p.10.
[37] *Id*.
[38] *Id*.

exemption is limited to pharmaceutical and agricultural chemicals or plant protection products.[39]

At this point, it is important to note that this variation in the scope of applying the Bolar exception is largely driven by the underlying purpose that the exception is supposed to serve in the respective national policy regimes. To this end in some countries, the Bolar exception is applied to acts that may be carried out for obtaining regulatory approval in their respective territory. In others, the exception is applicable for activities carried out in other countries as far as the purpose of the activities is for regulatory approval. The experiences of India, Brazil, and Germany can be a case in point in this respect. Further, the way countries of the world implement Bolar exception varies across jurisdictions. Many countries have specific statutory provisions for Bolar exceptions[40] while other countries have expressly combined the Bolar and experimental or scientific research exception into a single provision.[41]

Now we turn to the position of the TRIPS Agreement on this issue. Under the TRIPS Agreement, patents confer exclusive rights to the patentee for making, using, offering for sale, selling, or importing (except to the extent that parallel imports are allowed)[42] a protected product.[43] These rights, however, are subject to exceptions under the general requirements contained in Article 30 of the Agreement. It provides that Members may provide limited exceptions to the exclusive rights conferred by a patent, if such exceptions do not unreasonably conflict with a normal exploitation of the patent, do not unreasonably prejudice the legitimate interests of the patent owner, and take account of the legitimate interests of third parties.[44]

The most common exception to the patent holder's exclusive rights in pharmaceuticals is often referred to as the 'Bolar provision.'[45] A Bolar provision allows interested (generic) manufacturers to start producing test batches of a product before the patent expires to collect the necessary data for submission to the registration authorities. This will reduce the delay for generic products to enter the market after the patent has

[39] *Id*.
[40] Experiences of Egypt, the USA, South Africa, and India can be an example as the bolar exception is regulated under a separate statutory provision.
[41] The experiences of Argentina, Bosnia Herzegovina, Croatia, Hungary, Jordan, Portugal, Slovakia, and Spain can be mentioned as an example of the issues of bolar exception, and experimental or scientific research exception is provided by a single provision.
[42] Carlos. M Correa, *supra* note 12, p.5
[43] *Id*.
[44] *See* TRIPS Agreement, *supra* note 3, Art.30
45TRIPS agreement and pharmaceutical, WHO, 2012, available at http://digicollection.org/hss/en/d/Jh1459e/6.5.html#Jh1459e.6.5(Last accessed on August 25, 2021)

expired, and thereby enhance competition. Yet the text of the TRIPs Agreement does not explicitly address this issue.[46]

Though the TRIPS Agreement does not address the issues of the Bolar exception, the issue as to whether the Bolar exception is consistent with Article 30 of the TRIPS Agreement was tested in a case initiated against Canada by the European Communities and their Member States through which Bolar exception had been introduced in 1991.[47] The points of argument were related to the Canada Patent Act, Section 55.2(1) which explicitly allows a third party to use the patented invention to submit the information required for marketing approval (in Canada or abroad) and stockpile the product (for up to six months) for release immediately after the expiry of the patent. It provides that:

It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province, or a country other than Canada that regulates the manufacture, construction, use or sale of any product.[48]

This section pertains to activities reasonably related to developing and submitting the information required by a regulatory body (such as the health office of Canada, similar to the US Food and drug administration). Finally, it is also important to note that Section 55.2(1) relates to information that a regulatory body may require not only in Canada but anywhere in the world. Under the Manufacturing and Storage of Patented Medicines Regulations, "the applicable period referred to in under 55.2(2) of the Patent Act is the six months immediately preceding the date on which the term of the patent expires."[49]

In March 2000, the WTO panel concluded that Canada was not in violation of the TRIPS Agreement in terms of its practice of allowing the development and submission of information required to obtain marketing approval for pharmaceutical products carried out without the patent holder's consent. However, Canada's actions were found to be inconsistent with the Agreement in terms of its practice of manufacturing and

[46] TRIPS agreement and pharmaceutical, WHO, 2012, available at http://digicollection.org/hss/en/d/Jh1459e/6.5.html#Jh1459e.6.5(Last accessed on August 25, 2021)
[47] Carlos. M Correa, *supra* note 12, p.6
[48] Canada patent act of 1985, Section 55.2(1)
[49] Carlos. M Correa, *supra* note 12, p.6

stockpiling pharmaceutical products during the six months immediately before the expiry of the 20-year patent term.[50]

Based on this reasoning and other convergent arguments, the panel concluded that the Canadian Bolar exception was consistent with the TRIPS Agreement. The panel ruling dismissed the argument suggesting that the owner of an expired patent had a right to a *de facto* extension of its monopoly resulting from the delay in approving generic products. However, the panel found that the stockpiling provision was inconsistent with Article 30 of the TRIPS Agreement. Canada subsequently amended its legislation in this regard.[51] The panel has also concluded that stockpiling provision was inconsistent with Article 28.1, as it constituted curtailment of the exclusionary rights granted to the patent holders.[52]

As the TRIPS Agreement does not define the scope or nature of the permissible exceptions, countries are left with considerable freedom for doing so. In determining which other exceptions may fall within the ambit of Article 30, Paragraph 5(a) of the Doha Declaration provides guidance for the interpretation and implementation in stressing the importance of the object and purpose of the TRIPS Agreement. In the circumstances, exceptions crafted to achieve objectives related to the promotion of the transfer of technology, the prevention of abuse of intellectual property rights, and the protection of public health may well be justifiable.

Finally, from the analysis presented in this section, member states of the WTO from the developing world should be aware that TRIPS does not prohibit countries from permitting the regulatory approvals of generic drugs to occur before the patent term expires.[53] Many WTO Members have implemented this exception in their domestic laws to facilitate the early entry into the market by generic competitors.[54] Yet, nothing will hinder nonmember states from inculcating Bolar exceptions to patent regimes so that it will positively contribute to ensuring access to medicines at lower prices.[55]

2. Bolar Exception under National Laws

[50] *Id.*
[51] *Id*, p.9
[52] *Id.*
[53] Moni Wekesa and Ben Sihanya, *Intellectual property rights in Kenya*, Konrad Adenauer Stiftung, Berlin, (2009), p.32
[54] *Id.*
[55] *Id.*

Following the WTO panel decision favoring the Bolar exception, several countries have incorporated such trends into their national legislation.[56] Since it is one of the flexibilities allowed by the TRIPS agreement, it is recommendable for the least and developing countries that cannot afford to buy patented medicine to mitigate the negative impact of patents on access to medicines via the adoption of Bolar exception in their national legislation.[57] There are differences, however, regarding the scope of protection from infringement claims. The next sections explore such varying experiences of selected countries.

2.1. South Africa

While some African countries have introduced a Bolar exception, a number of others have done so lower than those in other regions of the world.[58] The Bangui Agreement Relating to the Creation of an African Intellectual Property Organization (OAPI), with 27 member states, does not currently include a Bolar exception among those provided for patent rights.[59] The 2007 review[60] of the national legislation in 39 (out of the 47) Sub-Saharan African countries found that, although most of them, including least-developed countries, provided patents for pharmaceutical products, the level of the incorporation of the flexibilities, including the Bolar exception, was inadequate. Only three countries (Kenya, Namibia, and Zimbabwe) expressly provided for the Bolar

[56]WIPO, Exceptions and Limitations to Patent Rights: Experimental Use and Scientific Research, A report prepared by the Secretariat of WIPO for the SCLP, Geneva, November 18, 2013, available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=256318(Last accessed on August 25 2021)

[57]Germán Velasquez, Carlos Correa and Xavier Scuba, IPR, R&D, Human Rights and Access to Medicines, research paper, South Centre, Geneva, 2012, available at https://www.southcentre.int/wp-content/uploads/2016/05/Bk_2012_IPR-RD-HRs-Access-to-medicine_EN.pdf(Last accessed on August 25, 2021)

[58]WIPO, Regional Seminar on the Effective Implementation and Use of Several Patent-Related Flexibilities, Bangkok, Thailand March 29 to 31,2011, available at https://www.wipo.int/edocs/mdocs/patent_policy/en/wipo_ip_bkk_11/wipo_ip_bkk_11_ref_topic3.pdf
(Last accessed on August 25, 2021)

[59] *Id.*

[60] Sisule F.Musungu, Access to ART and Other Essential Medicines in Sub-Saharan Africa: Intellectual Property and Relevant Legislation, UNDP, September 2007,p.13, available at https://www.opensocietyfoundations.org/uploads/11027264-6d1f-4456-99fd-fa46b53730da/artafrica_20090313.pdf (Last accessed on August 25, 2021)

exception.[61] Since the review, however, some African countries have incorporated it. The Notable exceptions were Egypt, South Africa, and Nigeria.[62]

South Africa undertook the intellectual property amendment Act in 1997, and further amendments were made in 2002 and 2005.[63] The relevance of the South African experience with pharmaceutical patent issues goes beyond doctrinal matters as it used competition law and other governmental interventions for price bargaining. As such, the practice in this country brought the potential tension between patent protection for pharmaceuticals and public health concerns to public attention. triggering a debate about what should be allowed and what should be prohibited to preserve the incentives for investments in pharmaceuticals while still allowing the flexibility to respond to public health crises as deemed fit.[64]

Further, through a legislative amendment made in 2002, the South African patent act introduced a Bolar-type exception.[65] This exception allows a potential competitor to use an invention to undertake acts necessary for obtaining regulatory approval and registration of a generic product before the expiry of the patent term without the patent holder's authorization.[66] This exception is provided in the Patents Act under Section 69A (Acts of non-infringement), which provides:

(1) It shall not be an act of infringement of a patent to make, use, exercise, offer to dispose of, dispose of, or import the patented invention on a non-commercial scale and solely for the purposes reasonably related to the obtaining, development and submission of information required under any law that regulates the manufacture, production, distribution, use or sale of any product.[67]

From this provision, it is clear that the generic manufacturer can use the patented invention to obtain regulatory approval. It should be further noted that the generic manufacturer could not use the patented invention for any other purpose than obtaining market approval which in turn allows to put the generic product on the

[61] Carlos. M Correa, *supra* note 12, p.12
[62] Sisule F. Musungu , The use of flexibilities in TRIPS by developing countries: can they promote access to medicines?, World Health Organization, April 2006,p.57, available at https://apps.who.int/iris/handle/10665/43503(Last accessed on August 25, 2021)
[63] Yu-Fang Wen & Thapi Matsaneng, Patents, Pharmaceuticals, and Competition: Benefiting from an Effective Patent Examination System, Competition Commission's 7th Annual Conference, China, (Sept.5, 2013). p.1
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] South African Patent Act of 1978, as amended by Patents Amendment Act No. 58 of 2002, Section 69A

market on the day of or immediately after the expiry of patent protection. For instance, the generic manufacturer is not allowed to stockpile a product before the expiry date of the relevant patent protection.[68]

2.2. USA

As it has been mentioned, the Bolar exception was introduced by the US' Drug Price Competition and Patent Term Restoration Act of 1984.[69] Specifically, Section 271(e) (1) of this Act, widely known as safe Harbor in the USA[70], sets out stipulations that insulate certain activities from patent infringement. Evidencing this intent, it provides:

It shall not be an act of infringement to make, use, offer to sell, or sell within the United States or import into the United States a patented invention (other than a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Act of March 4, 1913) which is primarily manufactured using recombinant DNA, recombinant RNA, hybridoma technology, or other processes involving site-specific genetic manipulation techniques) solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products.[71]

From these stipulations, it is clear that the generic manufacturer can use the patented products for regulatory procedures before the relevant patent(s) expiry if the use is solely related to the development and submission of information for the drug and administration approval process. Also, from this provision, one could see that in the United States, the Bolar exception is broadly applied to pre-clinical testing of drugs or potential drugs "at least as long as there is a reasonable basis to believe that the compound tested could be the subject of ... and the experiments will produce the types of information relevant to" an application for approval for clinical trials or marketing.[72]Yet its application is limited to drugs for human use; other biological products would only be covered to the extent that they are regulated as drugs. The exception does not

[68] Elijah Munyuki &Rangarirai Machemedze, Implementation of the TRIPS flexibilities by east and southern African countries: Status of patent law reforms by 2010, Southern and Eastern African Trade, Information and Negotiations Institute (SEATINI), 2010,p.15, available at http://www.equinetafrica.org/sites/default/files/uploads/documents/Diss80TRIPSupdate2010.pdf(Last accessed on August 25 2021)

[69] Carlos M. Correa, *supra* note 12, p. 2

[70] *Id*.

[71] Drug Price Competition and Patent Term Restoration Act, Public Law 98-417, 98th united states congress,1984, Section 271(e)(1)

[72] Sisule F. Musungu, *supra* note 60, p.56

apply if the drug is primarily manufactured using recombinant DNA or hybridoma technology or if the drug is a new animal drug or veterinary biological product.[73]

The Safe Harbor has been interpreted broadly by US courts and, as a result, exempts a wide variety of activities with the attendant commercial benefits provided that the conduct is reasonably related to gaining information relevant to the FDA approval process.[74] The courts stated that under certain conditions, the exemption could include: (1) experimentation on drugs that were not ultimately the subject of FDA submission; or (2) the use of patented compounds in experiments that were not ultimately submitted to the FDA.[75]

Looking into the literature on the welfare implications of the Hatch-Waxman Act", one can see that the source of significant potential positive gains of two types. First, it eliminated costly scientific testing, which served no useful purpose. Second, the Act lowered prices to consumers with some elimination of deadweight losses and large transfers from producers to consumers.[76] Similarly, the Bolar exceptions incorporated in modern patent laws serve the public's interest, governments, and social security systems that bear the cost of medicines. There is ample evidence that price is reduced after the first generic is introduced following patent expiration, albeit it may not be initially significant.[77] In the USA, for instance, the introduction of the second generic has been reported to reduce the price, on average, by half, and that when a more significant number of generic manufacturers enter the market, the average price may fall to 20 percent or less of that of the brand-name product.[78] Finally, USA law provides very little research or experimental use exemption concerning patented inventions. The exemption is so limited that it is limited to actions performed for "amusement, to satisfy idle curiosity or for strictly philosophical inquiry." [79]

2.3. India

[73] *Id*.
[74] Carlos M. Correa, *supra* note 12, p.2
[75] *Id*.
[76] Joseph E. Harrington, John M. Vernon & W. Kip Viscusi, *Economics of regulation and antitrust*, 2nd edition, Cambridge, The MIT Press, (1997), p.857
[77] Carlos M. Correa, *supra* note 12, p.5
[78] Lisa.Mueller, Understanding Bolar and Bolar-Like Exceptions in the US and Abroad, *National Law Review*, Vol.7, No.201,(2017) available at https://www.natlawreview.com/article/understanding-bolar-and-bolar-exceptions-us-and-abroad-part-1(Last accessed on 13 June 2021)
[79] *Id.*

Most countries in Asia provide for the Bolar exception, albeit with different scope.[80] In some countries, it is limited to marketing approval in its territory (e.g., Pakistan, Singapore). In others (India, Philippines, Israel), submissions in other countries are also exempted.[81]

India took a similar vision but a different path to balance pharmaceutical innovation with the public health concern of access to medicines.[82] To alleviate the problem, India reformed its patent policy in 1970, and this patent regime was also amended on January 1, 2002.[83] India introduced the Bolar exemption by the Patents Amendment Act of 2002 which amended the Indian Patents Act of 1970.[84] Section 107A of the Indian Patent Act of 2002 is known as India's Bolar Exemption. The fundamental objective of Section 107A is to delineate certain acts that are not to be considered an infringement. For this Act:

(a) any act of making, constructing, using, selling, or importing a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or a country other than India, that regulates the manufacture, construction, use, sale or import of any product.[85]

Under this section, using a patent to develop and submit information for regulatory approval will not be considered an infringement of the patent right. Thus, in the new patent regime, as innovator companies introduce new drugs in India and enjoy exclusive patent rights, such Bolar provisions can introduce generics immediately after the expiry of patents.[86] Making, constructing; using; selling, or importing a patented invention are allowed in acts for obtaining regulatory approval from the concerned authorities.

[80] Sisule F. Musungu, *supra* note 62, p.56
[81] Anthony Tridico, Jeffrey Jacobstein & Leythem Wall, *supra* note 11.
[82] Prabhu Ram, India's New Trips-Compliant Patent Regime between Drug Patents and The Right to Health, *Chicago-Kent Journal of Intellectual Property*, Vol.5, No.2, (2006), p.195
[83] *Id*.
[84] Ravindra K. Ahuja, *Intellectual property rights in India*, 2nd edition, New York, Lexis Nexis, (2015), p.557
[85] The Patents Act 1970, Intellectual property of India (hereinafter, Indian patent act of 1970 as amended in 2005) , section 107A (a) available at https://ipindia.gov.in/writereaddata/Portal/IPOAct/1_113_1_The_Patents_Act_1970_-_Updated_till_23_June_2017.pdf(Last accessed on 13 August 2021)
[86] Ravindra K. Ahuja, *supra* note 84

In India, the Bolar provision is comparatively broader than its US counterpart.[87] While the US provision restricts the safe Harbour available to generic manufacturers to make, use, offer for sale, or sell the patented invention solely for uses that are reasonably related to the development and submission of information under US federal law in the United States only, its Indian counterpart does not specify such territorial limits.[88] Thus, even if outside India, a sale will fall within the sweep of Section 107A if it is reasonably related to the development and submission of information required for regulatory approval under the country's law in which the sale takes place.[89] Further, unlike US rule, which has specified that research exemption is to be provided only for drugs or veterinary biological products, Indian law has not created any such demarcation, and the research exemption is for any product.[90]

Generally, the Bolar exemption enables generic drug manufacturers to use an inventor's pharmaceutical drug before the patent expires, which aids in the early launch of generic versions of the drug once the innovator drug's patent term ends and promotes further R&D.[91] It is important to here that there is a lack of cases regarding Bolar exemption in India. India has only one case (Bayer Corporation vs. Union of India & Anr) [92] regarding this provision wherein clinical trials have been mentioned as part of the Bolar exemption.

3. The Place of Bolar Exception under the Ethiopian Patent System

In Ethiopia's context, the Ethiopian National Health Policy, which was launched in 1993, aimed at the development of preventive, promotive, and curative health; assurance of health care accessibility for all segments of the population in general, and the availability of drugs, vaccines, equipment, supplies, etc. in particular.[93] In line with this policy, the FDRE Constitution has also urged the government to provide all Ethiopians access to public health and education, clean water, housing, food, and social security,[94] At the same time, the government is taking steps to promote science,

[87] Diksha Dubey, Bolar exemption: Indian perspective, 2017, available at https://iprlawindia.org/wp content/uploads/2017/12/cipra-research-paper.pdf (Last accessed on 13 August 2021)
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] Aayush Sharma, Bolar Exemption in India,2018, available at https://www.mondaq.com/india/patent/691036/bolar-exemption-in-india(Last accessed on 13 June 2021)
[92] *Id*.
[93] Thige G/Mariam, Kedir Tahir& Solomon G/Amanuel, Bringing Industrial and Health policies closer: Reviving Pharmaceutical Production in Ethiopia, Springer, 2016, p.70, available at https://link.springer.com/content/pdf/10.1007%2F978-1-137-54647-0_5.pdf (Last accessed on 13 June 2021)
[94]FDRE Constitution, Art. 41(4) &90(1)

technology and innovation, including the promotion of traditional knowledge (TK)/traditional medical knowledge(TMK) to solve the country's needs by formulating a National Science and Technology policy in the same year which was later revised in 2012.[95]

Moreover, the FDRE Constitution entitled every Ethiopian citizen to the right to the ownership of private property, including any intangible product produced by the creativity of an individual citizen.[96] In connection with this, the 1995 Ethiopia's patent proclamation stipulates the objective of encouraging local innovation/creativity, transfer and adoption of foreign technology, and fulfilling the nation's multidimensional demand like public benefits, including public health.[97] Accordingly, this proclamation made patent protection available for products including pharmaceuticals.[98] Yet while the proclamation has tried to give a place for public health[99], Ethiopia couldn't be free from the controversial issues of the problematic relationship between patents, including pharmaceutical patents and access to medicines that ought to be resolved with such a decision. The next sections take the issues of contention in turn for detailed analysis.

3.1. The Two Competing Interests and Bolar Exception under the Ethiopian Patent Law

To clear the ground for detailed elaboration of the issues, we need to note that, under the Ethiopian patent regime, exclusive rights are given to the patentee for a specific time as a reward for the inventor's contribution. Exclusive rights of the patentee as enshrined under the patent proclamation are not absolute as they are subject to some limitations.[100] As stipulated under Articles 25 and 26 of the proclamation, third parties have a right to exploit patented inventions without securing the consent of the patentee and the payment of equitable remuneration.[101] In this instance, the patent owners cannot claim their exclusive rights to exclude third parties exploiting the patented inventions. Exclusive rights are given to the patentee to achieve some overriding public policy objectives. Similarly, in certain circumstances, the exclusive rights of the patentee are limited to achieving some objectives.

[95] Thige G/Mariam, et al, *supra* note 93, p .79
[96] *See* FDRE constitution, Art.40 (1, 2) and 91(2).
[97] *see* FDRE constitution, Preamble
[98] *see* FDRE constitution, Art 14 & 18
[99] *See* FDRE constitution, Arts. 4, 25(1) (a & b), 25(2), 29-33.
[100] Ethiopian patent proclamation, Art.22.
[101] Ethiopian patent proclamation, Arts. 25 & 26.

It is clear that giving exclusive rights to the patentee and limiting the same have different objectives. One of the policy objectives for liming the exclusive rights of the patentee is public health objectives. The right to patent is granted for the promotion of invention in general and the protection of the patentee in particular. Accordingly, a monopoly right is given to the patentees to incentivize them for their invention. On the other hand, the grant of a patent negatively impacts society's interests and needs as it excludes them from exploiting the patented product. The problem is how to minimize the negative impact of patent grants by permitting third parties to exploit patented inventions without the patentee's consent to achieve some overriding objectives. In doing so, the Ethiopian patent proclamation has provided various limitations on the patentee's exclusive rights. To this end, Articles 25 and 26 of the proclamation lay down different grounds for the limitation of the patentee's exclusive rights. This shows how much the Ethiopian government has made effort to balance the two competing interests. Yet one of the newly emerging exceptions that has a tremendous role in ensuring access to patented medicines without the patentee's consent is missing in the Ethiopian patent regimes. This exception is known as the Bolar exception.

The absence of a specific provision on the Bolar exception under the Ethiopia patent regime would inevitably beg other questions as to whether the Bolar or regulatory approval exception may be justified under other exceptions of patent proclamation or otherwise. A patent confers upon its holder the right to exclude others from making, using, possessing, or selling the protected product. The exceptions under Article 25 of the Patent Proclamation do not include any reference to the use of patented substances to request marketing approval before the expiry of the patent term. Concerning pharmaceutical products, such authorization may only be obtained from a specialized regulatory body in Ethiopia, the Ethiopian Food, Medicine, and Healthcare Administration and Control Authority. Obtaining approval for the marketing of a drug might take time, and this could extend the monopoly rights of the patentee over the product.[102] Since the approval process may take time, the generic drugs would be available long after the expiry of the patent. This would certainly have important implications to access to drugs at affordable prices. That is why making a specific exception to use the patented invention for requesting regulatory approval has become an important issue.[103]

Turning to the rights of the patentees, one could see that the Ethiopian Patent Proclamation grants them the right to preclude any person from, among others, using

[102] Fikre Merkos, *supra* note 19, p.186
[103] *Id.*

the patented product.[104] The term "using" could be construed to include submitting a patented substance to secure regulatory approval. This may become an important bottleneck for generic manufacturers. By implication, this suggests that the inclusion of this specific exception in the Patent Proclamation would be an important measure to promote access to affordable medicine in Ethiopia.[105]

3.2. Bolar Exception *Visa Vis* the Scope of Scientific Research and Experimentation Exception under the Ethiopian Patent Law

The other important question is whether the scientific research and experimentation exception can be construed to justify a Bolar exception. Research and experimentation exception is useful in fostering pharmaceutical technological progress by exempting from patent protection; experimentation acts for purposes such as inventing around the initial invention, improving the invention, or evaluating the invention and determining validity.[106] Research exemption permits the use of a patented invention for experimental purposes without infringing the holder's rights.[107] The objective is to promote research and development in the country and ensure that patent rights must not impede or hinder higher education and research.

Looking into the Ethiopian Patent Proclamation in this light, it takes the position that the patentee's rights must not extend to "the use of the patented invention solely for scientific research and experimentation."[108] The justification for the existence of this exception is to facilitate the dissemination and advancement of technical knowledge.[109] It is argued that under the policy of the patent laws, both society and scientists have a legitimate interest in using the patent disclosure to support the advancement of science and technology, including pharmaceutical innovations.[110] The existence of this exception triggers further innovations by using patented inventions. However, the scope of this exception has been a subject of intensive policy debates

[104] *Id.*
[105] *Id.*
[106] MoniWekesa &Ben Sihanya, *supra* note 53, p. 32
[107] *Id.*
[108] Ethiopian patent proclamation, Art. 25.1(b)
[109] ". . . as an illustration, Article 30-type exceptions in national patent laws – the use of the patented product for scientific experimentation, during the term of the patent and without consent, is not an infringement. It is often argued that this exception is based on the notion that a key public policy purpose underlying patent laws is to facilitate the dissemination and advancement of technical knowledge and that allowing the patent owner to prevent experimental use during the term of the patent would frustrate part of the purpose of the requirement that the nature of the invention is disclosed to the public."
[110] Israel Begashew, *supra* note 22, P.63

and litigation.[111] The scope of the exception remains unknown as it has never been subjected to interpretation in Ethiopia. In particular, it is not clear whether the exception is limited only to experiments or research of non-commercial nature or if it could, on a case-by-case basis, extend to experiment or research even with some commercial end.[112]

Again, the use of the term *"solely"* under the same provision tends to limit the scope of the exception only to scientific research and experimentation. Yet the objective of the scientific and experimentation exception is not clearly articulated, and this opens a room to invoke this room of using the exception for other extended purposes connected to research and experimentation. Accordingly, as the objective of the exception is not limited by patent proclamation, one can argue as though the use of the patented invention to get scientific information about the product, and ultimately to produce the product upon the expiry of the patent right over the product is covered under the research and experimentation exception. This may take us to the experiences of other countries.

Most countries of the world do not make a distinction between the applicability of research exceptions based on scientific purposes and research that have the immediate purpose of generating information for securing the marketing approval of the product.[113] This has been for example true in continental Europe. However, due to the confusion caused by such trends, the European Commission introduced directive 2004/27/ that exempts acts done for regulatory approval purposes.[114] In line with this, many countries have moved to adopt a separate exception in the context of pharmaceutical clinical trials.[115] For instance, under Article 25/1(f) of Botswana's industrial property Act, it is stipulated that rights conferred by a patent shall not extend

[111] For instance, *Roche Products Inc. v. Bolar Pharmaceutical Company* case can be a good example.

[112] Fikre Markos Marco, Ethiopia's World Trade Organization Accession and Maintaining Policy Space in Intellectual Property Policy in the Agreement on Trade-Related Aspects of Intellectual Property Rights Era: A Preliminary Look at the Ethiopian Patent Regime in the Light of the Agreement on Trade-Related Aspects of Intellectual Property Rights Obligations and Flexibilities, *The Journal of World Intellectual Property*, Vol. 15, No. 3, (2012), P.183

[113] Evans Misati & Kiyoshi Adachi, The Research and Experimentation Exceptions in Patent Law: Jurisdictional Variations and the WIPO Development Agenda, UNCTAD- ICTSD Project on IPRs and Sustainable Development policy, UNCTAD, March 2010, p.4, available at https://unctad.org/system/files/official-document/iprs_in20102_en.pdf (Last accessed on 13 June 2021)

[114] *Id.*

[115] *Id.*

to acts done regarding patented invention for purposes of compliance with pharmaceuticals regulatory marketing approval procedures.[116]

Further, countries that opt to regulate the Bolar exception under the research and experimentation exception have an express provision to that effect. Particularly, some countries have expressly combined the Bolar and experimental or scientific research exception into a single provision.[117] Coming back to the Ethiopian patent proclamation, nothing is provided as to whether the research and experimentation exception is applied to both research for scientific purposes and research that have the immediate purpose of generating information for securing the marketing approval of the product or otherwise. From the experiences of other countries, it is clear that the absence of clarification on the scope of application of the exception would inevitably create confusion on the practical implementation of the exception on pharmaceutical products. Hence, the use of the patented product for getting market approval may not be justified under the research and experimentation exception.

3.3. The Need for Integrating the Bolar Exception into the Ethiopian Patent Regime

As outlined in the last sections, the Bolar exception is an essential mechanism in facilitating the production and accelerating the introduction of generic substitutes on patent expiry.[118] Particularly, it has important implications for developing countries in two ways. First, it allows such benefits for countries that are currently or potentially producers of generic medicines. Second, even where they are not likely to be producers of medicines, the United Kingdom Commission on Intellectual Property Rights has recommended that developing countries to include a Bolar-type exception within their domestic law to enable the products of a foreign company to gain regulatory approval and, to enter the market soon after the expiry of the patent.[119]

Therefore, it is imperative for Ethiopia to incorporate Bolar exceptions to the substantive parts of the patent regime. This move can be justified on many grounds. First, the Bolar exception is important from the point of view of promoting access to affordable medicine. As far as granting a patent for pharmaceutical products is

[116] *Id.*, P.52.

[117] The experiences of Argentina, Bosnia Herzegovina, Croatia, Hungary, Jordan, Portugal, Slovakia, and Spain can be mentioned as an example as the issues of bolar exception, and experimental or scientific research exception are provided by a single provision.

[118] Integrating intellectual property rights and development policy, Commission on Intellectual Property Rights, London, September 2002, p.50, available at http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf(Last accessed on 13 June 2021)

[119] *Id.*

concerned, the government should not confine itself to encouraging research and development. It needs to see it from the perspective of making the pharmaceutical products or medicines affordable and accessible in the market to ensure the protection of public health. Suppose the manufacturer of generic products is allowed to get market approval before the expiry of patent protection. In that case, it will open a room for them to make it avail on the market immediately upon the expiry of the protection. This would inevitably lower product prices and enable the poor or needy parts of society to access medicine at lower prices. Contrary to this, if there is no bolar exception, it would take a long time to avail the generic drugs on the market even after the expiry of the patent protection as the approval process may take time. This would result in the de facto extension of patent protection and have important implications on access to drugs at affordable prices. Hence, providing Bolar exceptions concerning pharmaceutical patents sometimes becomes inevitable to save the lives of the populace by ensuring accessibility of drugs at affordable prices as it can be used to break up monopolies and cartels, which are some of the abuses of patents rights.

Second, incorporating such kinds of exceptions is a practice of aligning domestic laws with the international patent regime. As it has been mentioned, the Bolar exception is consistent with Article 30 of the TRIPS agreement. Further, it is important to note in this connection that Ethiopia has been making moves to join WTO and the country despite the arguments against and in favor of joining WTO has resumed its journey to finalize the membership. As per the membership procedures of the WTO, a country that has applied for membership has to "bring its house in order" and ensure that its IP-related trade and legal regime is compatible with TRIPS. The patent is one of the areas of protection under the TRIPS Agreement. The experience of certain countries that had acceded to the WTO substantiates the argument that making national patent laws compatible with TRIPS is a prerequisite to the attainment of this goal.[120]

As the developed countries already had TRIPS standards and IP institutions in place, they did not need to make significant amendments or revise their domestic IP laws and administration to implement TRIPS.[121] On the other hand, implementing TRIPS in developing and least developed countries may require them to raise their IP standards (increasing the terms and scope of protection).[122] As such, it may involve complex reforms to update or redraft existing laws, adopt new laws, and promulgate new

[120] Abdulkader Mohammed Yusuf, Globalization of Patent Laws through Trade Agreements, and Pressures on Ethiopia's Patent Regime: The Passenger behind the Whee*l, Mizan law review*, vol.12, NO.1, (2018),p.86

[121] Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual property perform in developing countries*, (Oxford university press), (2009)

[122] *Id.*

administrative regulations and guidelines.[123] Thus, notwithstanding the special and differential treatment and certain flexibilities that Ethiopia is entitled to, its patent regime has to be consistent with TRIPS.[124] Hence, providing a Bolar exception would play its role in paving the way for the country to join WTO.

Third, providing such exceptions plays a vital role in developing and fostering a local generic pharmaceutical industry in Ethiopia. As it stands now, let alone the patented invention, the drug industries of Ethiopia have not been using the invention that entered the public domain. The development of the Ethiopian local pharmaceuticals manufacturing sub-sector has been very limited in production capacity, technology acquisition, employment opportunities, and investment.[125] Most local manufacturers are not in conformity with international good manufacturing practices (GMP), and no single product has prequalified for WHO standards.

Yet it is important to note that the Ethiopian government took several steps to incentivize the development of the local pharmaceutical industry during the past five years, with a noticeable positive impact.[126] One of such steps is the launching of a national strategy and plan of action for pharmaceutical manufacturing development in Ethiopia (from 2015-2025).[127]This strategy has played an important role, including laying the groundwork for developing the Ethiopian pharmaceutical industry. Hence, since the patent owner's exclusive rights are not affected during the patent term, its incorporation into patent regimes is sufficiently justified.

Finally, sometimes delay in the development of important technological tools is caused due to deadlocks between the improver and the original patentee. In the absence of this exception, the patent holder will have the exclusive right to exclude scientific research, and in this case, the patent system by itself inhibits the progress of science and technological knowledge. Bolar exception can effectively resolve these deadlocks as it contributes to generating rapid technical progress.

Despite all these justifications for integrating the Bolar exemption into the Ethiopian patent proclamation, the mere adoption of the Bolar exception may not guarantee the attainment of its objective, i.e., ensuring access to medicine. Experiences from other

[123] *Id.*
[124] Abdulkader Mohammed, *supra* note 120, p.86.
[125] National strategy and plan of action for pharmaceutical manufacturing development in Ethiopia(2015-2025), Developing the pharmaceutical industry and improving access, https://www.who.int/phi/publications/Ethiopia_strategy_local_poduction.pdf?ua=1.(last accessed July 25, 2021)
[126] *Id.*
[127] *Id.*

countries show that attaining this goal requires actual implementation of this exception. If we look at the experiences of Zimbabwe, early working of an invention is allowed as early as six months before the expiry of the patent.[128] In the absence of such stipulation, there may be a chance that a generic competitor would be able to start its bioequivalence and other testing/trials only after patent expiry. This, in turn, would result in a de facto extension of patent protection. Therefore, Ethiopia must provide a clear stipulation on the period from which the generic competitor would be allowed to start its bioequivalence and other testing or trials to obtain regulatory approval.

Concluding remarks

Protecting patients and facilitating adequate health services is one of the major governmental imperatives in modern policy moves. Such obligation is clear from various international treaties such as the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR). However, the strict protection of patent rights may result in total denial of access to public health or be detrimental to the survival of human beings. Accordingly, there is a need to protect patent rights without affecting access to medicines. The extreme choice of protecting patent rights or public interest to access patented invention, especially medicines, would directly affect abrogating the protection given for either of the two interests. Thus, it would be better to find a solution that could balance two competing interests extensively discussed in this paper. One of the avenues by which the two extremes can be balanced is by incorporating the Bolar exception into domestic legislation.

Bolar exception is firmly grounded in WTO case law. This exception, among others, permits clinical trials and other preparatory activities "on" or "with" a patented pharmaceutical product before the expiry of the patent to enable generic competitors to apply for marketing approval of the competing product(s) as soon as possible after the expiry of the patent. This allows generic manufacturers to prepare production and regulatory procedures before patents expire so that products can be ready for sale as soon as the patent expires, rather than going through the lengthy preparatory process only after the patent expires. Owing to such advantages in ensuring access to medicines, a considerable number of countries in the world have integrated the Bolar exception into their domestic laws and benefited from such advantages of the exception. The experiences of South Africa, India, and the USA can be mentioned as examples.

[128] *See* Zimbabwe's Patents Act of 1996 as amended in 2002, Section 24 (3).

Turning to the context of Ethiopia, one could see that the FDRE constitution recognizes the right to public health and property right. Further, to balance the patentee's rights and public interest over health rights, the Ethiopian patentee regime sets various limits to the exclusive rights of the patentee. Yet, concerning the Bolar exception, the patent proclamation and its implementing regulations have no explicit provision. Further, the research or experimentation exception envisaged under Ethiopian patent regimes cannot justify the Bolar exception via interpretation. The historical, theoretical, and empirical lessons from other countries suggest that incorporating the Bolar exception could have an instrumental role in ensuring access to medicine.

It fundamentally balances two competing rights, namely the exclusive rights of the patentee and the right to public health recognized under the FDRE constitution. As such the patent owner's exclusive rights are not affected during the patent term and its incorporation into patent regimes is sufficiently justified. Further, the Bolar exception plays a key role in promoting technology transfer, preventing abuse of intellectual property, and protecting public health. Therefore, based on the conclusion drawn from the analysis., Ethiopia should reform its patent law and incorporate an exception that allows third parties to undertake without the authorization of the patentee acts in respect of patented products necessary for obtaining regulatory approval for the product just on the day of or immediately after the expiry of patent protection.

Particularly, the author would recommend Ethiopia to integrate into the patent proclamation, a provision that stipulates:

a) It shall not be an act of infringement of a patent to make, use or import the patented invention on a non-commercial scale and solely for uses reasonably related to the development and submission of information required under any law in Ethiopia or a country other than Ethiopia, that regulates the manufacture, use, sale or import of any product.

b) Notwithstanding what is provided under sub(a), the generic competitor shall not start early working on an invention as early as six months before the expiry of the patent protection.

Financial Consumer's Access to Justice: Considerations towards Adapting Financial Ombudsman Scheme in Ethiopia

Tewachew Molla Alem[Ω]

Abstract

Access to justice is one of the fundamental human rights of every human being. The Constitution of Federal Democratic Republic of Ethiopia constitutionalizes this right; however this can be ensured when there is an efficient and proper venue to adjudicate grievances. The inherent asymmetric relationship between financial institutions and consumers, and the complexity of financial services or products is a major barrier to easily access justice for financial consumers. One of the mechanisms to overcome such institutional inefficiency is to establish an out-of-court adjudication body, widely called financial Ombudsman. However, in Ethiopia, financial Ombudsman has never been established. This acutely limits consumers' access to justice. Also, the absence of this institution suggests that the country follows a laissez-faire approach in dealing with issues related to the subject.

This article explores dimensions of financial consumers' access to justice from the Ethiopian perspective. The study employed doctrinal research method to attain the desired end. The major finding of the exploration shows that financial consumers in this country have no access to an independent, efficient, impartial, free-of-cost, and professional out-of-court dispute resolution bodies such as financial Ombudsman to seek remedy for their complaints. Further, the findings shade light on crucial role of the financial Ombudsman for access to justice. Accordingly, adapting this scheme in Ethiopia will be an important alternative to financial consumers in the country. Though adopting such a scheme in Ethiopia may face possible challenges, it can be overcome through applying good design choices of the scheme. Finally, the results from the exploration indicated that the Policy landscape in this country has enabling environment on which interested bodies can capitalize on to adapt financial Ombudsman scheme.

Keywords: *Access to Justice, Ethiopia, Financial Consumer, Financial Ombudsman*

Introduction

Access to justice is one of the fundamental rights that the citizens of a country are entitled to enjoy in the exercise of their liberty, equality, and dignity. Accordingly, bills of rights unanimously recognize it not only as right in itself but also as an instrumental

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right safeguarding the protection of other rights.[1] Despite this recognition of international Bill of rights, the conceptualization and the extent of realizing these aspirations lack uniformity across jurisdictions. Thus, problems relating to enforcement of this right have been one of the subjects of concern for jurists, human rights activists and other bodies.

Looking into the Ethiopian law one could see that the right to access to justice is one of the fundamental human rights recognized in legislative documents.[2] Yet citizen in this country barely enjoy this right in many avenues of their lives particularly in their interaction with financial institutions. Financial institutions,[3] as a growing volume of theoretical and empirical evidences show, are vital instruments of socio-economic changes with direct link to economic growth and poverty reduction. As such, they are systems through which citizens make transactions of savings and investments, which in turn, influence human development measures such as life expectancy, literacy, and school attainment.[4]

Due to such roles, financial institutions in general and banks in particular are treated as special legal persons under national laws. In situations where disputes arise between financial institutions and their consumers, the law puts consumers in a disadvantaged position, by limiting them to access only judicial mechanisms which is inadequate to access justice. In specific terms, through this treatment, consumers are placed in unequal position with financial institutions which are far stronger in information power, expertise, and money.

Such effects from an asymmetric relationship between consumers and financial institutions are compounded with the complexity of the financial services or products which unjustly cost consumers to comprehend and explore their essence and operations. Given the connection between contemporary human life and financial institutions, consumers and in particular financial consumers have considerable vested interest in the operation of banks. Equally, they deserve reliable access to justice to redress grievances arising from the arrays of transactions they make with banks. As

[1] Transforming Our World: the 2030 Agenda for Sustainable Development, United Nation (UN), (2015), Agenda 16, https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf [hereinafter UN (2015)].

[2] Ethiopia ratifies bill of rights, and also constitutionalize it. See, The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazzeta*, (1995), Articles 9, 13, 37.

[3] Financial institution refers to banks, insurance companies, micro-finance institutions, and credit and saving institutions in this article.

[4] Ross Levine, *et-al*, Financial Intermediation and Growth: Causality and Causes, *Journal of Monetary Economics*, Vol. 46:No.1, (2000), pp.31-77; Ross Levine, International Financial Liberalization and Economic Growth, *Review of International Economics*, Vol.9 No.1, (2001).

conceptualized by Mauro Cappelletti[5] access to justice for such ends should encompasses more than simple access to court and demands adopting special procedure, simplifying the procedure, and promoting alternative dispute settling mechanisms. It should also serve as way to achieve social inclusion through avoiding a multitude of societal barriers (such as poverty and educational impoverishment).[6] Making such elements of justice accessible to citizens requires establishing institutional mechanisms with varying setup.

Consumer Ombudsman or financial Ombudsman scheme is one of such mechanisms to attain such ends of justice. It is widely used by a growing number of States as an alternative venue for consumers and financial consumers in particular to access justice for their grievances in relation to financial products and services.[7] In Ethiopia, however, little evidence of experience is available with regard to dealing with consumers' right in general and financial consumer in particular. In more specific terms, it is hard to find a study focusing on the financial consumers' dispute resolution tools such as financial consumers' Ombudsman as alternative forum to access justice.

This article is a contribution to elucidation of ways by which financial Ombudsman can be used in the realization of the consumers' right to access justice. It is a common practice in many jurisdictions to employ different formats in the actualization of the enjoyment of the right to access to justice. Ethiopia also engages various actors and modalities with the view to help people exercise their right to access to justice.[8] Yet these mechanisms have strengths and weaknesses, making it imperative to use a combination of them at the same time with a collaborative effect.[9]

Financial consumers' protection comes as a new feature in the Ethiopian legal system, and private consumer Ombudsman scheme has never been adapted. Yet with adequate support in place, the coordinated use of the available mechanisms can have a

[5] Mauro Cappelletti and Bryant Garth, Access to Justice: The Newest Wave in the World Wide Movement to Make Rights Effective, *Buffalo Law Review*, Vol.27, (1978), pp.181-292; Kokebe Wolde Jemaneh, Reconsidering Access to Justice in Ethiopia: Towards a Human Rights Approach, in Pietro S. Toggia,*et-al*, (eds.), *Access to Justice in Ethiopia: Towards an Inventory of Issues*, AAU, (2014), pp.13-14.

[6] Marc Galanter, the Duty Not to Deliver Legal Services, *University of Miami Law Review*, Vol.30:No. 4, (1976).

[7] Cappelletti and Garth, *supra* note 5, pp.210-211, 274-276; Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Services*, Oxford: Hart Publishing, (2008), pp.257-258; Estelle Hurter, Access to Justice: to Dream the Impossible Dream?, *The Comparative and International Law Journal of Southern Africa*, (2011), Vol.44:No.3, p.423.

[8] Courts, Human Right Commission, Ombudsman (public), Tribunals (such as in tax and labor disputes), ADR mechanisms, Religious and Customary ADR mechanisms, Legal Aid Centers (though university based).

[9] See, Hurter, *supra* note 7, pp.419-421. "The battle for an accessible civil justice system cannot be a single front"

tremendous impact on the protection of the rights to access to justice for financial consumers. With a preliminary discussion of these modalities (access to justice as a human right and the role of financial Ombudsman to access to justice, and some justice actors in Ethiopia to show the non-existence of financial Ombudsman scheme in the country), this article explores the enabling environment to adapt the financial Ombudsman scheme in Ethiopia. By doing so, it identifies possible challenges, the fundamental design features of the financial Ombudsman scheme aiming to fill the knowledge gap in the area and use as guide by the policymakers.

To accomplish this, the researcher employed qualitative legal research method along with doctrinal research design. The explorations of the issues in the problem under study and the lessons drawn from different sources have been organized under three major parts.

The first section presents the conceptual basis of access to justice as a fundamental human right in international laws and in the Ethiopia legal regime. The second section deals with the concept of financial Ombudsman scheme and its role in access to justice. It particularly outlines the enabling environment and challenges with regard to the adoption of financial Ombudsman scheme in Ethiopia. The last section discusses the fundamental design features of the financial Ombudsman scheme with particular emphasis on the link between effectiveness of the financial Ombudsman scheme and quality of design feature in the adaptation of the scheme in Ethiopia. Finally, concluding remarks are made on the basis of analyses presented.

1. The Conceptual Framework

1.1. Access to Justice as a Fundamental Human Right

Access to justice is both a fundamental right in itself and a precondition for the enjoyment of other rights.[10] Currently it has become one of the subjects of scholarly dialogue among legal scholars and practitioners in human rights law.[11] In terms of human rights jurisprudence, the right to access to justice has developed tremendously ever since it has been incorporated in the bills of rights. Yet, despite its prominent importance in the modern democratic state, there is no uniform understanding of the term 'access to justice'. It is not a term that is often expressly used or defined by international human rights conventions because some international human right

[10] UN (2015), *supra* note 1.

[11] United Nations Development Programme (UNDP), Access to Justice, (2004), p.3. http://www.undp.org/content/undp/en/home/librarypage/democraticgovernance/access_to_justiceandruleoflaw/access-to-justice-practice-note.html [accessed on June 2021]; Anbesie Fura Gurmessa, The Role of University Based Legal Aid Centers in Ensuring Access to Justice in Ethiopia, *Bejing Law Journal*, Vol.9:No.1, (2018), p.362.

instruments use, as its equivalents, such phrasings as "right to an effective remedy"[12], "fair public hearing"[13], "right to have his cause heard"[14]. However, the recent international instruments that establish principles for the administration of justice employ the term 'access to justice'.[15] Review of literature and policy papers on the issue of access to justice reveals that there are two approaches in conceptualizing the term. In the narrower sense, the term access to justice is equated with access to judicial remedies to vindicate rights recognized by law and/or resolve disputes. However, in the broader and recent phenomenon, it has included legal advice and representation, the adoption of special procedures (such as class action and public interest litigation) to represent diffuse group and public interest, the simplification of procedures, and the promotion of alternatives to the formal judicial process to settle disputes.[16] This conceptualization requires the inclusion of dispute resolution mechanisms as part of both formal and informal justice institutions.[17]

According to the traditional understanding (the narrow view) of access to justice, courts are the central 'suppliers' of justice for everyone, including financial consumers. To some extent that remains true. Courts are ultimately the arbiters of legal issues: able to declare what the law is, what the rights and obligations of parties are and enforce those declarations. It is now generally accepted that justice need not only be dispensed by the formal justice system.[18] Further, the cost of litigation, the slowness of the process, and its procedural complexity are usually still mentioned as factors

[12] United Nations General Assembly Resolution 217A, Universal Declaration of Human Rights (UDHR), (1948), Article 8; European Convention on Human Rights (ECHR), Council of Europe, (1950), Article 13.

[13] International Covenant on Civil and Political Rights, United Nations, General Assembly Resolution 2200A (XXI), (1966), Article 14(1).

[14] African (Banjul) Charter on Human and Peoples Rights, Organization of African Union, (1981), Article 7.

[15] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, The United Nations, Treaty Series, Vol.2161, (1998); UN General Assembly Resolution No. 67/187; Twelfth United Nation Congress on Crime Prevention and Criminal Justice Resolution No.65/230, Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and their Development in a Changing World, R/65/230, (2010), https://www.unodc.org/documents/crime-congress/12th-Crime-Congress/Documents/Salvador_Declaration/Salvador_Declaration_E.pdf [accessed on October 2022].

[16] Cappelletti and Garth, *supra* note 5; Jemaneh, *supra* note 5, pp.13-14.

[17] Julinda Beqiraj, *et-al*, Ombudsman Schemes and Effective Access to Justice: A Study of International Practices and Trends, *International Bar Association*, (2018), p.5.

[18] Bryant Garth, A Revival of Access to Justice Research?, in R. L. Sandefur, (ed.), Access to Justice, Sociology of Crime, Law and Deviance, Vol.13, (2009), p.255; Rebecca L. Sandefur, Access to Justice: Classical Approaches and New Directions, in Rebecca Sandefur (ed.), Access to Justice, Sociology of Crime, Law and Deviance, Vol.12, p.x.

obstructing or limiting access to justice.[19] The battle for an accessible civil justice system cannot be attained through a single route.

Thus, adapting various measures, including alternative dispute resolution (ADR),[20] is commendable to provide an accessible dispute resolution system.[21] With regard to the new approach, legal scholars such as Macdonald and Currie calls for comprehensive access to a justice strategy that is multidimensional and takes a pluralistic and multidisciplinary approach in which the justice system partners with interest groups, communities and institutional sectors to produce less costly, faster, and efficient solutions.[22] This primarily suggests that the problem of lack of access cannot be solved with a one-size-fits-all approach. Hence, one would argue that formal civil justice reformers should consider a new approach to make the justice system accessible, and should not limit their actions to reshaping formal justice.[23]

The neglect of the means for effective exercise of legal rights is especially acute in the case of the low-income consumer whose daily life is inextricably connected to the law.[24] The consumer with a grievance needs to have an appropriate mechanism to seek a settlement, or even a choice of method to attain this.[25] Economic constraints, long delays, rising costs, high legal fees and complex procedures are among the problems that have been identified in the system on many occasions as factors, discouraging complainants from bringing their case before courts or from giving up along the way.[26]

Grievances arising from disputes with financial institutions usually involve small amounts which are substantially less than the fee required to compensate members of the private bar.[27] To a large degree, the consumer's apathy rests on a belief that nothing can be done about his problem or feeling that they have to accept something that

[19] Hurter, *supra* note 7, p.409.
[20] Robert M Goldschmid, *et-al*, Major Themes of Civil Justice Reform, Civil Justice Reform Working Group, (2006), para.6; Ab Currie, Down the Wrong Road-Federal Funding for Civil Legal Aid in Canada, *International Journal of the Legal Profession*, Vol.13:No.1, (2006), p.99.
[21] Hurter, *supra* note 7, p.421.
[22] Ab Currie, Riding the Third Wave-Notes on the Future of Access to Justice, Expanding Horizons: Rethinking Access to Justice in Canada, Proceedings of a National Symposium, Ottawa, (2000), pp.38-39
[23] Hurter, *supra* note 7, p.421.
[24] Thomas L. Eovaldi and Joan E. Gestrin, Justice for Consumers: the Mechanisms of Redress, *New York University Law Review*, Vol.66, (1971), p.282.
[25] Lord Chancellor, Access to Justice, Consumers' Association Lecture Proceedings, *RSA Journal*, Vol.141, (1992), pp. 21-32.
[26] Consumers and Access to Justice: One-Stop Shopping for Consumers?, Consumers International, (2011).
[27] Eovaldi and Gestrin, *supra* note 24, p.286.

cannot be changed.[28] Other consumers may resign themselves to their disappointment, perhaps experiencing a degree of self-blame for having allowed them to be duped.[29] In some cases, the apathy and inaction is traced to a lack of knowledge about sources of help.[30] Confronted with what they perceive to be an injustice, the only action taken by most poor consumers is self-help, which may be in the form of refusing to pay amounts which they do not believe are justly due, or lashed out violently against those elements in their midst which they perceived as symbols of oppression like the alienated inhabitants of the urban ghettos.[31] This problem is more serious for financial consumers due to the asymmetric relationship with financial institution and their lack of expertise.

Given the current socio-economic conditions in which the majority of citizens find themselves and their level of connection to financial institutions, it is imperative for legal institutions and other government bodies to devise just viable mechanisms that regulate the relationship between financial institutions and their customers. As part of an effort to suggest such mechanisms, this article in the next subsection evaluates the existing legal mechanisms in Ethiopia.

1.2. Financial Consumers' Access to Justice under the Ethiopian Legal Regime

Discussion under this part tries to show why one looks for an additional alternative to access justice for financial consumers in Ethiopia. The discussion highlights the limitations of the existing grievance handling mechanism for financial consumers. Particularly, it explores the limitations of the judiciary and out of court commercial dispute resolution institutions such as Trade and Consumers Protection Authority, Addis Ababa Chamber of Commerce and Sectorial Association-Arbitration Institute, Bahir Dar University Arbitration and Conciliation Center, and the National Bank of Ethiopia from the perspective of the propriety for solving financial consumers' disputes.

Undoubtedly, the Ethiopian legal system recognizes access to justice as one of the cardinal rules of human right principles. This is because Ethiopia has negotiated and ratified the terms of major human rights bills which recognize access to justice. This includes the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (ICCPR), and the

[28] Id., p.284; David Caplovitz, *The Poor Pay More: Consumer Practices of Low Income Families*, (1963), p.172.
[29] Eovaldi and Gestrin, *supra* note 24, p.284
[30] Id.
[31] Id., p.285.

African Charter on the Rights and Welfare of the Child (ACRWC). Access to justice is also recognized as a right under Article 37(1) of the FDRE Constitution which guarantees to all citizens the right to seek and access justice from "a court of law" or "any other competent body with judicial power".[32]

The practical realization of the constitutional right, however, depends on the right to access institutional mechanism designed for access to justice.[33] Despite a demonstrated desire by the government to achieve access to justice, the majority of the public is still far from benefiting from this right. This can largely be attributed to the rampant disregard to and massive violation of human rights and freedoms. Also, the judiciary in Ethiopia has been known for its low levels of impartiality, integrity, inefficiency, and incompetency.[34] Kokebe, in recognition of this ordeal, writes that "[h]owever, the real application of the right for Ethiopia is fraught by a multitude of legal and practical challenges".[35] With regard to access to courts and their performances, Assefa Fiseha also writes that because of the factors, external and internal to the judicial systems, "(…) the courts are far from accessible to the ordinary men and women".[36] One of the factors particularly identified by commentators is the citizens' low educational level in the country.[37] Such reality would pose a serious challenge in realizing access to justice for the society because the exercise of this right primarily requires awareness on the part of the individual targets of the right.

The other major problem contributing to the low level of access to justice in Ethiopia is the perception of people and institutions towards the level of independence and efficiency of the judiciary.[38] Several studies assessing the institutional performance of the justice system in this country reported low "level of trust and public confidence over courts, with national institutions rating them at 65%, parliament at 41%, the police at 68%, and the civil service at 59%".[39] This low level of trust and confidence

[32] FDRE Constitution, *supra* note 2, Article 37(1).
[33] K. I. Vibhute, Right to Access to Justice in Ethiopia: An Illusory Fundamental Right?, *Journal of the Indian Law Institute*, Vol.54:No.1, (2012), p.69.
[34] Leul Estifanos, Judicial Reform in Ethiopia: Inching towards Justice, https://www.ethiopia-insight.com/2021/09/05/judicial-reform-in-ethiopia-inching-towards-justice/ [accessed on October 9, 2021].
[35] Jemaneh, *supra* note 5, p.10.
[36] Assefa Fiseha, Improving Access to Justice through Harmonization of Formal and Customary Dispute Resolution Mechanisms (CDRMs), in Pietro S. Toggia, *et-al*, (eds.), *Access to Justice in Ethiopia: Towards an Inventory of Issues*, AAU, (2014), p.99.
[37] Jemaneh, *supra* note 5, p.10; Statistical data available on UNICEF website on Ethiopia, (2018), https://www.unicef.org/infobycountry/ethiopia_statistics.html[accessed on December 9, 2021].
[38] Jemaneh, *supra* note 5, p.10.
[39] Assefa Fiseha, Separation of Powers and Its Implications for the Judiciary in Ethiopia, *Journal of Eastern African Studies*, Vol.5:No.4, (2011), p.709.

seems to have been the result of rampant corruption, gross incompetence and political patronage on the part of the judiciary.[40]

Further, considerable proportions of the population living in rural areas are far from the service of the judicial organ of the government. Most people have to travel a day or two to access justice through regular courts. Also, they incur considerable amount of expenses causing strain to their living. Even if they access the courts shouldering all the hardship from physical and financial inaccessibility, the majority of the population do not believe that they can redress their losses through the instrumentality of the judiciary.[41] This, in turn, affects their access to information, which is instrumental in the fight for the realization of access to justice for the individual members of the society.[42]

In addition to the above factors, like any developing country, Ethiopia faces considerable shortage of trained legal professionals, like judges, court personnel and sometimes even the court infrastructure itself.[43] The problem, when it comes to the legal representation, has been worsening from time to time because of the under-funding, high payment for lawyers, the limited attention paid to the problem and more importantly because of the failure to understand that representation is a fundamental right.[44] This led Wendmagen Gebre to conclude that justice currently has been "(…) a rare commodity which is accessible only to the privileged, the powerful and the rich, excluding the poor, the marginalized and the weak"[45].

As a way to demonstrate instances of such barriers to justice in this country, this article examines the ways and processes through which the Trade Competition and Consumer Protection Authority (hereinafter TCCPA) handles financial consumers' complaints against financial institutions. TCCPA is an institution widely established in many countries as an agency responsible for protection of financial services consumers along with other goods and services.[46] In the same fashion, Ethiopia, introduced a consumer protection law and institution for its enforcement (i.e. TCCPA) which has the adjudicative authority, and also an appellate tribunal with authority to provide a

[40] Id.
[41] Id.
[42] Jemaneh, *supra* note 5, p.10.
[43] Fiseha, *supra* note 36, p.101.
[44] Jemaneh, *supra* note 5, p.10.
[45] Wendmagen Gebre, The Role of Traditional and Informal Justice in Promoting Access to Criminal Justice: A Comparative Study of South Africa, Uganda and Ethiopia, in Pietro S. Toggia,*et-al*, (eds.), *Access to Justice in Ethiopia: Towards an Inventory of Issues*, AAU, (2014), pp.123-124.
[46] Oya Pinar Ardicle et-al, Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set, WB Working Paper 5536, (2011), p.11.

binding decision as per Proc.No.813/2013. This proclamation gives protection for consumers of goods and services in general.[47]

In this regard, consumers of goods have unreserved right to claim remedy from this institution, but the financial consumers' access to this institution is doubtful. It is so because the definitional part of the proclamation defines 'service' as "any commercial dispensing of service for consideration (…)"[48]. Also the term 'consumer' is taken to mean "a natural person who buys goods and services for his personal or family consumption (…)."[49] Here, the definition of consumer covers buyers of goods and services for consumption only. Yet financial consumers may buy financial products and services expecting income in the form of interest. Particularly, legal entities as financial consumers such as small scale firms cannot access remedy from this organ since the term consumer refers only to natural person under the proclamation. Being this as it may, TCCPA has also other limitations to be a forum for justice, in general and financial consumers in particular. The contributing factors for the inadequacy of the institution include: lack of designated unit which specifically deal with financial consumers' disputes, adjudicators' lack of knowledge about the financial market, and consumers' lack of awareness about this Authority.[50] Further, lack of special procedure to resolve disputes amicably[51], the duty to apply the civil procedure or criminal procedure codes by the adjudicative bench and its appellate body[52], and consumers' duty to pay fees[53] impede the Authority's capacity to provide speedy and less costly justice to consumers, contrary to expectations from a tribunal or an out-of-court dispute resolution institution.

The other forums to arbitrate commercial disputes are the Addis Ababa Chamber of Commerce and Sectorial Association, Arbitration Institute (hereinafter AACCSA-AI)[54], and Bahir Dar University Arbitration and Conciliation Center (hereinafter

[47] Trade Competition and Consumer Protection Proclamation, Proclamation No.813/2013, *Federal Negarit* Gazzette, (2013), preamble [hereinafter Proc.No.813/2013].
[48] Id., Article 2(2).
[49] Id., Article 2(4).
[50] Tewachew Molla, Protection of Bank Depositors in Ethiopia: Analysis of the Legal and Institutional Frameworks, Master Thesis, BDU, (2020), pp.104-106; Oya Pinar Ardicle et-al, *supra* note 46, p.11.
[51] Proc.No.813/2013, *supra* note 47, Article 32-33.
[52] Id., Article 41.
[53] Id., Article 40.
[54] Chambers of Commerce and Sectoral Association Establishment Proclamation, Proclamation No.341/2003, *Federal Negarit Fezetta*, (2003) [hereinafter Proc.No.341/2003]; The Revised Arbitration Rules of the Addis Ababa Chamber Commerce and Sectorial Associations, Addis Ababa Chamber of Commerce and Sectorial Association, (2008), Articles 4, 5 [hereinafter ACCSA Arbitration Rules].

BDU-ACC)[55]. The impact of these service providers is so limited that they could barely address the needs of financial consumers for judicial redress. [56] Several reasons underlie their limited impact on serving the ends of justice. Firstly, they lack the jurisdiction to arbitrate financial consumers' disputes. For instance, the AACCSA-AI is mandated to arbitrate and settle disputes arising only out of business transactions between members, but not between members and consumers.[57]

Another problem is the disputant parties in both cases are required to pay arbitration fee and to cover costs such as fees to arbitrators, application/registration fee, arbitration fee, and administrative cost. This makes the institutional service very costly and unjust for the economic situation of small financial consumers.[58] Setting aside small financial consumers even investors do not comfortably decide to pay such costs in their moves to settle their disputes through these institutions.[59] This suggests the need for institutions such as financial Ombudsman which minimizes such costs or adjudicates disputes free of cost.

Moreover, AACCSA-AI suffers from other limitations such as lack of business community's interest to join the association as members; lack of self-initiated but demand driven culture of the Chamber/business associations; failure to represent the real interest and views of its members but rather serving government policies and ideologies; lack of effective communication and internal engagement with the members; and lack of transparent governance system.[60] Furthermore, lack of necessary support from the government, absence of comprehensive and inclusive laws, failure to acknowledge the right of associations to advocate representing its members, and non-involvement of business associations in the policy debate damages its reliability as an access to justice in general.[61]

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[55] Arbitration, Mediation, and Conciliation Proceeding Regulation, Bahir Dar University Arbitration and Conciliation Center, (2014), Article 3 [hereinafter BDU Arbitration Regulation].

[56] Alemayehu Yismaw, The Need to Establish a Workable, Modern and Institutionalized Commercial Arbitration in Ethiopia, *Haramya Law Review*, Vol.4:No.1, (2015), pp.47-49; Yohannis Woldegebriel, Current Status of Alternative Dispute Resolution in Ethiopia, p.3. http://www.addischamber.com/file/ICT/20140812/Current%20Status%20of%20Alternative%20Dispute%20Resolutions.docx/ [accessed on May 2021].

[57] Proc.No.341/2003, *supra* note 54, Article 5 (6); ACCSA Arbitration Rules, *supra* note 54, Article 4, 5; BDU Arbitration Regulation, *supra* note 55, Article 3.

[58] ACCSA Arbitration Rules, *supra* note 54, Articles 32-35, Annex I-III; BDU Arbitration Regulation, *supra* note 55, Articles 77, 79, 80, 81, Annex-III.

[59] Civil Code of Ethiopia, Proc.No.165/1960, *Negarit Gazzeta*, (1960), Articles 3318-3346; Civil Procedure Code of Ethiopia, Proc.No.52/1965, *Negarit Gazzeta*, (1965), Articles 315-319.

[60] Yismaw, *supra* note 56, p.47; Bacry Yusuf, et-al, Situation Analysis of Business and Sectoral Associations in Ethiopia, Addis Ababa Chamber of Commerce and Sectoral Association, (2009), pp. 89-91.

[61] Yismaw, *supra* note 56, p.47; Bacry Yusuf, *et-al*, *supra* note 60.

For example, the BDU-ACC−except in a single pending commercial case which is unrelated to financial matters− was not functional since its establishment in 2014. Besides, both the BDU-ACC and the AACCSA-AI are looking for mandatory arbitration agreement in the form of arbitral submission or clause to establish jurisdiction[62], which is criticized for not working to the parties with asymmetric business relationship like consumers and financial institutions.[63]

This evidence affirms that limited number of institutions cannot be reliable access to justice. It is the availability of different forums for access to justice that can widen the individual's choice. Authorities in this country come to see this reality and are showing concern for the challenges. Accordingly, based on the gaps with respect to courts, the TCCPA, and the two commercial arbitration institutions (AACCSA-AI and BDU-AC) to address financial consumers' demand for justice, Ethiopia has begun to devise a mechanism to fill this gap.[64]

Some of such moves include the issuance of financial inclusion strategy in 2017, financial consumers' protection directive in 2020, and amendment of the financial businesses (banking, insurance, and micro-finance) proclamation in 2019.[65] Further, the national Parliament, in 2019, confirms the minimum protection given to financial consumers' interest and understands the need as well as importance of protecting them, thereby giving mandate to the National Bank of Ethiopia (hereinafter represented by NBE) to issue a directive determining the minimum conditions for protection of financial consumers.[66] The NBE on its part issued the Financial Consumer Protection Directive stating that establishing clear and objective dispute resolution mechanisms are necessary to promote fair, professional, responsible and

[62] BDU Arbitration Regulation, *supra* note 55, Article 3; Proc.No.341/2003 *supra* note 54, Article 4; ACCSA Arbitration Rules, *supra* note 54, Article 4.

[63] Mala Sharma, A Fair Alternative to Unfair Arbitration: Proposing an Ombudsman Scheme for Consumer Dispute Resolution in the USA, *Journal of the International Ombudsman Association*, (2020), pp.3,6; Mark E. Budnitz, Arbitration of Disputes between Consumers and Financial Institutions: A Serious Threat to Consumer Protection, *Ohio State Journal on Dispute Resolution*, Vol.10:No.2, (1995), pp.299-309.

[64] Cumulative reading of Banking Business (Amendment) Proclamation, Proclamation No.1159/2019, *Federal Negarit Gazette*, (2019), Article 57 [hereinafter Proc.No.1159/2019]; Insurance Business (Amendment) Proclamation, Proc.No.1163/2019, *Federal Negarit Gazette*, (2019), Article 59 [hereinafter Proc.No.1163/2019]; Micro finance Business (Amendment) Proclamation, Proclamation No.1164/2019, *Federal Negarit Gazette*, Article 26 [hereinafter Proc.No.1164/2019]; Financial Consumer Protection, Directive No.FCP/1/2020, NBE, (2020), Article 4.5.2 Cum. Article 2.12 [hereinafter FCP/01/2020]; Financial Inclusion Strategy, NBE, (2017).

[65] Id.

[66] Id., Proc.No.1159/2019 Article 57; Proc.No.1163/2019 Article 59; Proc.No.1164/2019 Article 26.

transparent financial transactions towards the financial consumers.[67] The directive also lays a ground for establishment of an out-of-court dispute resolution body that specifically serves financial consumers' claim for justice in addition to the internal dispute resolution system.[68] As such, it defines external dispute resolution body as "a dedicated scheme, to be established by the National Bank, for resolving disputes between the financial consumer and/or the security provider and financial service provider".[69] In addition, courts are also recognized as arbiter of financial consumers' disputes.[70]

Yet except these two provisions, the directive does not have any indication about the character or feature of the scheme to be established. From these evidences, one can infer that the NBE is still following a laissez-faire approach to the protection of financial consumers.[71] However, one can at the same time see that Ethiopia is in transition from general consumers' protection framework to particular sectors. For instance, in this transitional move, the issue of financial consumers' protection becomes part of the NBE's financial sector regulatory and supervisory role widely reported to have an important impact in protecting the rights of consumers in other countries.[72]

2. Financial Ombudsman Scheme as ADR Institution

2.1. Its Concept and Role to Access Justice

A closer look into the analyses made so far shows that despite the encouraging institutional moves to establish more ways of protecting consumer rights, the existing

[67] FCP/01/2020, *supra* note 64, the preamble.

[68] However, this mechanism is subject to critics for its inadequacy in rendering justice to the financial consumer because of its inefficiency, lack of effectiveness and trustworthiness, and favor towards maximizing the interest of the respective employing institution. Kebede Teshale Shode, Determinants and outcome of Customer Satisfaction at the Commercial Bank of Ethiopia: Evidence from Addis Ababa, *African Journal of Marketing*, Vol.9:No.7, (2017), p.111, 118; Mulugeta Bekele, Practices of Customer Protection in Financial Institutions: The Case of Selected Private Commercial Banks, Master Thesis, St. Mary's University, (2015), p.35; WB (2011), p.26; Adeola A. Oluwabiyi, A Comparative Legal Analysis of the Application of Alternative Dispute Resolution to Banking Disputes, *Journal of Law, Policy and Globalization*, Vol. 38, (2015), p.5; Good Practices for Financial Consumer Protection, WB, (2012), pp.28-29 [hereinafter WB (2012)]; OECD, Effective Approaches for Financial Consumer Protection in the Digital Age: FCP Principles 1, 2, 3, 4, 6 and 9, Task Force on Financial Consumer Protection, (2019), p.46 [hereinafter OECD (2019)]; Allan Asher, *et-al*, Asean Complaint and Redress Mechanism Models, Models for Internal Complaint Systems and External Consumer Redress Schemes in Asean, (2013), pp.20-53;

[69] FCP/01/2020, *supra* note 64, Article 2.12.

[70] Id, Article 4.5.2 cum. Article 2.12.

[71] Sharma, *supra* note 63, pp.329-332.

[72] Oya Pinar Ardic, *et-al*, *supra* note 46, pp.11-12.

grievance mechanism or the moves to formulate others are far from meeting the growing demand for access to justice in Ethiopia. This suggests the need for a more practical move to establish new justice-dispensing institutions.[73] To this end, establishing an Ombudsman scheme as part of ADR systems can be one of the viable options to provide accessible, fair and faster remedies for aggrieved ones.[74]

Traditionally, Ombudsman refers to a public official with a role in the context of administrative justice (separate from the executive and judiciary) to deal with citizens' grievances and complaints against public bodies.[75] It addresses complaints from individuals, and acts to investigate, review and address individual or systemic violations or maladministration.[76] Their role evolved from being a prosecutor of official wrongdoing to defender of citizens' rights and interests in good administration.[77] Moreover, independence, impartiality, and confidentiality are taken to be critical attributes of an Ombudsman's complaint-handling mechanism.[78] The institution expanded its function as a provider of ADR and facilitator of dispute resolution over the ages.

In the late 20th century, the role of the Ombudsman was further transformed to accommodate the operations of private sector organizations and became an institutional means for the resolution of employee grievances, customer complaints, and workplace disputes.[79] This expansion of its role from governmental organizations to the private sector, open a space of opportunity to entertain a wider range of disputes. Specifically, the investigation of maladministration, which was a major function of Ombudsman in the public sphere[80], gave way to address systemic institutional issues

[73] Rescoe Pound, The Administration of Justice in the Large City, *Harvard Law Review*, Vol.26:No.4, (1963), pp.66-69; Eovaldi and Gestrin, *supra* note 24, p.302.

[74] Neville Melville, Has Ombudsmania Reached South Africa? The Burgeoning Role of Ombudsmen in Commercial Dispute Resolution, *South African Mercantile Law Journal*, Vol.22:No.1, (2010), pp.50, 54; H McVea and P Cumper, The Financial Ombudsman Service and Disputes Involving Wider Implications Issues, *Lloyd's Maritime and Commercial Law Quarterly*, (2007), pp.246-247.

[75] Phillip Rawlings and Willett Chris, Ombudsman Schemes in the United Kingdom's Financial Sector: The Insurance Ombudsman, the Banking Ombudsman and the Building Societies Ombudsman, *Journal of Consumer Policy*, Vol.17:No.3, (1994), pp.307-333; Sabine Carl, The History and Evolution of the Ombudsman Model, in Marc Hertogh and Richard Kirkham (eds.), *Research Handbook on the Ombudsman*, (2018), pp.17, 19.

[76] Id.

[77] Gerald E. Caiden, *et-al*, The Institution of Ombudsman, in Gerald E. Caiden (ed.), *International Handbook of the Ombudsman: Evolution and Present Function*, Greenwood Press, (1983), p.10.

[78] Donald C. Rowat, The Parliamentary Ombudsman: Should the Scandinavian Scheme Be Transplanted? , *International Review of Administrative Sciences*, Vol.28, (1962), pp.399, 400.

[79] Frank Evans and Shadow Sloan, Resolving Employment Disputes through ADR Processes, *South Texas Law Review*, Vol.37, (1996), pp.745, 751-52; Frank Elkouri, *et-al*., *How Arbitration Works*, Kenneth May (ed.), 8th ed. (2016).

[80] Gerald E. Caiden, *et-al*, *supra* note 77, p.10.

in private organizations such as Financial Services Ombudsman scheme, energy, telecommunication, finance, etc.[81]

Further, consumerism and privatization of public services create private Ombudsman scheme with a goal of protecting economic interests and ensuring access to justice.[82] The scheme, which is widely known as (financial Ombudsman scheme), has become an indispensable ADR tool in the financial community.[83] It has a principal function of dealing with complaints of consumers about financial services providers by mediating and, where necessary, by investigating and adjudicating.[84] As such, like other Ombudsman schemes, the financial Ombudsman scheme addresses the policy concerns such as power imbalances between financial services providers and consumers.[85] In doing so, the financial Ombudsman scheme can be seen as a part of a broader scheme of providing access to justice which, in a liberal democratic society, fulfills the normative function of ensuring the rule of law.[86]

At this point it is important–as a way to rationalize the need for more institutions of access to justice–to understand the financial services and operation of contemporary financial institutions. Financial services have particular features which make the issue of consumer access to justice or remedy especially relevant. First, financial services often involve highly complex products.[87] This gives rise to inevitable information asymmetry, where financial service providers know a great deal more about their products than even cautious and prudent consumers. This, in turn, leads to unavoidable consumer difficulty in assessing the nature and quality of the product purchased. The complexity of the products also gives rise to potential abusive selling practices. Case studies on the operation of the financial Ombudsman scheme provide a range of examples of such practices.[88] Moreover, many financial services are purchased on a 'credence' basis whereby their value to the consumer becomes apparent only with the passing of time. For example, the determination of whether an insurance contract

[81] Julinda Beqiraj, *et-al*, *supra* note 17, pp.7, 12, 27; Najmul Abedin, Conceptual and Functional Diversity of the Ombudsman Institution: A Classification, *Administration and Society*, Vol.43:No.8, (2011), p.896.

[82] Abedin, *supra* note 81, p.896; Julinda Beqiraj, *et-al*, *supra* note 17, p.12; Mary Donnelly, The Financial Services Ombudsman: Asking the Existential Question, *Dublin University Law Journal*, Vol.35, (2012), p.230.

[83] Walter Merricks, The Financial Ombudsman Service: Not Just an Alternative to Court, *Journal of Financial Regulation and Compliance*, Vol.15, (2007), pp.135-36.

[84] Donnelly, *supra* note 82, p.229.

[85] Id., p.230.

[86] Id.

[87] Id., p.233.

[88] There are numerous examples of mis-selling of products, including to elderly and uninformed consumers.

meets a particular consumer's needs typically becomes apparent to the consumer only when s/he makes a claim on the insurance policy.[89]

According to Cappelletti, the access movement identified obstacles which restrict individuals' access to justice, focusing especially on those individuals who were at a particular disadvantage, through poverty, asymmetric economic relationship with in the society, or lack of education.[90] Thus, financial Ombudsman scheme is a considerable help in empowering weak consumers in the fight against such barriers to justice. Further, this institution possesses many of the benefits offered by other ADR mechanisms. It allows economical utilization of time and money, flexibility, independence, efficiency, impartiality, convenience, non-binding decisions on consumers and confidential approach to the resolution of financial disputes.[91] In addition, unlike other ADR mechanisms, it plays a role in identifying and resolving systemic issues.[92] Experience in many jurisdictions show that such feature of the institution enables it to attain many of the ends of justice aspired by financial consumers.

The lessons from other countries suggests that establishment of a financial Ombudsman scheme requires consideration of such qualities. Among others, the financial Ombudsman scheme must be inexpensive and accessible to the needy.[93] The service should not only be made inexpensive to the economically strained parties, but should also be prohibited to the economically stronger parties who move to combine the inexpensive service from the institution with their strong economic power to improve their position relative to the weaker party. For example, it should prohibit stronger parties to have access to legal representation for lower costs in circumstances where this is unrealistic for the weaker party.[94] This depends on a variety of

[89] Donnelly, *supra* note 82, pp.233-234.

[90] Mauro Cappelletti, Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to Justice Movement, *Modern Law Review*, Vol.56, (1993), pp.282-287.

[91] Ben Bradford and Naomi Creutzfeldt, Procedural Justice in Alternative Dispute Resolution: Fairness Judgments Among Users of Financial Ombudsman Services in Germany and the United Kingdom, *Journal of European Consumer and Market Law*, Vol.7:No.5, (2018), pp.188-89; Nuannuan Lin and Weijun Hu, Systemic Issue Resolution in Two Dimensions: A Reflection Based on a Ten-Year Review of the Australian Financial Ombudsman Service, *Harvard Negotiation Law Review*, Vol.26, (2020), p.128.

[92] Christopher Hodges, Collective Redress: The Need for New Technologies, *Journal of Consumer Policy*, Vol.42, (2019), pp.59, 68; Chris Gill, *et-al*., The Managerial Ombudsman, *Modern Law Review*, Vol.83, (2020), pp.797, 798, 829.

[93] United Nations Guidelines for Consumer Protection (as expanded in 1999), UN Conference on Trade and Development, UN, (2001); which requires governments to establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.

[94] Donnelly, *supra* note 82, p.233.

institutional and jurisdictional arrangements, operational methods and decision-making processes the financial Ombudsman scheme sets.

The provision of effective mechanisms for consumer dispute resolution also serves economic goals in addition to ends of justice. The same is true for the financial Ombudsman scheme. Particularly, the financial Ombudsman scheme contributes to a more efficient market in financial services.[95] Effective consumer redress contributes to heightened consumer confidence and improved market discipline.[96] However, the economic imperative for effective consumer dispute resolution is not concerned with poorer or more vulnerable consumers to level the need for access to justice compels.[97]

Looking into some historical developments of the financial Ombudsman scheme as an institution, one can see that it was mainly industry based or sector specific financial institutions such as banking, insurance, etc., though recently it is advanced to a harmonized financial Ombudsman to all financial institutions.[98] Fragile industry based financial Ombudsman confuses consumers in choosing among the financial sector Ombudsmen where to plead leads to a desire to eliminate "gaps, overlaps and inconsistencies" in the financial dispute resolution system by merging various sector specific dispute resolution services.[99] The industry based financial Ombudsman scheme in Australia could be an example which later on the financial Ombudsman scheme has consolidated various overlapping industry based dispute resolution systems that existed across the Australian financial sector to form a "one-stop shop" for consumers to resolve any of their disputes with financial services providers instead of navigating across multiple schemes based on the category where their disputes fell under.[100] Thus, the historical development of the financial Ombudsman scheme has a lot of lessons to draw for contemporary institutional establishment and practices.

2.2. Possible Challenges and Enabling Environments for Adapting Financial Ombudsman Scheme in Ethiopia

Adaption of financial Ombudsman scheme in Ethiopia may face challenges though not exceptional. First, there is an economic constraint whereby certain classes of

[95] Id., p.230.
[96] Id., pp.234-235.
[97] Id., p.235.
[98] WB (2012), *supra* note 68.
[99] Regulatory guide 267(RG 267), Oversight of the Australian Financial Complaints Authority, Australian Securities and Investments Commission, (2018); Paul Ali, *et-al*., Australia's Financial Ombudsman Service: An Analysis of Its Role in the Resolution of Financial Hardship Disputes, *Conflict Resolution Quarterly*, Vol.34:No.2, (2016), pp.167-168.
[100] Lin and Hu, *supra* note 91, pp.124-125; Alternative Dispute Resolution Discussion Paper: Submission by Industry-Based External Dispute Resolution Scheme, Submission no.ADR/22, pp.1-3, 12.

people who, because of poverty and/or associated factors, have little or no access to information necessary for the vindication of their legal rights. The lower literacy level of citizens' causes them to have less motivation, information and power to take actions necessary to exercise his or her rights. The business community's skeptics towards institutionalized ADR methods and love of customary and traditional dispute resolution mechanisms may also be another challenge.[101]

Depending on the design choices, financial Ombudsman scheme demands sustainable financial source which can be generated from members (financial institutions), the government and service fees (paid by businesses or consumers). This may be a challenge in Ethiopia, where one third of the population is not able to meet their basic needs or pay service fee to access remedy for grievances. Further, the business community is substantially skeptical about the reliability of the remedy from institutional commercial arbitrators in the country. This in turn is a major source of failure to generate funds for these institutions from the business community.[102] Furthermore, lack of mediator or adjudicator with the required level of expertise in the field is another challenge.

Albeit these and other possible challenges, there are enabling environments for adapting the financial Ombudsman scheme in Ethiopia in the future than the past. First, the adoption of financial inclusion strategy by NBE is one fertile ground to suggest such scheme in Ethiopia.[103] This strategy puts financial consumer protection as one of its vision and mission for ensuring financial inclusion.[104] Consideration of financial consumers' protection as an explicit agenda by the policymakers, and issuing a law to that end shows the policymakers and the regulatory body's attention for financial consumers' protection and particularly financial consumers' dispute resolution.[105] This interest of the government to protect financial consumers smoothens the adaptation of financial Ombudsman scheme in Ethiopia. This also

[101] Yismaw, *supra* note 56, p.48.

[102] Booz Allen Hamilton, Ethiopia Commercial Law and Institutional Reform and Trade Diagnostic, United States Agency for International Development, (2007), p.70; Yismaw, *supra* note 56, p.48.

[103] Financial Inclusion Strategy, NBE, (2017), pp.33.

[104] Id., pp.27-35.

[105] In Ethiopia, there was a general consumer protection law with no explicit reference to financial consumers until 2019. Trade Competition and Consumers Protection Proclamation, Proclamation No.813/2013, *Federal Negarit Gazetta*, (2013), Article 14 and following provisions; Proc.No.1159/2019, *supra* note 64, Article 57; Proc.No. 1163/2019, *supra* note 64, Articles 54, 56, 58; Proc.No.1164/2019, *supra* note 64, Article 27. The *lex preparatories* of the amendment proclamations has also revealed the government's emphasis for protection of financial consumers' nowadays. የኢትዮጲያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ, 5ኛዉ የህዝብ ተወካዮች ም/ቤት, 4ተኛ አመት የስራ ዘመን, 44ኛ መደበኛ ስብሰባ ቃለ ጉባኤ, ጥራዝ 5, (2011), ገጽ 62-64.

uncovers the country's transition from attraction of investors in the market to consumers' protection issue.

In addition, NBE's consideration of financial literacy as part of the financial inclusion strategy to improve the financial consumers' financial education and awareness will maximize consumers' ability to exercise their legal rights in relation to financial products and services.[106] Theoretical and empirical evidence in the literature shows that financial education, information and guidance−while serving as an ingredient for the financial Ombudsman scheme efficacy− improve consumers' ability to manage their personal finances, protect themselves against risks, and not to be victims of financial fraud.[107] Moreover, the operation of the traditional or public Ombudsman lends a positive insight to the adaptation of the financial Ombudsman scheme, the private Ombudsman in Ethiopia. Experiences of institutions such as the Ethiopian Chamber of Commerce and Sectorial Association's and BDU Arbitration and Conciliation Center will have substantial contribution [108] to the adaptation process. As such, they can provide ancillary support for the architecture for the establishment and growth of a financial Ombudsman scheme by filling the knowledge gap in the area of conciliation and arbitration of financial disputes. Finally, the NBE as an authorized authority for determining the conditions for financial consumer protection can institute and integrate the financial Ombudsman scheme with the other justice machinery.

3. Fundamentals of Financial Ombudsman Scheme

The financial Ombudsman scheme has long been promoted, in legal jurisdictions such the EU and WB, as a mechanism to solve consumer disputes.[109] It gradually becomes broadly accepted in other legal practices due to its independence, impartiality, convenience, efficiency and money and time saving qualities.[110] However, its effectiveness depends on applying good institutional design choices. Applying the good design principles helps the Ombudsman to fulfill its purpose and to sustainably maintain its legitimacy by users. In this section, the author outlines the issue of determining the necessary precautions or fundamentals of financial Ombudsman scheme, and suggests consideration for designers in choosing the design of the financial Ombudsman scheme workable in the context of Ethiopia.

[106] See, *supra note* 103, strategy 4.
[107] WB (2012), *supra* note 68, p.29.
[108] BDU Arbitration Regulation, *supra* note 55, Article 4(b).
[109] Horst G. M. Eidenmuller and Martin Engel, Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe, *Ohio State Journal on Dispute Resolution*, Vol.29:No.2, (2014), p.261; Gerhard Wagner, Private Law Enforcement through ADR: Wonder Drug Or Snake Oil?, *Common Market Law Review*, Vol.51:No.1, (2014), p.165.
[110] Chris Gill, *et-al*, Designing Consumer Redress: A Dispute Model Design (DMD) for Consumer to Business Disputes, *Legal Studies Journal*, Vol.36:No.3, (2016), p.439.

3.1. Jurisdiction

Determining which complaints fall within the jurisdiction of the scheme is one of the primary tasks in the formulation of a financial Ombudsman scheme. Such determination involves multifaceted considerations. Among others, the jurisdiction of the financial Ombudsman scheme is (a) split between compulsory and voluntary categories; (b) depend on membership requirement, and (c) reflects the varied background from which it evolved. "Compulsory category" denotes the obligation imposed on a regulated firm to submit to the procedure and comply with the decision of the Ombudsman. As the name implies, there is no obligation imposed on regulated firms to submit to the voluntary jurisdiction of the financial Ombudsman scheme.[111] Also, no such obligation is imposed on the complainant.

The jurisdiction of voluntary financial Ombudsman scheme depends on the "buy-in" by the financial institutions and limited to complaints with respect to products and services totally agreed by its members.[112] As a result, it has the opportunity to leave the significant area of complaints outside its scope.[113] This jurisdiction, limited only to member financial firms and agreed products or services, is perhaps the greatest threat to the credibility of the scheme.[114] In addition, concerns are widely raised about the independence of the voluntary schemes, which will be more futile when the scheme depends on industry funding.[115] To widen its jurisdictional scope by attracting membership, this type of scheme requires effort and expensive frequent advertisement campaigns.[116] However, others argue that voluntary financial Ombudsman scheme attracts financial sectors. This is mainly because membership of the schemes provides a competitive marketing advantage for participants who can advertise membership as a means of attracting customers.[117] In addition, the scheme provides a bulwark against the possibility of an externally imposed scheme, thus leaving some degree of control within the industry. [118] The non-existence of publicity associated with adverse judicial findings in this scheme also reduces the costs of breach, thereby justifying the benefits of this scheme. Still another reason for using a voluntary scheme is its role in dispute

[111] Iain MacNeil, Consumer Dispute Resolution in the UK Financial Sector: The Experience of the Financial Ombudsman Service, *Law and Financial Market Review*, Vol.1:No.6, (2007), p.516.
[112] Ewart S Williams, The Benefits of having a Financial Services Ombudsman, at the 9th Annual Breakfast Meeting, Office of the Financial Services Ombudsman, Port-of-Spain, (2012), p.4.
[113] Id.
[114] Id.
[115] Donnelly, *supra* note 82, p.237.
[116] Williams, *supra* note 112, p.4.
[117] Donnelly, *supra* note 82, p.236.
[118] Id.

resolution. Through this scheme, dispute resolutions can be individualized and the consequences of binding precedents can be avoided.[119]

The fact that voluntary schemes were beneficial for financial service providers does not, of course, mean that they could not also serve an access function. The private sector schemes meet a genuine need among consumers for an accessible dispute resolution mechanism.[120] Yet it needs more actions to be inclusive of all consumers' complaints. Particularly, to attain inclusiveness, the voluntary scheme has to be backed by laws with appropriate sanctions for non-compliance.[121]

Now we turn to financial Ombudsman scheme with compulsory membership jurisdiction. This scheme, in contrast to the voluntary scheme, has a significantly different relationship with financial institutions it oversees.[122] Compulsory or mandatory scheme achieves high coverage of consumers' complaint because of the number of financial firms' and products or services membership, and provision of reliable, binding and a precedent decision. Due to that, it can ensure higher consumer confidence in accessing justice for their grievances, and enable financial firms to have effective quality management by learning from complaints and market development.[123] Also, it is important to note that an efficient functioning compulsory scheme needs adequate resourcing and increasing its capacity to cope with the changing financial market and strengthen its credibility in the eyes of consumers and service providers.[124]

Apart from such enabling inputs, financial Ombudsman scheme should have clear codes of conduct and standard contracts[125] binding to all financial sector businesses.[126] Also, it requires publicizing the scope of operation and services it provides.[127] Particularly, consumers should be clearly informed about the types of disputes the scheme entertains, the eligibility of consumers for the service (i.e. foreign consumers, small businesses or individuals), the time limit for bringing a complaint, and the limits on the amount of compensation.

3.2. Funding

[119] Id.
[120] Id.
[121] Williams, *supra* note 112, p.4.
[122] Chris Gill, *et-al*, *supra* note 110, pp.438-463; Donnelly, *supra* note 82, p.237.
[123] Financial Services User Group's (FSUG), Opinion on the Use of Alternative Dispute Resolution, FSUG c/o European Commission, EU, (2011), p.2 [hereinafter FSUG].
[124] Williams, *supra* note 112, p.4.
[125] WB (2012), *supra* note 68, p.29.
[126] Id.
[127] Consumer Empowerment and Market Conduct Working Group Survey Report: Alternative Dispute Resolution, (2017), p.5 [hereinafter CEMC Working Group].

One of the major questions surrounding the establishment and running of a financial Ombudsman scheme is whether funding the scheme will be met from the public purse or by the financial industry. The international experience shows that financial Ombudsman schemes are largely funded by the industries they oversee, although sometimes they are publicly funded. For instance, in Germany, the Bundesanstaltfur Finanzdienstleistungsaufsicht (BaFin) is funded by fees and contributions from the financial institutions and their subsidiary undertakings.[128] Countries that fully or partially fund the Ombudsman from public treasury include Sweden, Netherlands, Ireland and UK.[129] Still other use options of funding such as funding through general membership fees, levies, case fees or a combination of these.[130]

Decisions on such choices needs important considerations such as whether the funding model is aligned to the broader goals of the scheme; for example, whether the fee is used to incentivize the scheme at early stage and then will be curtailed. A related issue is whether the consumer is expected to pay a fee for using the scheme.

The international practice shows that there are varying models with regard to the nature of the fee and its underlying purposes. For instance, in Armenia, Cyprus and Denmark, claimants pay an arbitration fee and case hearing costs, but later recovered by the losing party.[131] Also in Singapore, both the consumers and the institution will pay case fee (though with disparity in amount) during adjudication process and exists returnable fixed amount.[132] In contrast to this model of States, in Germany, BaFin offers the services of an arbitration board free of charge for the consumer.[133] This same practice is widely used in most other States where Mauritius Office of Ombudsperson provides free access to justice to consumers.

[128] Federal Financial Supervisory Authority, Arbitration Board at BaFin,Federal Financial supervisory Authority, Germany, https://bit.ly/2LWzwQd [last accessed on May 27, 2022].

[129] In Sweden the national board for consumer disputes is a public authority and is fully funded by the state. In the Netherlands, the *Geschillencommissies* system for resolving disputes receives some public funding. In the UK, only the Pensions Ombudsman is funded by government in the context of consumer to business disputes.

[130] See, WB (2012), *supra* note 68, p.6. In Ireland, Financial Services and Pensions Ombudsman (FSPO) is funded by levies on financial services providers and by a grant from the government. See, Financial Services Ombudsman, Annual Review, (2017), https://bit.ly/2M6arPv [accessed on January 02, 2022]. In Singapore, adjudication case fee applies. See, Policy Consultation on the Financial Industry Disputes Resolution Centre Ltd, Monetary Authority of Singapore,https://www.mas.gov.sg//media/MAS/resource/publications/consult_papers/2004/Public_Consultation_Paper_FIDReC.pdf [accessed on May 27, 2022].

[131] CEMC Working Group, *supra* note 127, p.6; The Law Relating to the Establishment and Operation of a Single Agency for the Out-of-Court Settlement of Disputes of Financial Nature, (2010), https://bit.ly/2vpQmMP [accessed on May 2021]; The Danish Financial Complaint Boards, Submitting a Complaint, https://bit.ly/2mXiMKf [accessed on July 2021].

[132] See *supra* note 129.

[133] See, *supra* note 128.

Finally, the European Union Directive on ADR schemes guarantees the right to free services of the scheme and requires nominal fee only where it will not cause a barrier for consumers.[134] From these analyses of the varying models one would see that a free financial Ombudsman scheme service is largely commendable as a way to avoid cost barrier for consumers.[135]

3.3. Governance

Apart from the quality and modalities of service fee, the issue of the financial Ombudsman scheme governance also needs particular attention. The issue of financial Ombudsman scheme governance involves the proper consideration of the fulfillment of certain minimum requirements such as expertise, independence, impartiality, transparency and accountability of the financial Ombudsman to the national competent authority.[136] As such, designing a proper governance arrangement is helpful to demonstrate the scheme's independence, to build trust, and to ensure that appropriate oversight and accountability arrangements are in place.[137]

Independence in this context requires financial Ombudsman scheme to be legally independent of the financial firms, or at least from its expertise. To this effect, board members are required to be independent of the member financial firms.[138] Yet it is important to note that the issue of independence and accountability gets complicated when the Ombudsman is voluntary and funded by the financial firms. If the scheme is funded by firms to demonstrate sufficient independence, consumers should be equally represented in its management board. This, in turn, demands close regulatory supervision.[139] In any way industry funding must not lead to conflict of interest, and the Ombudsman must be neutral and independent of the financial firms, which, in one way or another, depends on the terms of reference, specific structure of the scheme, and the legal principles governing the scheme.[140]

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[134] EU's Directive on Alternative Dispute Resolution for Consumer Disputes (2013/11/EU), (2013), Article 8 (c) [hereinafter EU Directive]; A Known and Trusted Ombudsman System for All Consultation Policy Document, National Treasury, Republic of South Africa, (2017), p.26.
[135] CEMC Working Group, *supra* note 127, p.5.
[136] EU's Directive, *supra* note 134, Articles 6, 7.
[137] Chris Gill, *et-al*, *supra* note 110, p.455.
[138] CEMC Working Group, *supra* note127, p.5.
[139] Steffek Flix *et-al*., Guide for regulating dispute resolution: principles and comments, in Flix Steffek and Hannes Unberath(eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads,* Oxford: Hart Publishing, (2013), p.29; EU's Directive, *supra* note 134, Article 6(4).
[140] FSUG, *supra* note 124, p.7.

Impartiality requires the Ombudsman to attain consumer trust and confidence to the effect of examining a case fairly, depending on relevant laws and precedents.[141] Many argue that such institutional trust and impartiality is attained where it is funded by the public. Others, however, hold that public funding may not be always necessary. If the Ombudsman is appropriately institutionalized, industry funded schemes can also work well. For instance, a German Insurance Ombudsman scheme for instance avoids the government funding and successfully functions through industry funding scheme.[142]

The principle of transparency demands the Ombudsman to make public its activities and operations, powers and procedures, type and effect of its decisions as well as case studies and guidance notes.[143] It is also expected to publish reports containing its work details at least annually to promote public accountability for its decisions and actions.[144] Public reporting requirement has positive impact on governance, [145] market regulation, and quality control.[146] Yet reporting requirement has to be in conformity with the confidentiality of parties' information.[147]

3.4. Accessibility

Accessibility is the fourth consideration in the adoption of an financial Ombudsman scheme setup. Global experience shows that efficient financial Ombudsman schemes are accessible to consumers.[148] For the scheme to be accessible, primarily the financial Ombudsman as well as the financial firms (during formation of contract and later when consumers are dissatisfied by its products and services as well as its internal solutions) should inform consumers about the place and the functions of the Ombudsman.[149] Further, design choices relating to accessibility should take into account the extent to which the scheme provides information, advice, representation, and whether the scheme takes a proactive approach in raising consumers' awareness.[150]

[141] Williams, *supra* note 112, p.4.
[142] Steffek Flix *et-al*, *supra* note 139, p.7.
[143] David Thomas and Francis Frizon, Resolving Disputes between Consumers and Financial Businesses: Fundamentals for a Financial Ombudsman, WB, (2012), p.8; Steffek Flix *et-al*, *supra* note 139, p.5.
[144] Id; Christopher Hodges, *et-al*, *Consumer ADR in Europe: Civil Justice Systems*, Oxford: Hart Publishing, (2012), p.452.
[145] Richard Kirkham and Philip Wells, Evolving Standards in the Complaints Branch, *Journal of Social Welfare and Family Law*, Vol.36:No.2, (2014), p.190.
[146] Hodges *et-al*, *supra* note 144, p.452.
[147] Steffek Flix, *et-al*, *supra* note 139, pp.28-29.
[148] Chris Gill, *et-al*, *supra* note 110, p.456.
[149] Thomas and Frizon, *supra* note 143, p.8.
[150] Chris Gill, *et-al*, *supra* note 110, p.456.

Looking into the international practice in general, financial Ombudsman scheme, as an ADR service provider, maintained an efficient, convenient, inexpensive, and fruitful approach to the resolution of financial disputes in many jurisdictions. By providing free and convenient avenues for submitting complaints, it succeeds to resolve most disputes that were submitted to it.[151] In doing so, it minimizes time spent on dispute resolution and adds convenience to the dispute resolution process. Further, the introduction of online submission modalities (via financial Ombudsman scheme website or email) of disputes has become a cost-effective way of accessing the financial Ombudsman scheme 's services, while letters, phone and fax are also alternatives to submit complaints free of charge.[152] Finally, for such measures enabling access to be successful, they should follow the underlying principles of justice.[153]

3.5. Adjudication Philosophy

Adjudication philosophy is still another principal issue of consideration in the design of financial Ombudsman scheme. This consideration is mainly about whether the scheme adopts a redress-focused model (rights based approach) or prevention focused model (interest based approach) of dispute resolution.[154] The former approach applies in areas of here-now consumer detriments issue with greater focus on meeting the needs of individual parties or solving disputes (i.e. to cure problems). As such, maintaining long term business relationship between the disputant parties is not its focus.[155] James Reason calls this a "personal approach" with a "long-standing and widespread tradition" of error analysis. It particularly focuses on active errors "arising primarily out of aberrant mental processes such as forgetfulness, inattention, poor motivation, carelessness, negligence, and recklessness."[156] The associated countermeasures are therefore directed mainly to using regulatory and disciplinary measures to reduce "unwanted variability in human behavior".[157]

Finally, it is important to point out the major weakness of the personal model. It excludes ways of dealing with unsafe acts of people which, in effect, cannot prevent similar errors from resurfacing again and again.[158] This deficiency of the approach makes it a traditional model, preferred only by scheme funded by the industry on the bases of individual case fees.

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[151] Lin and Hu, *supra* note 91, pp.126-128.
[152] Id, p.127.
[153] Donnelly, *supra* note 82, p.233-34.
[154] Chris Gill, *et-al*, *supra* note 110, p .456.
[155] Id.
[156] James Reason, Human Error: Models and Management, *British Medical Journal*, Vol.320, (2000), p.768.
[157] Id.
[158] Id., pp.768-69.

Now we turn to the prevention-focused model (interest based approach). This model works in areas of higher potential consumer detriment with the goal of meeting consumers' collective interest by engaging in standard-raising work such as the collection and provision of feedback data, advising and guiding consumers, and changing the behavior of financial firms.[159]

Financial Ombudsman scheme is expected to report systemic issues that were identified through disputes lodged with it to the regulator.[160] Such issues are "[variables] that will have an effect on other persons... beyond the parties to the dispute" or those that "have implications beyond the immediate actions and rights of the parties to the complaint or dispute".[161] Accordingly, the prevention-focused model works through identifying the causes of systemic issues (latent errors which erodes the basic safety of the system).[162] Also, it works towards resolving the effects of systemic issues on customers or claimants. Advocates of this model such as James Reason recommend that the focus of the investigation of adverse events should shift from the personal approach, which focuses on individual errors to the systemic approach that targets "the error-provoking properties within the system at large."[163] That is the adjudication philosophy should emphasize the proactive systemic defenses to prevent the recurrence of an issue or on similar mistake than reactive or remedial measures.[164]

In this second approach, financial Ombudsman scheme can provide policy guidance for future regulation based on the experiences of previous cases so that things can be improved in future for all consumers.[165] This approach is preferable when membership is compulsory and the funding model is different from individual case fee.[166] Practices

[159] Chris Gill, et-al, *supra* note 110, p.456

[160] Financial Ombudsman Services Limited, Operational Guideline to the Terms of Reference, Financial Ombudsman Service Australia, (2012), p.107, https://www.afca.org.au/media/879/download [accessed on January 2022].

[161] Financial Ombudsman Services Limited, Terms of Reference-1 January 2010 (As Amended 1 January 2012), article 11.2(a), https://www.afca.org.au/media/836/download [accessed on September 2021]; Australian Security and Investment Commission, Regulatory Guide 139: Approval and Oversight of External Dispute Resolution Schemes, RG 139.119, p.26, (2013), https://download.asic.gov.au/media/5689909/rg139-published-13-june-2013-20200727.pdf [accessed on February 2022]

[162] Lin and Hu, *supra* note 91; Mark A. Latino *et-al*., *Root Cause Analysis: Improving Performance for Bottom-Line Results*, 5th ed., (2020), pp.25, 163-65, 257; James Reason, *Human Error*, (1990), pp.179-80.

[163] Reason, *supra* note 156, p.769.

[164] Lin and Hu, *supra* note 91.

[165] Sharon Gilad, Juggling Conflicting Demands: The Case of the UK Financial Ombudsman Service, Oxford University Press, *Journal of Public Administration Research and Theory*, (2009), Vol.19:No. 3, p. 663.

[166] Chris Gill, *et-al*, *supra* note 110, p.456.

shows the former approach is widely used by Ombudsman schemes although the latter approach can also work in the absence of natural defects.[167]

In addition, the determination of whether the decisions of financial Ombudsman scheme should be binding to the parties needs consideration. As such, decisions of financial Ombudsman scheme should be binding on financial firms as it would help consumers to trust the scheme. Yet the decisions should not be binding on consumers because this would restrict their access to such schemes. The widely acclaimed principle in this respect is financial Ombudsman scheme decision can be binding in all cases or at least up to a certain monetary value (if the value of the case goes beyond a recommendation character) or it can be determined based on type of complaint.[168] Moreover, in relation to the adjudication philosophy, whether the scheme adopts an inquisitorial or adversarial investigation approach is another design choice. Depending on other design features of the scheme, a more adversarial approach largely results in quicker and cheaper dispute resolution. This is mainly because the adjudicator is solely dependent on arguments and supporting evidences presented by the parties in adjudicating the case.[169] The Irish Financial Services Ombudsman, which is widely known for its highly formal processes, can be a good example for such an approach.[170]

The approach affords for high transparency of the adjudication process and high degree of party participation, for which some people takes it as a major positive attribute. Yet others argue that this may be time consuming and costly that [171] puts consumers at a disadvantaged position unless the imbalance of arms is addressed by imposing the burden of proof on the financial firms.[172]

In contrast to the adversarial approach, an inquisitorial investigation modality helps institutions to redress the imbalance between consumers and businesses, and to ensure that consumers are not disadvantaged by lack of knowledge on how to submit and prove their case.[173] Inquisitorial approach may also allow the scheme to uncover more problematic issues of the firm's business conduct and helps firms to learn from complaints.[174]

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[167] Id.; Horst Eidenmuller and Martin Engel, Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe, *Ohio State Journal on Dispute Resolution*, Vol.29:No.2, (2014), p.261.
[168] FSUG, *supra* note 123, p.3.
[169] Chris Gill, *et-al*, *supra* note 110, p.457.
[170] Chris Gill, *et-al*, Models of Alternative Dispute Resolution, A Report for the Legal Ombudsman, *Queen Margaret University*, (2014), p.3.
[171] Id.
[172] Chris Gill, *et-al*, *supra* note 110, p.457; Chris Gill, *et-al*, *supra* note 170, p.78.
[173] Chris Gill, *et-al*, *supra* note 110, p.457.
[174] Id.; Chris Gill, *et-al*, *supra* note 170, p.3.

Finally, the issue of whether a dispute resolution process is predominantly adversarial or inquisitorial determines the decision maker and decision-making process. Particularly, it guides the determination of the identity of the decision makers in terms of their qualifications and skills and the extent of publicity of information about them. To this end, the EU Directive, for instance, requires the financial Ombudsman scheme adjudicator to be independent, impartial and to have the "necessary expertise".[175] Expertise will be satisfied by having the "necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes as well as general understanding of law".[176]

Many schemes involve single decision maker, albeit they often carry out their work in an organizational context (where several individuals may be involved in the decision).[177] The other decision-making approach is by using decision-making panels rather than relying on a single decision maker. This is particularly important in industries that require assurance regarding the competency of the decision makers and fairness of decisions to which they will be subjected (as the panel can include both consumer and industry representatives).[178] However, a single decision maker method is time saving and cost-effective compared to the panel method. Therefore, choice has to be made regarding the decision making modality.[179] Hence, while introducing the financial Ombudsman scheme in Ethiopia, it is recommendable to consider these and other precautionary measures in designing the scheme.

Conclusion

As demonstrated in the hosts of analyses in this article, the right to access to justice has attained an emphatic recognition in international and national legislations. Yet, its application in Ethiopia is in a very poor shape. This is due to various reasons and has a direct negative effect on the financial consumers' right to access to justice. Evidences show that the existence of economic and associated imbalances between the financial sector and consumers' as well as the special complexity of financial services or products makes the issue of financial consumers' access to justice special. This puts institutionalizing an effective grievance resolution mechanism in the sector as an important agenda globally. Particularly, institutionalizing formal and informal methods

[175] EU Directive, *supra* note 134, Article 6(1)(a).
[176] Id., Article 6(6), 7(1)(d)).
[177] *See*, Chris Gill, *et-al*, *supra* note 170, p.3.
[178] Id, pp.3, 61-63,171.
[179] Nick O'Brien, The Ombudsman as Democratic Alternative: Reading the EU Consumer ADR Directive in light of the PASC Reports, *Journal Social Welfare and Family Law*, Vol.37, (2015), p.274.

of resolving disputes in different forms is proposed as a better affordance to access to justice for such group of citizens. Financial Ombudsman scheme is accepted as one of such alternatives to redress the grievances of financial consumers'. It is widely acclaimed as a convenient, freely accessible, time and money saving, impartial, independent, and efficient way to identify and resolve consumers' grievances both in its remedial and systemic approach. This helps to ameliorate financial consumers' access to justice.

However, the effectiveness of the financial Ombudsman scheme depends on applying good design choices. The fundamental design choices include issues of jurisdiction, governance, accessibility, funding, and adjudication philosophy. With due consideration of such design features, this article suggests adapting the scheme in Ethiopia to advance the financial consumers' access to justice.

Finally, it is important to note that the policy landscape in this country has enabling environment to establish the institution. Notably, the policymakers and government show considerable attention for financial consumers' protection. Further, it shows commitment for efficient resolution of their grievances by courts and any other out-of-court mechanisms to be established by the NBE. Thus, human right agents, financial consumer communities, lawyers and other interest group should use the local fertile ground and the international experience to establish an efficient financial ombudsman scheme.

Public Participation Provisions in Environmental Impact Assessment process in Ethiopia: A Comparative Analysis

Melaku Gezahegn*

Abstract

The Constitution of the Federal Democratic Republic of Ethiopia and relevant subsidiary laws grant people the right to full consultation and to the expression of views in the planning and implementation of environmental policies. However, the impact of these general principles on the desired outcome is limited, suggesting the need for formulation of further detailed rules. Particularly, an effective realization of such constitutional stipulations require detailed rules that clearly set out identification of legitimate stakeholders, mechanisms of information accessibility, information dissemination, grievances handling processes, timeline to review and make comments, incorporation of public comments into final Environmental Impact Assessment (EIA) decisions. The objective of this article is to comparatively assess and explain the sufficiency and lacunas of the existing Public Participation Provisions (PPPs) of Ethiopia against countries having detailed rules required for the realization of effective public participation. To this end, a doctrinal research method is used to assess the content, principles and gaps in the existing legal documents. It is argued in the article that the existing environmental laws of Ethiopia are short of providing the required PPPs rules ranging from identification of stakeholders to grievance handling mechanisms. This in fact would render public participation to be a mere procedural requirement than creating an avenue for the public to influence environmental decision making processes. The assessments conducted thus uncover the dire need for the enactment of detailed PPPs and the possible ways to achieve this.

Key Words: *Environmental Impact Assessment, Public Participation, Public Participation Provisions*

Introduction

Environmental Impact Assessment (EIA) is a systematic and proactive process examining the consequences of development actions to the environment.[1]It

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mainly seeks to identify, predict and describe probable effects of such actions on public interest inherently connected to the environment. The use of EIA as a mechanism of protection of public interest has long been a subject of public policy debate and legislative actions. One of the critical issues in such moves is ensuring public participation in EIA processes.

With the public concern over the environment is steadily increasing, public participation during EIA has become a mandatory requirement in several developed and developing countries.[2] Equally, scholars and institutions stressed the place of public participation as a fundamental component of the EIA process.[3] Reflecting this position, the International Association for Impact Assessment (IAIA) has incorporated public involvement as an important principle of good practice in EIA. In practical terms the institution stresses the need for enabling laws that provide appropriate opportunities to inform and involve the interested and affected segments of the public in the documentation and decision-making process of EIA.[4]

Looking into the Ethiopian practice, one would see that there are insufficient evidences over public participation in EIA processes. Even if there are previous studies conducted on public participation in the EIA process, they are of more general in nature and do not specifically target the EIA provisions which are of significance to properly carry out public participation. Moreover, the studies are also short of providing a comparative assessment of public participation provisions of Ethiopia against countries having best experiences in the area.[5]

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[1] Glasson J., Therivel R., Chadwick A., *Introduction to Environmental Impact Assessment: Principles and Procedures, Process, Practice and Prospects*, 2nd edn, The Natural and Built Environment Series. UCL Press, UK, (1999), p. 4

[2] Obaidullah Nadeem, Rizwan Hameed, and Sajjad Haydar, Public Consultation and Participation in EIA in Pakistan and Lessons Learnt from International Practices, *Pakistan. Institute of Engineering and applied Science*, Vol. 14: (2014), https://www.researchgate.net/publication/262161132 (accessed Sep. 9, 2021) p. 73

[3] C. Wood, *Environmental Impact Assessment: A Comparative Review*, 2nd ed. Prentice Hall, Harlow, Great Britain (2002), P. 275

[4] International Association for Impact Assessment (IAIA), Principles of Environmental Impact Assessment Best Practice, (1999), http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA_web.pdf> (accessed Sep. 10, 2021).

[5] For example, see the article which is written by Dejene Janka on the title, Environmental Democracy in Ethiopia: Emphasis on Public participation in Environmental Impact Assessment in Ethiopia, published on *Bahir Dar University Journal of law*, Volume 1 No. 2: 2010. In this article the writer has tried to assess the legal regimes governing public participation in the EIA process and pinpointed the practical gaps that hinder the process. However, the writer does not single out those public participation provisions that extend from stakeholders Identifications to grievance handling mechanisms and does not indulge in to comparatively assessing the EIA laws of Ethiopia against countries having better experience in the area.

Thus, this article seeks to comparatively assess the sufficiency and lacunas of the existing Ethiopian environmental laws in ascribing enabling Public Participation Provisions (PPPs) against the experiences of South Africa and Kenya. The two African countries are selected because of their experience in having detailed rules of public participation. It has to be also noted that best practice of public participation of other countries might be dealt with where doing so is of a particular significance to draw lessons related to the subject.

The subsequent part of the article is organized in two major sections. The first section provides an overview of theoretical background such as the meaning, objective and significance of public participation in general. The second section provides a comparative assessment of how PPPs of Ethiopia identify legible participants/stakeholders and discusses the EIA stage and procedures through which the public can be allowed to participate in the desired process. This section also makes a comparative assessment of the nature and content of information to be disclosed to the public and how grievance handling mechanisms adopted under the Ethiopian environmental legislation are employed. Finally, the paper provides concluding remarks.

1. Theoretical Background: Meaning, Objective, and Significance of Public Participation in the EIA process

The International Association for Impact Assessment (IAIA) defines public participation in the environmental assessment as "the involvement of individuals and groups that are positively or negatively affected, or that are interested in a proposed project, program, plan or policy that is subject to a decision-making process."[6] Public participation is also meant for the involvement of citizens in decision making regarding an EIA process with a view to influence decision makers through presentation of information, and turning their focus of decision to the differential environmental effects of development projects.[7] As such,

[6] International Association for Impact Assessment (IAIA), Public participation: International Best Practice Principles, Special Publication Series No.4., http://www.iaia.org/publicdocuments/special-publications/SP4%20web.pdf > (2006), (Accessed, Sep. 20, 2021)

[7] Joseph F.C. Dimento, *The Global Environmental and International Law*, University of Texas press, 2003, p. 173

public participation is essentially concerned with informing, consulting and involving the public in planning and managing EIA activities.[8]

Instead of being a mere procedural requirement for providing information to the public, it seeks to gather input over concerns of participants that should be taken into account in decision-making process. If handled properly, public participation in planning, decision-making and environmental impact assessment has a critical role to play in helping to integrate economic, social and environmental ends. It also serves as a safeguard against bad or politically motivated decisions, and as a mechanism to increase public awareness over the delicate balance between economic and environmental tradeoffs.[9] Finally, public participation, where it is made transparently, may increase public confidence in the decision making process.[10]

Public participation for EIA purposes may take different forms and varies according to the stages of an EIA process and the techniques that might be applied to achieve a particular objective. According to Yang, who has made comprehensive review of the relevant literature on the subject, public participation in EIA processes has the purposes of :

(i) Informing and educating, by distributing data early through various media to reach the maximum number of people, and then allowing the public to have sufficient time to prepare their opinions;
(ii) Identifying and evaluating issues, including problems, needs, values and alternatives;
(iii) Collecting feedbacks; and;
(iv) Establishing trust and resolving conflicts.[11]

Generally, sharing information, involving the community at an early stage of decision making, taking into account community aspirations, and capacitating the community to influence the outcome of the decision making are some of the basic objectives for engaging interested and affected parties in an EIA processes.

[8] Brian D. Clark, Improving Public Participation in Environmental Impact Assessment, *Built Environment(1978)*,Vol. 20: No. 4, (1994), https://www.jstor.org, (accessed on Sep. 22, 202), p. 294
[9] Id.
[10] Id., p.294
[11] Shanshan Yang, Public Participation in the Chinese Environmental Impact Assessment (EIA) system, *Journal of Environmental Assessment Policy and Management*, Vol.10: No.1, 2008, p, 94

2. Public Participation Provisions of Ethiopia and Selected Countries: A Comparative Analysis

The basic requirement for public involvement in an EIA process is having an enabling legislation that promotes participatory process and a working framework for local capacity building and commitment for enforcement.[12] Such legislative acts come under the domain of public participation provisions (PPPs).

According to Environmental Law Alliance Worldwide (ELAW) and Netherlands Commission for Environmental Assessment (NCEA), the general profile of PPPs in most countries includes provisions regarding Stakeholder identification (who should be involved during public participation process) and the EIA stages in which public participation is to be conducted, information is disseminated and accessed. Also, it is concerned with the timeline where the public reviews, the EIA documents and the stage where public comments would be inculcated in final decisions. Still another integral element of the PPPs is the degree of opportunity for appeal and the stage where the grievance redressing mechanisms are allowed in the EIA process.[13] Against this backdrop, the next sections of this article make a comparative assessment on the sufficiency and the dearth of the existing PPPs of Ethiopia.

2.1 Identification of Stakeholders - Who should be Involved During Public Participation in the EIA process?

Early identification of stakeholders, their skills and roles, and the extent of interests that will be affected are among the necessary requirements for achieving successful participation.[14] Stakeholders are defined as 'all those people and institutions that have an interest in the successful design, implementation and sustainability of the project.[15] Stakeholder participation

[12] Asha Rajvanshi, Promoting Public Participation for Integrating Sustainability Issues In Environmental Decision –Making; the Indian Experience, *Journal of Environmental Assessment Policy and Management*, Vol. 5: No. 3, special Issue: Public and Stakeholder Participation in Environmental Decision-Making (September, 2003), p. 298

[13] Environmental Law Alliance World Wide (ELAW), 2013. EIA Law Matrix.: https://www.elaw.org/node/5986, and Netherlands Commission for Environmental Assessment (NCEA), NCEA , 2013, Countries & profiles. at: http://www.eia.nl/en/countries, (Accessed Nov. 20, 2021)

[14] Sandara E. Odemene, Optimizing Public Participation in Environmental Decision Making in Nigeria, thesis submitted in partial fulfillment of the coursework requirements for the Degree of Masters in Environmental Policy and Management, unpublished, (2015), p.22

[15] Ross Hughes, *Environmental Impact Assessment and Stakeholders Involvement*, International Institute for Environment and Development, (1998), p.1

involves processes whereby all those with a stake in the outcome of a project can actively participate in decisions on planning and management.[16]

As such, participants for the EIA process include the developers, the regulators, the facilitators and the public.[17] The developers may include private and public sectors. The regulators represent governmental departments related to the proposal at national, regional and local levels.[18] The facilitators are those who plan and develop the EIA process. They are usually consultants, advisors and advocates; and they are often employed by developers, or by the regulators and the public.[19] While such classification and definitions of stakeholders are largely visible in the practice, scholars also try to identify possible categorizations based on theoretical and empirical evidences in the literature.

Shanshan Yang, after a thorough review of the relevant literature, tried to categorize those sections of the public into three categories.[20] The first category comprises of any person, industry and business affected or likely to experience physical, health and social-economic harm from the execution of a proposal. Those falling in this category could be identified through criteria such as proximity to the project, probable physical, health, social and economic benefits or losses resulting from the project, and other social and economic values associated with an institution, individual or an area likely to be affected by the implementation of the proposed project in general.[21]

The second category of participants constitutes statutory groups and non-governmental environmental groups at international, national and local levels. Under the third category we find the general public who want to conserve wilderness or scenic areas or to have pollution-free air and water, or who are just interested in the proposal. Turning to the experience of countries, in South Africa, one can see that the most important and comprehensive environmental legislation governing participation of the public include the South African Constitution of 1996 (Act 108 of 1996), the National Environmental Management Act (NEMA) of 1998, the Environmental Impact Assessment Regulations, and Integrated Environmental Management Guideline series 7 on Public Participation.

[16] Id.
[17] Yang, supra note 11, p. 94
[18] Id.
[19] Id., p. 94
[20] Id.
[21] Id.

As such, South Africa has crafted the necessary environmental legislation ranging from the South African constitution of 1996 to the 2010 public participation guideline which enshrine detailed rules intended for the realization of effective public participation in the EIA process. With regard to identification of stakeholders, the National Environmental Management Act (Act 107 of 1998) of South Africa states that the participation of all interested and affected parties must be promoted and participation by vulnerable and disadvantaged persons must be ensured.[22] The act thus identifies interested and affected parties as stakeholders. It specifically requires the participation and consideration of the concerns of vulnerable and disadvantaged communities in environmental decision making processes. The EIA Regulation of the country also identifies the competent environmental authority. The institutions with this authority include all State departments administering a law relating to a matter affecting the environment relevant to an application for an environmental authorization; all organs of state which have jurisdiction in respect of the activity to which the application relates; and all potentially interested, registered, or affected parties as stakeholders in an EIA process.[23]

In addition to the regulation, the country's Department of Environmental Affairs has adopted a public participation guideline that provide detail rules necessary for the realization of effective public participation. For example, even if the country's EIA regulation identifies Interested and Affected Parties (IAPs) and Registered Interested and Affected Parties as legible stakeholders, it does not provide a clue that would help one to differentiate one from the other. Hence, the guideline fills the gap by defining IAPs as any person, group of persons or organization interested in or affected by an activity and any organ of a state that may have jurisdiction over any aspect of the activity. On the other hand, it defines registered IAPs as any interested and affected party whose name is recorded in the register opened for that application.[24]

The guideline further enunciates that some stakeholders such as organs of the state, the owner or persons in control of the land etc…, should be specifically

[22] The National Environmental Management Act (Act 107 of 1998) of South Africa, *Gazette No. 19519, Notice No.1540*, see chapter 1 (section 4f), [hereinafter NEMA of South Africa, 1998]

[23] Environmental Impact Assessment Regulations, 2014, Government Notice R982 in *Government Gazette 38282* dated 4 December 2014, as amended by Government Notice 706 in *Government Gazette 41766* dated 13 July 2018, chapter 6

[24] Department of Environmental Affairs (2010), Public Participation 2010, Integrated Environmental Management Guideline Series 7, Department of Environmental Affairs, Pretoria, South Africa, Section 6, [hereinafter Public Participation Guideline of South Africa, 2010]

approached and be granted the right to participate in the EIA process as IAPs.[25] For other stakeholder, the guideline stipulates consideration of criteria related to inquiry of social profile of the people or community, previous experience of involvement in public participation proceedings, consideration of established lists and databases held by consultants, authorities or research institutions for identification of residents, NGOs, community based organizations or constituents as legible stakeholders during public participation in the EIA process.[26] In summary, the South African environmental legal framework has emulative elements such as detailed justification for identification of stakeholders and wide ranging screening mechanism for inclusion of those legitimately entitled to the right to participate in EIA processes. The PPPs of this country also provide special protection for the involvement and inclusion of vulnerable and disadvantaged groups as stakeholders in the EIA process.

Turning to the Kenyan experience, we could see that public participation in environmental decision making process is mainly regulated through the 2010 national constitution, Environmental Management and Coordination Act of 1999, and the 2003 Environmental (Impact Assessment and audit) Regulation. Moreover, the country has adopted public participation bill and public participation guideline which are instrumental to foster public participation in governmental decision making processes. With regard to identification of stakeholders, the constitution of the country generally stipulates that public participation should ensure equality and non-discrimination and that principle of governance should include democracy, participation of the people, inclusiveness, good governance, integrity, transparency and accountability.[27]

Further, the Environmental (Impact Assessment and audit) regulation of the country obligate parties such as project owners to seek the views and comments of persons and communities who may be affected by the project during the process of conducting an environmental impact assessment study report.[28] More specifically, the 2016 public participation guideline of the country enunciates that participation in county governance is open to all members of the public, either individually or in a legally binding self-organized format. According to the guideline no one can be limited from participating on any grounds such as

[25] Id., see section 4.3.
[26] Id.
[27] The Constitution of the Republic of Kenya, Nairobi: National Council for Law Reporting, (2010), Article 27 and 10 (2) a, b and c
[28] Environmental (Impact Assessment and Audit) Regulations of Kenya, (2003), see part III and IV of the guideline,[hereinafter EIA Regulation of Kenya, 2003]

age, race, colour, gender or political affiliation.[29] As such, the guideline defines the term 'public' to refer to the residents of a particular county; professional associations; community based organizations; and rate payers of a particular city or municipality.[30]

Apart from identifying such segments of the public as participants, the guideline enumerates rights, duties and responsibilities of members of the public related to equal participation, freedom of expression, right to access to information and specific right to participate in EIA processes.[31]

Still worth noting in Kenyan experience is the contents of the 2018 public participation bill. This bill, in its guiding principle, states that the public, communities and organizations to be affected by or be interested in a decision shall have a right to be consulted and involved in the decision making process and that effective mechanisms of public participation should be provided to guarantee the involvement of all stakeholders.[32] It can thus be argued that the PPPs of Kenya properly identify stakeholders who are legible for public participation and enunciate the rights and duties pertaining to participants in the decision making process.

With close parallels to South Africa and Kenya, Pakistan has institutions and laws regulating and protecting public rights related to the environment. The country's environmental protection agency issued a guideline for public consultation in 1997. The guideline in the relevant section identifies stakeholders who are entitled to the right to participate in an EIA process. Accordingly, local people, other affected communities, government agencies and local council, Non-governmental organizations (NGO`s), community leaders and others with legitimate interest are identified as stakeholders entitled to participate in EIA process.[33] These stakeholders are expected to be representative enough for varying segments of the public with sufficient potential to protect public interest against moves affecting the environment.

[29] Ministry of Devolution and Planning & Council of Governors Republic of Kenya County Public Participation Guidelines, 2016, see section 3.4 [hereinafter Public Participation Guideline of Kenya, 2016]
[30] Id., see key terms/concepts, p. vii
[31] Id., see section 3.4 of the guideline.
[32] Kenya Gazette Supplement No. 17 (Senate Bills No. 4), The Public Participation Bill, 2018, Guiding Principles of Public Participation, part 4, p.47, [hereinafter Public Participation Bill of Kenya, 2018].
[33] Id.

From the experiences of the three countries, one can see that participants who are entitled to participate in the EIA process need to be clearly identified and the identification need to involve those who are likely to be affected, positively or negatively, by the decision. Also, it should consider the voices of those who do have a mere concern and those who can affect the outcome of a proposal. Moreover, there should be clear criteria that would help public authorities to screen and identify stakeholders and to clearly set out the rights and responsibilities pertaining to participants.

Looking into Ethiopia`s experience, the FDRE Constitution expressly states that people have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that directly affect them.[34] The Constitution tends to grant the right to participate in EIA processes to those segments of the public who bear the direct impact of a project and it seems that it does not grant this right to those who might be indirectly affected and having interest in the conservation of natural resource and the environment.

The Amharic version of the relevant constitutional provision,[35] however, employed the term '*የሚመለከተው ህዝብ*' which literally means 'the concerned public'. This wording of the Amharic version, which is binding at times of competing interpretations, is different from the English version which suggests bearing direct impact of a project as inclusion criteria for stakeholders. Such disparity of meanings in the two versions of the constitutional provision leaves the determination of stakeholders open for debate.

As a way out of such problem, the author would argue that the constitution provides only general principles. Thus, it would be better to look into other subsidiary environmental laws of the country to identify the specifics about those stakeholders who are legible to take part during public hearings in an EIA process.

To this end, the EIA Proclamation No. 299/2002 of Ethiopia stipulates that environmental authorities should make EIA study report accessible to the public and ensure that the comments made by the public and in particular by the communities likely to be affected by the implementation of a project are

[34] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazetta*, (1995), Art. 92, [hereinafter FDRE Const.].
[35] Id., Art. 106

incorporated into the EIA study report.[36] Even if the provision at hand does not specifically identify those legible participants, it tends to identify both sections of the general 'public' and those section of the public who in particular are 'likely to be affected' to have a stake in the EIA process. Though it may be argued that the term 'general public' is inclusive of those who are going to be affected indirectly, and those who do have interest to be involved and participate in the EIA process, the proclamation does not specifically identify all those stakeholders who are legible to participate in the EIA process.

In more complementary tone, the 2003 EIA procedural guideline series1 of the Ethiopian Environmental Authority sets out details which are instrumental in our quest for identification of stakeholders in the EIA process. In this regard, it is stated under the guideline that the main objective of participation is to grant appropriate and timely access and opportunity to the process for 'all Interested and Affected Parties (IAPs).'[37] More specifically, the guideline in part 6.4, identifies local communities, the work force, customers and consumers, environmental interested groups and the general public as stakeholders who are entitled to participate in the EIA process. As such, the guideline tries to list and identify stakeholders who are generally stated under the constitution and the EIA proclamation.

However, when we look into the procedural guidelines of Ethiopia in light of public participation guideline of South Africa and Kenya, there are still some gaps which are significant in the identification of participants in the EIA process. For example, rather than specifically identifying legible public participants, it employs generic words such as 'the work force' and 'customers and consumers' which place practical difficulty in the identification of those who fall in this category. Moreover, unlike the experience of South Africa, the guideline does not clearly identify developers, facilitators, and regulators as stakeholders. It also fails to provide rules that might be applied for identification of stakeholders who should be specifically approached and those who should be identified through the application of some established criteria that public authorities might resort to in the course of identification of those applying for participation. Unlike the experiences of Kenya too, the guideline does not stipulate some of the rights, duties and responsibilities pertaining to stakeholders

[36] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, *Federal Negarit Gazetta*, (2002), Article 15 [hereinafter EIA Proc. No. 299/2002]

[37] Federal Democratic Republic of Ethiopia, Environmental Protection Authority, Environmental Impact Assessment Procedural Guideline Serious 1, 2003, Part. 4.2.2. (Hereinafter EPA, EIA procedural guideline Serious 1)

who are going to participate in the public participation process. The repercussion of all such lacunas thus would inevitably cast practical hurdle in the identification of stakeholders and their rights, duties and responsibilities during public participation process.

2.2 In which EIA stage should the public participate in the EIA process?

Once the issue of identification of stakeholders is addressed, the other pivotal issue worth considering is the EIA stages through which the views of the public are to be heard and participation to take place. In more general terms, the major EIA stages include screening, scoping, preparation of the EIA report, reviewing the EIA report, decision-making and monitoring. Perhaps as is revealed by comparative studies, in most countries, conducting public participation is set to be a mandatory requirement during one or two stages of the EIA process.[38]

In fact, the EIA stage through which participation is to be conveyed may differ from country to country. While in some countries public participation can occur earlier and persist across all EIA stages, in others it can only start late in the EIA process (e.g. in the review stage after EIA report has been almost done).[39] Equally worth noting is that the phase in which participation starts determines the quality of the entire EIA process. In general terms, early involvement of stakeholders is considered to ensure better input from the public, better quality of EIA reports and more credibility and transparency in the process.[40]

Looking into the detailed accounts of experiences from the selected countries, one could practically notice the realities behind the stages. The 1997 public participation guideline of Pakistan suggests that the concerned public should be involved during five stages of every EIA project. These include identification of the need and level of EIA; various steps of the preparation of EIA report and review; project implementation; and monitoring of impacts. However, in Pakistan, as is revealed by one study, the practice shows that the public is consulted mainly during review of EIA report and in the scoping stage of EIA.[41]

[38] Obaidullah Nadeem, et' all, supra note 2, p.75

[39] Jin Chen, Public participation provisions in Environmental Impact Assessment (EIA) legal system ;Case studies in China, India and Indonesia, A Thesis submitted to the Faculty of Geosciences for the Degree of Master of Science in Sustainable Development, (2013), P.12

[40] Obaidullah Nadeem, et al, *supra* note 2, p.75

[41] Id., p, 75. While addressing the issue, the writers argue that 'it is neither financially feasible nor administratively possible to consult all interested and potentially affected public during all these stages.' The author of this article also agrees with the assertion that conducting public

In South Africa, the national legislation requires that public participation must be done after submission of an application for either Basic Assessment (BA), scoping or environmental impact report.[42] In addition, consultations with relevant state departments and parliamentary scrutiny are required prior to publication of EIA report.[43]

In Kenya, project proponents are legally required to seek the views of persons who may be affected by the project during preparation of the EIA report. In addition, environmental authorities, within fourteen days of receiving the EIA study report, should invite the public to make oral or written comments on the report.[44] This clearly shows that the public is entitled to participate during preparation of the EIA report and after completion and submission of the report to environmental authorities. It can be deduced from the experiences of the above countries and their EIA laws that the EIA stages through which public participation is to be conducted need to be clearly articulated and that participation need to begin at the earliest stage of scoping, preparation of the EIA report and in its review stage.

In Ethiopia, the EIA proclamation is short of stating the EIA stage through which public participation is to be carried out. The EIA procedural guideline, however, states that proactive consideration and integration of environmental concerns should be sought at the earliest stages of the conceptualization of the projects, programs or policies and that the public should get appropriate and timely access and opportunity to participate in the process.[45] The guideline also indicates that the scoping stage is the process of interaction and identification of boundaries of EIA studies. In such interactional processes, important issues of concerns are going to be identified through the involvement of potentially affected groups or IAPs.[46]

Moreover, the guideline obligates environmental agencies to make sure that the views, concerns and position of IAPs are taken into account during assessment,

participation in all stages of an EIA process clearly posses immense financial and administrative hurdles which may place an insurmountable hurdle in the practical participation of the public in the EIA process. As such, it would be tenable if participatory stage is mandatorily required at the early stage of scoping, EIA preparation and review stage which is believed to ensure better input from the public, better quality of EIA reports and more credibility and transparency in the process.

[42] Public Participation Guideline of South Africa, 2010, *supra* note 24, section 4.1 see method of notification

[43] Id., Section 24O of EIA Act, 2010

[44] EIA Regulations of Kenya, 2003, *supra* note 28, see part III and IV of the guideline

[45] EPA, EIA Procedural Guideline Serious, *supra* note 37, Guiding principles, Par. 4.2.2

[46] Id.

reviewing, auditing and at all stages of decision making.[47] Hence, with regard to identification of the stage of participation, the EIA procedural guideline of the country embodies rules significant in addressing the issue at hand. It can, however, be noted from the guideline that it does not specifically state the EIA stage through which the public is entitled to participate. Rather, it addresses the issue incidentally while it states the responsibilities of environmental authorities in the EIA process. Moreover, it also obligates responsible environmental authorities to seek the views of the public in all EIA decision making processes. However, like that of the practice of South Africa and Kenya, it would have been better had the guideline clearly and directly entitle stakeholders to at least participate at the earliest stage of scoping and the EIA review stages which are considered to be financially feasible and administratively possible.[48]

2.3 Mechanisms of notification and timeline for public participation

Realization of effective public participation requires addressing issues related to mechanism of getting information (that describes where and how information can be obtained and viewed by the concerned stakeholder) and the timeline for making comments. Generally, the information with regard to public participation can be obtained through several techniques such as media outlets (radio, television, newsletters, internet etc.) and/or other mechanisms that ensure public visibility of the issue. Apart from providing detailed information to the public on the issue, sufficient time must be allowed to stakeholders to read, discuss and consider the information and its implications as a way to enable them to present their views in the EIA process.[49]

In line with this, Kenya`s Environmental (Impact Assessment and Audit) Regulations 2003, states that once the project report is approved by the authority (the National Environment Management Authority of Kenya), the owner of a project is required to post posts in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project.[50] The owner of the project is also required to publish

[47] Id., see part. 6.1
[48] For further clarification on the issue, see supra note 41
[49] Hussein Abaza, Ronald Bisset, Barry Sadler, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, (2004), Approach public participation in environmental impact assessment-legal framework, *International Journal of Research* - Granthaalayah, 5(5), p.75 https://doi.org/10.5281/zenodo.583918, (accessed Nov. 21, 2021)
[50] EIA Regulation of Kenya, 2003,*supra* note 28,see part III, section 17

notice on the proposed project for two successive weeks in a newspaper with nationwide circulation. Also, it is required to make announcements of the notice in both official and local languages on a radio with a nationwide coverage for at least once a week for two consecutive weeks.[51] In addition, the country's 2018 Public Participation Bill also states that the responsible authority shall establish mechanism to enable the widest reach which may include television stations, information communication technology centers, websites, community radio stations, public meetings, and traditional media.[52]

In South Africa,[53] the person conducting public participation is required to set up a notice board at a place noticeable to the public at the boundary or on the fence of the site where the activity is to be undertaken as well as in any alternative sites being considered. The applicant is also expected to give written notice to the owner or person in control of the land, occupiers, in both the local and district municipality. Further, the applicant must make public announcements of the facts in one local newspaper or any official Gazette that is published specifically for the purpose of providing public notice. In addition, the applicant must place an advertisement in at least one provincial newspaper or national newspaper if the activity has or may have impact extending beyond the boundaries of the metropolitan or local municipality and advertisement is not being placed in any official Gazette referred above.[54] Potential or registered interested and affected parties, including the competent authority, should be provided with a period of at least 30 days to submit comments on each of the basic assessment, scoping and environmental impact assessment report.[55]

In India, the project owner has to submit the executive summary of the project to the State Pollution Control Board (SPCB) for initiating the actions for the issue of notice for public hearing. The notice should indicate the date, time and venue for public hearing.[56] The State Pollution Control board is responsible to publish a notice for a public hearing in at least two news papers widely circulated in the region around the project as soon as project owners file an application to it.[57] So as to enable the public to properly understand about the nature and effects of the project, one of the news papers should be in the vernacular language of the

[51] Id., Article 17(a)
[52] Public Participation Bill of Kenya, 2018, *supra* note32, guideline paragraph 1, p.50
[53] Public Participation Guideline of South Africa, 2010, *supra* note 24, see chapter six
[54] Id.
[55] Id., see chapter six
[56] Ministry of Environment and Forest, Public Hearing Notification I, published in *the Gazette of India*, part II, Section 3(ii), (19970
[57] Id.

region. Then SPCB shall mention the date, time and place of public hearing. Suggestions, views, comments and objections of the public shall be invited within thirty days from the date of publications of the notifications.[58]

In Ethiopia, however, neither the EIA proclamation nor the EIA procedural guideline specifically stipulate mechanisms though which the public could get access to information about the time, date and the place where the public hearing is going to be conducted and the timeline for making comments. In addition, even if the EIA procedural guideline states that appropriate and timely access and opportunity to the process should be provided for all interested and affected parties, it is short of providing mechanisms of notification and details that will inform the public about the date, time and the place where public participation is going to be convened.[59] The timeline for making comment on the EIA document is not also stated under the EIA laws of the country. This would inevitably cause adverse impact on the implementation of public participation by rendering the process to be carried out at the wish and discretion of authorities. In this regard, the practices discussed above clearly suggest the need to have detailed regulatory rules that dictate where and how information can be obtained and viewed by the concerned stakeholders and the time limit for making comments which in fact are lacking under the environmental laws of Ethiopia. As such, there has to be detailed rules that would oblige project proponents[60] to properly adhere to the techniques through which the public could get information like media ways (radio, television, newsletters, internet etc.) and/or at certain places like posting a poster in strategic public places in the vicinity of the site of the proposed project, the concerned governmental authority, library and the like. Moreover, as the experiences of the selected countries show, the public should be provided with a time limit for making suggestions, comments and forward its views from the date of publications of the notifications.

2.4 **The nature of public information and the requirement of integrating it in EIA processes**

[58] Id.
[59] EPA, EIA Procedural Guideline Serious 1, *supra* note 37, Part, 4.2.2.
[60] See, Tesfaye Abate, Environmental Impact Assessment and Monitoring under Ethiopian Law, *Haromaya University Law Review*, vol. 1: issue I, p. 111. As costs related with EIA process are to be covered by proponents, it is thus the duty of proponents to cover all costs required to carry out public participation process.

The effectiveness of public participation is determined by the availability and quality of the information given to the participants by the government agencies regarding the EIA. Meaningful participation can only occur if the public is knowledgeable on the importance of the EIA processes.[61]As such, sufficient and relevant information must be provided in a form that is easily understood by non-experts.[62] This enables stakeholders to clearly understand the nature, significance and the possible impact of a proposed project in a way that promotes effective public participation.

The experiences of countries such as South Africa show that the quality of information and level of access to it is key to institutional success in EIA processes. As a way to attain such ends, the person conducting public participation process in South Africa is required to ensure that information containing all relevant facts in respect of the application or proposed application is made available to potential interested and affected parties; and participation is facilitated in such a manner that all potential or registered interested and affected parties are provided with a reasonable opportunity to comment on the application or proposed application.[63] Interested and Affected Parties and the competent authority should obtain clear, accurate and understandable information about the environmental impacts of the proposed activity or implication of a decision.[64]

The country's EIA regulation also provides that in those instances where a person is desirous of but unable to participate in the process due to illiteracy, disability, or any other disadvantage, special mechanism should be adopted to accommodate their concern and interest.[65] Moreover, the applicant must also ensure that the comments of interested and affected parties are recorded in reports and plans. Further, written comments including responses to such comments and records of meetings need to be attached to the reports and plans that are submitted to the competent authority.[66] Finally, where a person desires but is unable to access written comments due to lack of skills to read or write

[61] Marzuki, A. A Review on Public Participation in Environmental Impact Assessment in Malaysia, *Theoretical and Empirical Research in Urban Management*, No. 3/12, (2009), p.133
[62] Hussein Abaza, et al, *supra* note 49, p,75
[63] South African National Environmental Management Act, 1998 (ACT NO. 107 of 1998), Amendment to the Environmental Impact Assessment Regulation, No. 2014, chapter six, pp, 243-247 [hereinafter NEMA of South Africa, 2014].
[64] Id.
[65] NEMA of South Africa, 2014, supra not 63, esee chapter six
[66] Id.

due to disability; or any other disadvantage, reasonable alternative methods of recording comments must be provided.[67]

In Kenya, the 2003 EIA regulation requires an EIA study report to be accompanied by a non-technical summary outlining the key findings, conclusions and recommendations of the study and shall be signed by the proponent and environmental impact assessment experts involved in its preparation.[68] The country's 2016 public participation guideline also states that communication should be tailored to meet the needs of persons with disabilities, senior citizens, the marginalized and the less educated residents of the County.[69] To meet such needs, the guideline specifically recommends communications to be carried out in a manner that address the special condition of each individual involved in the public participation process. For example, for persons with disability the recommended communication ways are usage of Braille, sign language, publications, radio, TV, and newspapers. For elderly people, it suggests using large print publications for communication purpose. This way, Kenya's PPPs manages to accommodate the concerns and the needs of each and every participant including those who might encounter different barriers to effectively participate in the public participation process.

Hence, one of the basic principles in the EIA process and public participation is that relevant information is communicated and provided clearly and understandably to the public. So as to make meaningful and effective participation, there should be special mechanism that would enable the integration of the concerns and needs of people with disability or those who are marginalized or less educated section of the society. In summary, the experience of South Africa and Kenya is substantially informative of viable mechanisms to ensure public participation.

Coming to the Ethiopian context, the EIA proclamation No. 299/2002 specifically provides that EIA report that is submitted to the Authority or the relevant regional environmental agency for review shall include a brief statement summarizing the study in non-technical terms as well as indicating the completeness and accuracy of the information given in the study report.[70] Thus, proponents are obliged to prepare and submit EIA reports in non-technical terms which could easily be understood by any ordinary person. The report should also

[67] Id.
[68] EIA Regulations of Kenya, 2003, *supra* note 28, part III, section 18(2)
[69] Public Participation Guideline of Kenya, 2016, *Supra* note 29, see section 3.4 which deals about Communication and access to public information
[70] EIA Proc. No. 299/2002, *supra* note 36, Art. 9

provide sufficient and very relevant information about the negative impacts of the projects and the remedies available in this regard. More specifically, proponents are expected to include sufficient and basic information related to the nature of the project including the technology and processes to be used and their physical impacts; the content and amount of pollutants that will be released during implementation as well as operation.[71]

The EIA procedural guideline series 1 also replicates what has been stated under the EIA Proclamation. It states that an EIS shall contain sufficient information to enable the determination of whether and under what conditions the project shall proceed.[72] It further requires submission of a brief statement that summarizes the EIS in non-technical terms and shows the completeness and accuracy of the information given.[73] The guideline also obligates environmental agencies to make sure that the public, especially affected communities are given meaningful opportunity in the EIA process. The institutions are also responsible to make sure that the views, concerns and position of IAPs are taken into account at all stages of decision making.[74]Hence, the EIA laws stated above enunciate the need for preparation of an EIA document in non technical terms and in a manner that is easily understandable by the public. The information to be disclosed under the EIA should be substantially significant and precise enough to inform the public about the impact of the project on humans and the environment. However, other than stating the requirement of preparing the EIA document in non-technical terms, the laws are short of providing special mechanism to be implemented in those instances where a person is desirous of but unable to participate in the process due to illiteracy, disability, or any other disadvantages.

The non-existence of such mechanisms would have the effect of bypassing the concerns of people with disability, the marginalized, the less educated or any other disadvantageous people in the EIA process. This in fact poses negative repercussion in fostering inclusive public participation in the EIA process. In this regard, the practices of South Africa and Kenya is of significant importance in that both countries provide mechanisms which are mainly intended to integrate the concerns of those who are unable to participate due to different reasons.

2.5 **Determination of Options for Public Participation**

[71] Id., Art. 8
[72] EPA, EIA Procedural Guideline Serious 1, *supra* note 37, Part 5, p.8
[73] Id.
[74] Id., part 6.1

The other pivotal issue that public participation provisions need to clearly articulate is the method or technique of participation to be applied in the EIA process. In this regard, there are numerous techniques or methods that can be used to involve stakeholders during public participation process in the EIA. These include but not limited to:

- Public meetings (these are "open" with no restriction as to who may attend);
- Advisory panels (a group of individuals chosen to represent stakeholder groups –which meet periodically to assess work done/results obtained and to advise on future work);
- Open houses (a manned facility in an accessible local location which contains an information display on the project and the study. Members of the public can go in to this venue to obtain information and make their concerns/views known);
- Interviews (a structured series of open-ended interviews with selected community representatives to obtain information/concerns/views);
- Questionnaires (a written, structured series of questions issued to a sample of local people to identify concerns/views/opinions. No interviewing may be involved); and,
- Participatory appraisal techniques (a systematic approach to appraisal based on multiple and varied inputs generated through group inquiry and analysis. The appraisal may be assisted, but not controlled or directed, by external specialists.[75]

It has to be noted that the appraisal methods considerably differ from country to country based on their specific interest and need. For example, in China, questionnaire survey, expert consultation and testimony hearings are the techniques suggested for public consultation.[76] Furthermore, seminars and discussion forums may be held to collect 'public opinion. Hearings may also be held as the most formal channel to consult the public.

Such appraisal process in Kenya requires making announcement and adequately informing the public about it prior to the process itself. The Kenyan law also requires the use of public hearing as a method of appraisal which must be conducted at least three times with the affected parties and communities to

[75] Hussein, Abaza, et al, *supra* note 49, p.73

[76] Wang and C. Xin-geng, The Design of Public Participation in Environmental Impact Assessments, *Aquatic Ecosystem, Health and Management* Vol. 9: (2006), pp, 93-97

explain the project and its effects, and to receive their oral or written comments.[77] The laws of the country further stipulate requirements that need to be adhered to while conducting the public hearing. It states, among others, that public hearing shall be presided over by a suitably qualified person appointed by the Authority and it shall be conducted at a venue convenient and accessible to people who are likely to be affected by the project. Moreover, a project owner should be given an opportunity to make a presentation and to respond to presentations made at the public hearing. And the presiding officer shall in consultation with the Authority determine the rules of procedure at the public hearing.[78]

In South Africa, the most appropriate mechanisms suggested for conducting public participation are: public meetings and open days, conferences, press release, questionnaires or opinion surveys, information desks and/or info lines and meetings/workshops with constituencies (e.g. national standing committees, non-governmental organizations/community based organizations).[79]

With a similar modality to South Africa, Pakistan adopted a range of techniques believed to facilitate public participation. For example, public hearing, public meeting, focus group meeting, village meeting, small group meeting are some of the techniques listed under the pertinent guideline. Among those techniques, focus groups, workshops, and review of scope of EIA by concerned stakeholders have been categorized as the most effective techniques for achieving the objectives of public participation.[80] It is thus imperative that EIA laws need to clearly articulate the method or technique of participation to be used during public participation in an EIA process. This would help authorities to easily conduct public participation in the EIA process by picking the appropriate technique which is already identified by public participation provisions.

In the Ethiopian context, unlike the experiences discussed above, no functional method is identified for ensuring public participation in pertinent EIA laws. Of course, Article 15 of the EIA proclamation No. 299/2002 requires the Federal Environmental Protection Authority (EPA) or relevant regional agencies to make any environmental impact study report accessible to the public and solicit comments on it. It also requires the need to ensure that public comments are incorporated into the final report. However, neither the EIA proclamation nor

[77] EIA Regulations of Kenya, 2003, *supra* note 28, part IV, No. 22
[78] Id.
[79] Public Participation Guideline of South Africa, 2010, *Supra* note 24, section 5, guidance on the level of public participation, p.9
[80] Obaidhllah Nadeem, *et al*, *supra* note 2, p. 78

the EIA procedural guideline providing those methods that could be used to engage IAPs and the public during public participation process. More specifically, the laws fall short of articulating detailed rules that, among others, regulate as to who shall preside over such public hearings. Nor are there rules that oblige public authorities to conduct such public hearings at a venue which is convenient and accessible to people who are likely to be affected by the project. This, in fact, poses additional burden and difficulty on authorities vested with the power to facilitate and conduct public participation. It may also grant them a discretion to choose any inconvenient method and place that might not be suitable to integrate the concerns of all stakeholders. In this regard, the experiences discussed above are of a particular significance to address the lacunas noticeable under the Ethiopian environmental laws.

2.6 Grievance handling mechanisms during public participation

Stakeholder in an EIA process may forward their comments and suggestions during public participation and consultation secession. If those comments and suggestions are not properly addressed and a grievance handling mechanism is not set up, participation in the EIA process would be an incomplete exercise. Thus, public participation provisions should envisage grievance handling mechanisms which are designed to resolve disputes that might arise between stakeholders, project owners and authorities responsible for conducting public participation in the EIA process. So as to properly handle grievances, comments and responses to such comments and reports of meetings should be attached to and need to be submitted to the competent authority.[81]Then, stakeholders need to be informed about the decision rendered, where the decision could be accessed and the fact that an appeal may be lodged against the decision.[82]

In this regard, Kenya's public participation guideline clearly states that the public should have a mechanism of raising concerns and there should be a way of addressing public complaints and offering redress to members of the public.[83] The guideline also stipulates that the public could communicate grievance using either an e-platform or a physical complaints mechanisms. Relevant authorities are responsible to conduct a register of complaints that should be open to public scrutiny. This would help the public to bring issues which are bypassed or rights infringed in public participation in the EIA process to the appropriate bodies.

[81] NEMA of South Africa, 1998, *supra* note 22, see chapter six, p.43
[82] Id.
[83] Public Participation Guideline of Kenya, 2016, *Supra* note 29, see section four of the guideline, p. 43,

The guideline further stipulates principles designed to regulate compliant handling mechanisms. Some of these principles include:

- Visibility – information about how and where to complain is well publicized to interested parties.
- Accessibility – the process of making a complaint and investigating it is easy for complainants to access and understand.
- Responsiveness – complaints are acknowledged promptly, addressed urgently, and the complainant is kept informed throughout the process.
- Objectivity and fairness – complaints are dealt equitably and objectivey.
- Remedy – if a complaint is upheld, the organization provides a remedy.
- Review – there are opportunities for internal and external review and/or appeal about the organization's response to the complaint and complainants are informed about these avenues.
- Accountability – accountabilities for complaint handling are clearly established and complaints and responses to them are monitored and reported to the county government and other stakeholders.[84]

Coming to the Ethiopian context, we see that Article 17 of the EIA proclamation generally states that any person dissatisfied with the authorization, monitoring, or any decision of an Authority in charge of the task may submit a grievance notice to the head of the environmental Authority or the relevant regional environmental agency. The relevant head of the Authority or relevant regional environmental agency shall render a decision within 30 days following the receipt of the grievance. The EIA procedural guideline also requires appeals and grievance to be entertained and decisions to be communicated in due time. However, the legislations are short of providing mechanisms that dictate how complainants can submit their claims, principles that dictate the overall compliant handling mechanisms, the right of complaints to get access to and redress within the administrative and judicial system of the country. Rather, both legislations stipulate general principles regarding grievance handling mechanisms in an EIA process. This clearly calls for having a directive or a guideline that properly regulates the overall process of grievance handling mechanisms like the experience of Kenya as discussed above.

[84] Id.

Concluding Remarks

Public participation is a critical component of EIA process. Attaining the goal of this public moves fundamentally requires formulating and enforcing laws that would enable the public to effectively participate and influence decision making process of public authorities on environmental matters. In the context of Ethiopia, however, there are legal lacunas that would pose formidable challenge in the realization of meaningful and effective public participation in an EIA processes. Contrary to the experiences of South Africa and Kenya, wherein participation of the public in the EIA process is mainly carried out through specific public participation guidelines, there is nothing of such mechanism in Ethiopia.

The existing environmental legislations provide principles aimed at the implementation of EIA in general. Yet, they lack detailed rules related to identification of stakeholders and their respective roles and responsibilities during public participation. No clear stipulation of EIA stages are set out as mechanisms of notification through which the public would know about the date, time and the place where public participation is going to be convened. The legal frameworks do not also provide the appropriate method or technique to be applied to gather comments and suggestion of the public or those IAPs in the public participation process. In addition, mechanisms that dictate the overall compliant handling procedures, the right of complaints to get access to and redress within the administrative and/or judicial bodies of the country are left to the discretion of public authorities than being properly articulated through legal frameworks.

All the above constraining issues thus attest the need for formulation of detailed public participation guideline by a competent authority. The guideline, among other issues, needs to properly incorporate public participation provisions that properly identify stakeholders and their respective roles and responsibility. Further, it should envisage mechanisms of notification through which stakeholders would know about details of where and how information can be obtained and viewed and the time line for making comments. Finally, it should set out detailed rules that enunciate possible techniques to facilitate public participation among stakeholders and articulate grievance handling mechanisms and the recourse that aggrieved parties may utilize to achieve desired goals.

Comparison between the Ethiopian Model of Cassation Division Binding Legal Interpretation and the Chinese Model of Guiding Case

Haile Andargie[♦]

Abstract

Both Ethiopia and China have introduced a system resembling a common law feature where the judiciary is involved in the development of case laws. This article is purported to compare and contrast the cassation model of Ethiopia and the Chinese guiding case system and to draw relevant lessons. Using doctrinal research methodology, the article examined relevant Ethiopian and Chinese laws, scholarly research findings and the literature in the field. After due analysis, the author concluded that China's guiding case system adopts a broad base of case selection systems involving the decision of lower courts whereas the Ethiopian system entirely depends on the Cassation division decision of the federal supreme court. In the Chinese system, both internal and external recommendation for a guiding case is allowed. The internal recommendation may come from various levels of courts besides the Supreme Court. Externally, the delegates of the lawmakers, experts, scholars, lawyers, and any other interested party could recommend a guiding case. Conversely, Ethiopia's system does not allow recommendations from other courts or an outsider stakeholder. Finally, China has detailed guidelines on the selection, recommendation, approval, and publication of a guiding case whereas Ethiopia's system lacks a comprehensive guideline. Therefore, this article argues that involving external recommenders, having an independent office and enacting detailed procedural directives are among the best practice that Ethiopia should learn from the Chinese guiding case system.

Key words*:* Guiding Case, Cassation, Precedent, Ethiopia, China

Introduction

China is largely a civil law country where the primary sources of law are the constitution followed by the laws promulgated by the National People's Congress (NPC) and its Standing Committee.[1] The administrative regulations

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[1.] Mo Zhang, Pushing the envelope: application of guiding cases in Chinese Courts and development of case law in China, *Washington Journal of International Law Association,* Vol. 26 No. 2, (2017), p.282.see also Wang Chang *Inside China's legal system*, Madson, Nathan H. Oxford, UK Chandos Publishing, (2013), pp. 56–7. China's legal system is largely a civil law system, reflecting the influence of Continental European legal systems, especially the German civil law

made by the State Council also serve as sources of law applicable nationwide.[2] Moreover, provinces and municipal people's congresses are entitled to adopt local regulations involving local concerns.[3] At the bottom of the hierarchy are the rules, decrees, or ordinances issued by various ministries as well as the executive branch of provincial governments.[4][5]

Despite its choice of the civil law approach, a new trend of guiding case system of common-law character has also been attempted in different periods.[6] Most importantly, case publication by the Supreme People's Court began as early as 1985 when the *Gazette of Supreme People's Court* was first introduced.[7] Back then, the Supreme People's Court published cases with the view to utilize guiding cases to help unify the standard application of the law, direct the adjudicative work of the lower courts in their adjudication of similar cases.[8] However, the issue of whether the guiding cases should have a binding effect over lower court decisions through out the country or it is a mere suggestion to lower courts was disputable.[9]

In response, the Supreme Court has issued rules *Concerning the work of guiding cases* in November 2010.[10] The rule aims at summarizing adjudication experiences, unifying the application of the law, enhancing adjudication quality,

system in the 19th and early 20th centuries. On the other hand, Hong Kong still retains the common law system inherited as a former British colony, and Macau employs a legal system based on that of Portuguese civil law. This is part of the One Country, Two Systems theory. They have their own courts of final appeal. As such, respectively, they are not within the jurisdiction of the court system within China, which is only effective within mainland China.

[2] Mo Zhang, *supra* note 1, p.283.

[3] Id.

[4] Id.

[5] Id.

[6] Notice of Issuance of the Second Five-Year Reform Outline of the People's Courts (promulgated by Supreme People's Ct., October 26, 2005), (herein after called Five-Year Reform Outline of the People's Court(2005), available at http://www.66law.cn/tiaoli/2915.aspx_, (accessed on 5 December 2021).

[7] Hu Yunteng and Yu Tongzhi,Study on Several Important and Complicated Issues Concerning the System of Case Guidance, *Jurisprudence Research Journal*, Vol.6, (2008),p.125.

[8] Id.

[9] Mo Zhang *supra* note 1, p.271.

[10] According to Article 1 of the provision of the Supreme People's court concerning work on the guiding case, the term Guiding Cases is defined as the case which has a guiding effect on adjudication and enforcement work in courts throughout the country, shall be determined and uniformly released by the Supreme People's Court. See Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance, passed by the Adjudication Committee of the Supreme People's Court Apr. 27, 2015, issued and effective May 13, 2015,(hereafter called Detail Implementing Rule), available at http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english (accessed on 14 Dec 2020).

safeguarding judicial impartiality,[11] setting the standard and procedures for the selection of guiding cases.[12] Article 7 of the Guiding Case Provisions provides that the people's courts at all levels *shall refer* to the guiding cases when adjudicating similar cases.[13]

The Supreme People's Court adopted detailed rules for the implementation of the Guiding Case Provisions under its power of judicial interpretation.[14] The rules are designed to provide judges with instructions on how to refer to guiding cases in case of adjudications. Yet, this set of rules makes the status of the guiding case intentionally vague.[15] The provision in the detailed rules provides that when referring to the guiding cases during the adjudication of similar cases, the courts at all levels shall cite the guiding cases in their judgment reasoning, but may not use the guiding case as the legal basis for their judgments.[16] Despite the Supreme People's Court's efforts to clarify the matter, questions on the status of the guiding case remain widely open since the citation of guiding cases is required in judicial reasoning. Particularly, it remains unsettled whether a guiding case has the effect of binding precedent or remains merely a reference.[17]

Turning to Ethiopia, precedents did not have much attention in the Country's legal culture. Under the current Ethiopian Constitution, the House of Peoples' Representatives has legislative power in all matters assigned by the Constitution to Federal jurisdiction. Also, regional state councils have law-making power in all matters that belong to them.[18] According to Article 80 of the Constitution, the Federal Government has three-tier courts: Federal First Instance Court, Federal High Court, and Federal Supreme Court. The Constitution provides that "the Federal Supreme Court has a power of cassation over any final court decision

[11] Provisions of the Supreme People's Court Concerning Work on Case Guidance, passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, (hereafter called Guiding case provision), English Guiding Cases Rules Edition, available at http://cgc.law.stanford.edu/guidingcases- rules/20101126-English,(accessed on 9 Dec 2021).

[12] Notice of Issuance of the Five-Year Reform Outline of the People's Court, *Promulgated by Supreme People's Court Gazette* (October 20, 1999), available at http://sifaku.com/falvfagui/39/zcff03a163ec.html accessed on 12 Dec 2020.

[13] Five-Year Reform Outline of the People's Court (2005), *supra* note 6, Article 7.

[14] Id, p.28.

[15] Id.

[16] Detailed Implementing rule, *supra* note 10, Article 10.

[17] Mo Zhang, *supra* note *1*, p.273.

[18] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazzeta* ,(1995) Article 55(1), [hereinafter FDRE Constitution].

containing a basic error of law."[19] The state supreme courts have the cassation power over any final court decision on State matters.[20]

While the elements of a civil law system have largely been in place over the decades, Ethiopia has also attempted several times to utilize uniform interpretation of laws through the adoption of Common law features in its judiciary. For example, Proclamation No. 195/1962 made the decisions of superior courts binding on all subordinate courts on matters of law.[21] The problem with this proclamation was that higher court decisions were not officially published nor their status as precedent was practically certain at the time. The second attempt was made during the Transitional period following the fall of the Dergue regime. The transitional government Proclamation No. 40/1993, under Article 24(4), provides that an *interpretation of the law made by a division of the Central Supreme Court constructed by no less than five judges shall be binding*.[22]

Yet, the most significant development has been made through the enactment of Proclamation No. 454/2005 to re-amend the federal court Proclamation No 25/1996. This Proclamation in its Article 2(1) states that interpretation of the law by the Federal Supreme Court (FSC) rendered by the Cassation Division with no less than five judges shall be binding on the federal as well as regional courts at all levels. The cassation division may however render a different legal interpretation some other time. By rendering binding interpretations of the basic errors of law, the Federal Supreme Court sets the tune for other federal and regional courts to follow the same approach.

The most recent law, Proclamation No.1234/2021, has repealed all previous laws but maintained the meaning of *binding interpretation*. According to Article 10(2), of the newly enacted proclamation, interpretation of law rendered by the

[19] Id., Art. 80(3)(a). Concerning the Federals Supreme courts' power of cassation over cassation, there have been for and against debate among Ethiopia legal scholars. For example, an author like MehariRedai argues that the Federal Supreme Court has no legal authority having to review Regional State matters. See Mehari Radea, Observations of Federal Cassation Power Sources and Cassation over Cassation' (Amharic), *Journal of Ethiopian Law*: Vol.24. No.2, (2010), p. 201-213. Other authors like Abebe Mulatu argue in favor of cassation over cassation and justifies his argument by lack of expertise in regional state and the need to have a uniform interpretation of laws. The author's full version of the argument can be found in his work Abebe Mulatu, Apportionment of Jurisdiction under the 1994 Ethiopian Constitution, *Symposium Proceedings Ethiopian Civil Service College*, (2000), p.15.

[20] FDRE Constitution, *supra* note 19, Article 80 (3) (b).

[21] Proclamation No. 195/ 1962, *Negarit Gazette* 22nd year, No. 7, Article 15.

[22] A Proclamation to Provide for the Establishment of Courts of Central Transitional Government Proclamation No. 40/1993, *Negarit Gazette* 52nd year, No. 25, (1993), Article 24(4).

Cassation Division of the Federal Supreme Court with not less than five judges shall be binding from the date the decision is rendered. The Federal Supreme Court shall publicize decisions rendered by its Cassation Divisions on binding interpretation of laws via electronic and print Medias as soon as possible. This new proclamation under Article 26(4) also provides that interpretation of law rendered by cassation division presided by not less than seven Judges may review the same issue by not less than seven Judges.

Looking into the binding scope of precedents over the decades, one could observe variations. For example, Proclamation No. 195/1962 was broader than the other two legislations and it stipulates that all the lower courts are bound by the decisions of the higher courts although its practical application was in question.[23] The second and the third proclamations referred only to a cassation division within Central or Federal Supreme Court, which binds all courts. In other words, they limit themselves to a specific division, unlike the common law system where lower courts are generally bound by the decisions of higher courts according to their hierarchy.

So far, the Cassation division of the Ethiopian Federal Supreme Court has published 24 volumes of cases involving the interpretation of laws containing basic error of law.[24] Nonetheless, given the fact that the practice of judicial precedent has not yet been well developed, there are still many uncertainties. Among others, there are contentions over the constitutionality of cassation over cassation[25], on clarity and persuasiveness of the decisions, and the lack of detailed procedures for selection and amendment of cassation.

Using doctrinal research methodology, this article compares the Ethiopian FSC cassation division binding interpretation system with Chinese guiding case law, and it identifies relevant practices and draws insights for better practices. The basic criteria for comparison are the way of establishing binding interpretation; the status of the binding interpretation; and repeal or amendment as they are the defining feature of binding interpretation. The comparative investigation is justified mainly on three grounds. First, both Chinese and Ethiopian courts do not have lawmaking power. Second, in terms of authority of setting a precedent, both countries have entrusted power only to the highest-level court. Third, in

[23]Abdissa Dashura, Implication of Cassation over Cassation in the Ethiopian Federal Context: With Special Reference to Self-Determination', LL.M thesis(unpublished), (2014), p.23.

[24] See the official website of Federal Supreme Court of Federal Democratic Republic of Ethiopia, http://www.fsc.gov.et/Documents/Index1, (accessed on 15 March 2021).

[25] Muradu Abdu, Review of decisions of state courts over state matters by the federal supreme court, *Mizan Law Review*, Vol. 1 No.1,(2007), p. 60.

both countries, the scope of precedent has continued to be the source of debate. Such parallel between the two systems would lend a way to identify relevant practices and to draw insights for better institutional practice.

In doing so, the article is organized under five main sections. Section one presents the essence of a precedent system in common law and civil law traditions. Section two reviews the procedures through which the guiding case and binding interpretation of the law are established in China and Ethiopia respectively. The third section is dedicated to comparing the two systems in terms of the legal effect of the guiding case and binding interpretation of the law by the Cassation Division. This section particularly aims to compare the circumstances where lower courts are bound to apply guiding cases and binding interpretation of the Cassation Bench. Section four compares the procedure of amendment or repeal of guiding cases and the Cassation Bench binding interpretation. Section five discusses the existing challenges in both systems. Finally, the article concludes by recapping the best practice of each system.

1. Precedent System: An Overview

1.1. Essence and Justification of Precedent System

A precedent is a principle or rule established in a previous legal case that is either binding or persuasive for a court or other tribunals when deciding subsequent cases with similar issues or facts.[26] It is based on the notion of "stare decisis", derived from the full Latin maxim "*stare decisis et non quieta movare*", which literally means to stand by a decision and not to disturb that which is settled. That is, when a particular point of law is decided in a case, all future cases containing the same facts and circumstances will be bound by that decision.[27]

In terms of effect, a precedent can have a binding or persuasive effect.[28] Binding precedents, also known as authoritative precedents, are previous decisions which must be followed by judges once a judgment is made whether they approve it or not. Conversely, in persuasive precedents, the lower courts are not bound to follow the decision of higher courts. It depends on the court to decide whether to rely on it or not. Persuasive precedents mostly apply in civil law tradition where

[26] Black's Law Dictionary), 5th ed, (1979), p. 1059.
[27] Mary Garvey Alger, The Sources of Law and the Value of Precedent, *Louisiana Law Review*, Vol. 65, No.2, *(2005)*,p.782.
[28] Sebastian Lewis, 'Precedent and the Rule of Law', *Oxford Journal of Legal Studies*, Vol. 41, No. 4 (2021), p. 875

judges consider precedent similarly but are not obliged to do so and are required to consider the precedent in terms of principle.

The most widely held justification behind precedent as a source of law rests on three basic grounds.[29] First, courts should ensure certainty in the law through which people could predict the legal consequences of their actions. Such predictability could be obtained if judges can be expected to follow precedent in making their decisions. A second justification holds that the use of precedent is necessary to ensure that similarly situated litigants are treated equally.[30] According to this justification, two cases adjudicated by the same court, occurring in the same place and at the same time, and arising out of facts that are identical except for the identity of the litigants, should be treated equally.[31] As a way to ensure this principle of equality before the law, courts are required to make conscientious inquiries into the cases at hand. The first inquiry required in this respect is whether the case to be decided has similar facts or raises roughly the same issue as a case that is a potential precedent. If the earlier case can be distinguished from the one at the bar, it is not a "like" case, and judges deciding the latter case need not follow it. Third, the doctrine of precedent is often defended on the ground that it promotes judicial efficiency. Earl Maltz, for example, argued that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's course of bricks on the secure foundation of the courses laid by others who had gone before him".[32] Thus, precedent is said to reduce the burden of judges in the sense that judges can have guidance from the previously decided case on the interpretation and application of laws. Overall, whether it is civil law, common law, or other legal traditions, reliance on precedent is grounded in the rationale to create certainty and stability for parties operating in the jurisdiction. The doctrine of precedent is a vital part of English legal system as it provides certainty to the law and sets up the hierarchical structure of the court system.

1.2. The Position of Precedent in Common Law and Civil law Legal Tradition

It is a common characteristic of the legal systems that a law enacted by a law-making body is a source of law for that jurisdiction.[33] When it comes to a

[29] Maltz E, The Nature of Precedent, *North Carolina Law Review*, Vol. 66, No. 2, (1988), p. 369.
[30] Id.
[31] Id.
[32] Id., p. 369.
[33] Mary Garvey Algero, *supra* note 27, p.782.

precedent as source of law, however, jurisdictions have varied stances. Unlike most civil-law systems, common-law systems follow the doctrine of *stare decisis*[34], by which most courts are bound by their own previous decisions in similar cases and all lower courts should make decisions consistent with previous decisions of higher courts.[35] The courts decide the law applicable to a case by interpreting statutes and applying precedent, which records how and why prior cases have been decided. The following section discusses the position of common law and civil law traditions in terms of the nature, function, and scope of the precedent as they are the dominant system and related to the subject under discussion.

1.2.1. Precedent in Common Law Tradition

In common law tradition, the doctrine of *stare decisis* commands judges to apply the law as it has been set out in one prior case when the prior decision was made by a court that is higher than and sometimes equal to the court rendering the present decision.[36] The part of the decision that is binding is the *ratio decidendi* or the rule of the decision, as opposed to extraneous comments of the judges that are not relevant to the court's decision.[37] England and the United State of America (USA) are jurisdictions with established practice of the precedent system. In England, the decisions of the court of appeal bind lower Courts in the hierarchy,[38] whereas the decision of high courts does not bind any other court but serves merely as persuasive authority for other high courts and lower courts.[39] Finally, decisions of the House of Lords are strictly binding on all lower courts and on the House of Lords itself.[40]

In the USA, forty-nine states, other than Louisiana, as well as the USA federal court system follow precedent as a source of law.[41] The doctrine of *stare decisis* requires the lower courts in those jurisdictions to be bound by the decisions of

[34] Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2nd ed.(1995), P. 827.
[35] For example, in England, the High Court and the Court of Appeal are each bound by their own previous decisions, but the Supreme Court of the United Kingdom can deviate from its earlier decisions, although in practice it rarely does so. See also Mary Garvey Algero, *supra* note 27, p.782.
[36] Bryan A. Garner, *supra note* 34.
[37] James Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, *Louisiana Law Review,* Vol.54, issue.1, (1993), pp.4-5.
[38] Theodore F. T. Plucknett, *A Concise History of the Common Law,* 5th ed., (1956), p.326.
[39] Id., p.327.
[40] Mary Garvey, *supra note 27,* p.782. The House of Lords issued a notice in 1966 stating its position on *stare decisis* and the use of precedent, which changed the practice that had been in existence since 1898.
[41] Id., p.785.

the courts to which the lower courts' decisions are appealable. In these jurisdictions, the decisions have a force of law, judge-made law. Concerning overruling, the United States Supreme Court has the express power to overrule its own decisions," as do most of the state supreme courts.[42] Courts in the United States are allowed to deviate from strict adherence to precedent when the precedent appears to be outdated, when "the existing rule has produced undesirable results," or when "the prior decision was based on what is now recognized as poor reasoning.[43]

1.2.2. Precedent in Civil Law Legal Tradition

In civil law tradition, codes are the principal sources of law, and precedent is not formally recognized as a source of law. When considering precedent, courts are likely to look at prior decisions as mere interpretations of the law, and the courts are often free to decide consistently with the prior court's interpretation of the law or reject the prior interpretation.[44] If a court has adjudicated a consistent line of cases that arrive at the same holdings using sound reasoning, then the previous decisions are highly persuasive but not controlling on issues of law.

In some civil law systems, the doctrine of "*jurisprudence constante*" or "*giurisprudenza constante*"[45] calls on these courts to recognize the persuasive value of a long line of precedents. Therefore, a decision by a highly ranked court may carry considerable weight or even serve as a *de facto* binding authority due to the prevalence of availability of reported cases and the hierarchy of courts.[46] Both the Chinese and the Ethiopian legal system largely belong to the civil law system with codes and predefined rules in that judges seek the legislator's intention and the historical backdrop of the legislation to interpret the law.[47]

A close examination of Franch, Italian, Spanish, and Louisianan legal system reveals this fact. Principally, French courts are only bound to follow the official sources of law-the Constitution, European law, statutes, and codes-even though precedents are frequently cited by the courts to explain how to interpret and

[42] Id.
[43] Id.
[44] Bryan A. Garner, *supra* note 34, p.126.
[45] Id., p.1217.
[46] *Mary Garvey*, *supra* note *27*, p.788.
[47] Gebeyehu and Nadew Zerihun, 'How Does the Case Law System Fit into the Ethiopian Legal System?, https://ssrn.com/abstract=2604475 or http://dx.doi.org/10.2139/ssrn.2604475 accessed on 20 August 2022. See also Wang Chang, Inside China's Legal System, Madson, Nathan H. Oxford, UK Chandos Publishing, (2013), pp. 56–7

apply these sources.[48] Exceptionally, however, the decisions of higher courts in the French judicial system certainly have force on the lower courts whose decisions will be appealable to those same courts. The lower courts must conduct their analysis of the cases presented to them in light of the applicable enacted law, but they decide on cases knowing that the higher court may reverse them should they decide in a way inconsistent with the higher court's earlier decisions.[49]

Therefore, the lower courts are under implicit influence to follow the decisions of higher courts. In this regard, the decisions of the higher courts can provide an "authoritative argument" to the lower courts on how to interpret the enacted law, though "the lower court has no legal obligation to follow that argument.[50] This method of allowing precedent to play an important role, though not allowing it to bind courts, has been described as creating *a "de facto* obligation" to follow precedents, which arises from the hierarchy within the court system.[51]

Similarly, the Italian system considers precedents in much the same way as the French system. In the Italian legal system, no precedent may be considered strictly binding since there is no system based on the principle of formally binding precedent.[52] Italian courts are only bound to follow the official sources of law-codes, constitutions, and statutes. Precedents are frequently cited to the courts to justify how to interpret and apply the official sources of law.[53] However, the lower courts have a right, not an obligation, to apply the previous ruling. Thus, the decisions of the higher courts are instructive to the lower courts on how to interpret the enacted law.

In Spain, the fundamental principle of law is that the judge is bound by statutory law and not by precedent. The Civil Code of Spain lists legislation, custom, and the general principle of law as official sources of law.[54] However, Article 1(6) of the civil code recognizes "jurisprudence of the courts" as a "complement" to the legal order based on a doctrine constantly established by the Supreme Court. As such, these sources would be used in the interpretation of legislation, customs,

[48] Michel Troper & Christophe Grzegorczyk, Precedent in France: in Interpreting Precedents: A Comparative Study, (1997), p. 130-31.
[49] Id.
[50] Id., p. 111.
[51] Id., p.790.
[52] Id.
[53] Mary Garvey, *supra* note *27*, p.790.
[54] *Codigo* Civil (the Civil Code of Spain) provides in part:C.C. art. 1(1) (translation by . Julio Romanach, Jr., Lawrence Publishing Co. (1994), p.12.

and the general principles of law. Thus, although the legislature has not recognized precedent as a formal source of law, it has recognized its value.

The system of the state of Louisiana in the USA has a bit different stipulation. This legal system has developed in a way that most closely resembles the civil law traditions when it comes to the sources of law and the value of precedent with one exception-the express judicial recognition that Louisiana Supreme Court decisions are binding on the lower courts.[55] Much like the Civil Code of Spain, the Louisianan Civil Code identified legislation and custom as the sources of law. In the absence of legislation and custom, the Civil Code directs judges to "proceed according to equity.[56] Unlike other civil law jurisdictions, the Louisiana Supreme Court identifies its decisions as binding statements of Louisiana law. The decisions of the highest court in the system, which is the court of last resort, are considered statements of binding law on all of the lower courts, subject to change only by the highest court itself or the legislature, which is similar to the common law concept of *stare decisis*.[57] Other Louisiana court decisions are not considered binding on any court. This in effect is an aspect of the concept that incorporates the doctrine of constant jurisprudence. Finally, from a close observation of these features, one can notice considerable commonalities between the Louisiana system of precedent and the Ethiopian cassation bench binding interpretation.

Overall, in civil law tradition, courts are not obliged, at least as a matter of law, to follow precedents. Although precedents are not recognized by the legislature as sources of law, they still play important role in determining the meaning of laws. However, the lower courts in this legal tradition are free to take a different position on a legal issue from the position taken by the higher courts, but they are expected to adequately explain the reasons for disregarding the high court's prior interpretation of the law.

2. Comparison between Chinese Guiding System and Cassation System of Ethiopia

2.1. Establishing the Guiding Cases Vis-à-Vis Cassation Binding Interpretation

In the Chinese system, there is a well-established rule that governs the processes of establishing guiding cases. The 2010 Guiding Case Provision primarily

[55] Mary Garvey Algero, *supra* note 27, p.790.
[56] Louisiana Civil Code (1999), Article4.
[57] *Mary Garvey Algero,* supra *note* 27, p.891.

establishes the basic requirement that needs to be satisfied with the quality as a guiding case. Accordingly, a given case must satisfy two requirements as a guiding case status.[58] First , the judgment has to be already taken into effect.[59] Second, the judgment should have one of the following features: (a) the judgment is of great social concern; (b) it involves the issue for which the legal provision is relatively general; (c) the judgment is typical; (d) the judgment is difficult, complicated or of a new type; or (e) it contains other quality of guidance.

If a case satisfies these criteria, a three-step selection process of guiding case would follow.[60] The first step is case recommendation by internal or external bodies. There is a broad base for making such a recommendation in China's guiding system. Under the Guiding Case provisions and the detailed rules, the recommendation could be made either internally or externally. The internal recommendation may come from the adjudication divisions of the Supreme People's Court, the High People's Courts, and military courts.[61] The people's courts at intermediate and trial levels may also make recommendations through their corresponding High People's Court.[62] Externally, the recommenders could be the delegates of the NPC(National Peoples' Congress), members of the CPPCC(Committee of Peoples' political Consultative Committee), experts, scholars, lawyers, and any others who are interested in the adjudication and enforcement work of people's courts.[63] Therefore, China's guiding case law system is more participatory than it is only the issues of the Supreme People's Court.

The second step of establishing a guiding case in the Chinese system is the selection and review stage, which is different from the common law system. In typical case law systems such as England, binding precedents could be generated by other courts of higher status in addition to the House of Lords.[64] In cases where precedents are made by lower courts, the courts of the higher

[58] Guiding Case Provision, *supra* note 11, Article 2.
[59] Id.
[60] Detailed Implementing Rule, *supra* note 10, Article 5.
61Id.
[62] Id., Article 4.
[63] Id., Article 5.
[64] In the English legal system, the House of Lords makes precedents binding all courts in the hierarchy of courts. The European Courts of Justice's decisions bind the House of Lords. Lower courts such as the Court of Appeal, Divisional Courts and High Courts, in turn, make precedents that are binding on courts that are lower in the hierarchy of English courts. See Slapper and D. Kelly, 'The English Legal System', (2009), p.123-132.

hierarchy may consider such precedent though not bound to follow them as binding on such a higher court.[65]

The Chinese system of guiding cases takes a different approach than the typical case law system. In the Chinese system, even cases decided by the lower court can be selected as a guiding case to courts of all hierarchies. Institutionally, the Chinese Supreme People's Court has created an office to facilitate the guiding case selection. Members of the Guiding Case Office are the judges designated by the Supreme People's Court. The guiding case office is in charge of the solicitation of case recommendations and is responsible for collecting, selecting, and reviewing the cases recommended by internal and external bodies.[66] Besides, the Guiding Case Office has the authority to coordinate the guiding case selection process and provide instruction to the work on guiding cases nationwide.[67] Upon its review of the recommended cases, the guiding case office makes a selection and then submits the selected cases to the Judicial Committee of the Supreme People's Court for approval.[68] However, if, in its view, the case needs further discussion or research, the Office may send these cases to relevant government entities, social organizations, members of the guiding case advisory committee, and other experts and scholars for opinions and comments.[69] Therefore, the role of the Supreme Court in the Chinese system is to process the selection of the already decided cases either by itself or by other lower courts. As such, except for cases that are entertained by the Supreme Court, the role of the court is limited to endorsing the interpretation of the lower court and giving the status of a guiding case.

The final step in establishing a guiding case is publication and distribution. If the Judicial Committee of the Supreme People's Court determines that a proposed Case satisfies the applicable criteria, it approves it as a guiding case and orders publication and distribution. Thus, the guiding case provision contains a standard format that such cases should pass through before they are published and distributed. Article 3 of the detailed rules states that a guiding case must contain: (a) a title; (b) keywords; (c) main points of adjudication; (d) relevant legal provisions; (e) basic facts of the case; (f) the result of adjudication; (g) the judge's reasoning; and (h) the name of judges appearing on the judgment that

[65] Id., p. 117.
[66] Detailed Implementing, *supra* note 10 Article 4.
[67] Id., Article 5.
[68] Id., Article 8.
[69] Id., Article 7.

has taken effect.[70] Once the case takes this format, the guiding cases is sent in the form of notice by the Supreme People's Court to all of the High People's Courts. Finally, it will be published in the *Supreme People's Court Gazette*, *People's Court Daily*, and on the Supreme People's Court website.[71]

Coming back to the Ethiopian system of establishing cassation precedent, the system is not well established with a detailed set of rules. The proclamation that introduced the binding interpretation system had very general provisions as to how such binding interpretations of law are to be made. According to the recently changed federal court re-amendment proclamation, binding interpretations of law are made by the Federal Supreme Court cassation division where *it is rendered by a panel of not less than five judges*.[72] The federal Supreme Court in Ethiopia has labor, criminal, and civil divisions which are collectively called regular divisions. However, the cassation division of the Federal Supreme Court has the power to decide over any final decision with a basic error of law.[73] It is only this cassation division that has the power to pass binding precedent on federal as well as regional courts of all levels.[74] The power to make binding interpretations of law concurs with the power of the Federal Supreme Court cassation division to decide on cases of fundamental error of law. Such interpretations are made only if the case reaches the Cassation Division of the Federal Supreme Court alleging a basic error of law. The recently enacted Federal court establishment proclamation has not come up with substantial differences from its predecessors.

[70]ZuigaoRenmin and FayuanGongbao, Project Report on the Supreme People's Court Detailed Rules for the Implementation of the Provisions of Guiding Cases, Stanford Law School has an on-going "China Guiding Cases Project" ((2015), p.32.. In one of its online publications, it explains the required elements as follows: 1. "Keywords" (to list keywords that indicate the nature of the dispute, etc.); 2, "Main Points of the Adjudication" (to include general principles prepared by the Supreme People's Court that it expects other courts to refer to); 3, "Related Legal Rule(s)" (to list the legal rule(s) considered in the GC); 4, "Basic Facts of the Case" (to summarize the most important facts of the GC); 5, "Results of the Adjudication" (to report the outcomes of legal proceedings); and 6, "Reasons for the Adjudication" (to summarize the reasons for the final ruling/judgment). *See* Stanford law school: china guiding cases project, available at https://cgc.law.stanford.edu/guiding-cases-analytics/issue-4/,_accessed on 30 Jan 2021. See also Ethiopian Federal Court Cassation division Publications, <http://www.fsc.gov.et/Documents/Index1>, accessed on 12 March 2020.

[71]Id., p.15.

[72] Federal Court Proclamation Re-Amendment Proclamation, Proclamation No. 454/2005, Federal Negarit Gazzet, year 11, no. 42, (2005) Article 59[hereinafter called Federal Court Proclamation Re-Amendment Proclamation No. 454/2005].

[73] Mehari Redae ,*supra* note 19, p.15.

[74] Federal Court Proclamation Re-Amendment Proclamation, *supra* note 72. Article 2 of the proclamation indicates that the power of passing binding precedent is the sole authority of the Cassation Division of the Federal Supreme Court. The cassation division may, however, render a different legal interpretation some other time.

However, the new proclamation provides criteria to illustrate what constitutes a basic error of law to make a case subject to review by the cassation division of the Federal Supreme Court. The proclamation under Article 2(4) defines basic or fundamental error of law as an error of law that includes final judgment, ruling, order or decree which may be filed in the Federal Supreme Court Cassation division according to Article 10 of the Proclamation and/ or contains either one or similar basic errors and grossly distress of justice. As provided in Article 2(4), basic or fundamental errors of law includes violation of the constitution; misinterpreting a legal provision or applying an irrelevant law to a case; not framing the appropriate issue or framing an issue irrelevant to the litigation; denying an award judgment to a justifiable matter; giving an order in execution proceedings unwarranted by the main decision; rendering judgment in the absence of jurisdiction over the subject matter of dispute; an administrative act or decision rendered in contradiction with the law; and finally, any decision contravening the decision of the Cassation Bench.

Looking into these qualifiers, one could see that Proclamation No. 454/2005 does not provide any clue as to which cases could be seen by Federal Supreme Court Cassation Divisions. Thus, providing a non-exhaustive list of criteria about basic or fundamental errors of law in the current proclamation will help both the disputing parties and judges to have more room and clarity about cases to be seen by cassation benches.

From the above discussion on the precedent establishment, is clear that in both Chinese and Ethiopian systems, the Supreme Court has the power to formulate such precedent though the scope of involvement varies. However, the Chinese guiding case system has significant differences compared to the Ethiopian cassation decision in establishing the precedent. First, according to China's guiding case system, the selection of cases can be made only when the judgment of the case has been taken into effect and no one knows which case has the potential to be a guiding case. In the Chinese system, the Supreme People's Court, upon the recommendation of internal or external parties, selects guiding cases. However, in Ethiopia, the criteria for a cassation decision to be a binding precedent is legislatively determined as*"[a]ny interpretation on the basic error of law by the Federal Supreme Court cassation division with not less than five judges*." Here, the lawmaker decides the criteria and the federal Supreme Court does not have the power to choose which cassation decisions are going to be a precedent. The discretion of the Federal Supreme Court remains only to decide as to which cassation cases need to be seen by more than five judges. In doing so, the requirement is that a case should contain a basic error of law for it to

qualify for cassation. Then, three judges are supposed to screen those cases of fundamental importance.[75] Besides, once judges refer a case to the cassation division, at least five judges are expected to review it and give the verdict.[76] Then, the decision of the cassation concerning the interpretation of law shall have automatically a binding effect on Federal and Regional courts.

Second, unlike the Chinese guiding case system, Ethiopia does not allow both internal recommendations other than the Supreme Court and any external recommendations. There is only an internal screening mechanism where the three judges in the Supreme Court are supposed to screen and refer the case to the cassation division. Because of the absence of a set standard, judges in the Supreme Court could dismiss the review of the case by cassation division.. By incorporating a non-exhaustive list of criteria, the new federal court proclamation tries to minimize the work of judges screening the matter. Other courts are passive recipients of the binding interpretations of the Federal Supreme Court cassation division.

In the Chinese system, though it is the Supreme People's Court's exclusive jurisdiction to approve a guiding case,[77]other lower courts and external stakeholders are also allowed to recommend a candidate case. Lower courts in China can recommend cases that are decided by them including people's high courts and intermediate people's courts. Indeed, the assistance of an external recommender would be essential in Ethiopia as the cassation decisions have become laws and affect not only the particular litigants in that case but the legal system involving a range of interests.[78] The cassation decision has a long-lasting effect and requires serious scrutiny. Thus, in establishing a case, the Supreme Court Cassation Division should consider and can benefit from external recommendations as the Chinese Supreme Court does.

External stakeholders such as law schools, research institutes, law firms and civil societies may file an *amicus* brief in which they provide their opinion on upcoming Cassation decisions instead of giving critics thereafter. It is further important to note, in this connection, that Article 53 of Proclamation No.

75 Bililign Mandefro, The System of Cassation in Ethiopia, *Hegawinet Law Journal,* Vol. No. 1, (1989), p. 51

76 Id., p.50.

77 Li Shichu, 'China's Guiding Cases System: Dilemmas and Solutions, Speech at the "Frontiers of Civil and Commercial Law," *Forum at China's Renmin University* (2009), http://old.civillaw.com.cn/article/default.asp?id=44157[http://perma.cc/XV8H-UYPN, (accessed 20 May 2019).

78 Mulugeta Mengstie, 'if the doctrine of precedent did not exist, it would have to be invented', < http://Abyssinia.com> ,(accessed on 26 Jan 2020).

454/2005 empowers the Federal Supreme Court to establish external advisory board. Accordingly, the Court may establish a council composed of ex-judges of the federal courts, highly experienced and qualified legal professionals, and university professors who could serve in the council.. The Advisory Council would support the administration of the court by providing non-binding recommendations and perform such other functions assigned to it.

Turning to the third point of comparison between the two systems, the Chinese guiding case system has established an independent guiding case officer in charge of the selection, screening, and publication of a guiding case. In contrast, the Cassation division of the Ethiopian Federal Supreme Court does not have an independent office.[79] It is only required, under Article 10(4), to publicize decisions rendered by its Cassation Divisions on a binding interpretation of laws via electronic and print media as soon as possible. Establishing an independent office would thus help to pass high quality cassation decisions, to achieve uniformity of judgment, and to persuade lower courts and the legal professionals to follow a binding interpretation of the cassation division.

Fourth, the Supreme People's Court of China has issued two separate guidelines: *the provisions of the Supreme People's Court concerning work on case Guidance* and the detailed implementing rules on the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*. Both rules play a vital role in achieving the goals of uniform and standardized application of the law. In the case of Ethiopia, however, there is only a general statement under Article 4 of Proclamation No. 454/2005 authorizing the Federal Supreme court to *issue procedural directives necessary for its functions.* Nonetheless, the Federal Supreme court did not issue any procedural directives as per the proclamation. Moreover, the newly enacted federal courts establishment proclamation has also provided the same stipulation under Article 55, allowing the Federal Supreme Court to enforce the proclamation. Again, the proclamation has also authorized the Federal Supreme Court to issue a directive for the implementation of the proclamation and regulation. Despite these hosts of room to formulate a detailed procedural guideline helpful for more uniform and standardized decisions, the Ethiopian supreme court, unlike its Chinese counterpart, limits itself to general statements provided in the proclamation.

Lastly, in terms of format, the Chinese guiding case system provides detailed requirements on the contents of a guiding case. Upon publication, the case

[79] Federal Suprem Court Admistration and Directorates, <http://www.fsc.gov.et/About-Us/Court-Administration-Directorates#>, (accessed on 19 October 2021).

should contain a title; keywords; main points of adjudication; relevant legal provisions; basic facts of the case; the result of adjudication; the judge's reasoning; and the name of the judge. In Ethiopia, the cassation division of the Federal Supreme Court follows formats of ordinary civil and criminal procedure codes in composing and compiling its decisions. However, it is important to note that cassation decisions are more than ordinary cases and the Cassation Division of the Federal Supreme Court needs to pass detailed and persuasive decisions. In this respect, a cursory look into the volumes of cassation decisions of the Federal Supreme Court shows the continuous progress in the formatting of judgment. The common contents include messages of the President followed by a cluster of cases; a concise summary of the case, issues, appropriate law, interpretation of law, and decisions of the court. The length and depth of the decisions have improved a lot over time. However, the Federal Supreme Court needs to consider the special nature of the cassation decision and has to come up with detailed rules that comprehensively address the substantive content and formats of its decision.

2.2. Status of Guiding Cases and Cassation Decisions

Another notable line of comparison between the Chinese and Ethiopian systems is the status of the guiding case and cassation decision. The guiding case system established in China is different from the common law understanding of precedent. They are different not only in their naming but also in their nature. Some believe that guiding cases possess no legal force of law and thus should not be considered as a source of law.[80] In their view, because of their role of guiding and reference, the guiding cases have only persuasive effect,[81] and it is no more than a useful tool to help judges conduct legal research and exchange experiences of case adjudication.[82] Others, however, disagree. They argue that the guiding cases, once issued by the Supreme People's Court, should have a binding effect on all lower courts.[83]

[80] Zhou Wei, Interpretation of Law through Cases: Development of the Supreme People's Court Guiding Case System', C*ontemporary Law Review*, Vol.*23*, (2009), pp.134-139

[81] Yue Zhiyong, Construction of Guiding Case System of the Country, *Legal System and Social Studies Journal*, Vol.3,(2009), p.22.

[82] Cui Kai, Establishment of Guiding Case System in China: A Comparison with the Case Law in the West, *Journal of the Postgraduate of Zhongnan University of Economics and Law*, Vol. 4, (2006), pp.146–49.

[83] Dong Hao&HeXiaoyu, Teaching Probe into the Guiding Cases in Uniform Application of Law, *Journal of Jurisprudence*, Vol.11,(2008), p. 144.

Both arguments stem from the wording of guiding case provisions and the detailed rules that carry on a vague statement.[84] Article 7 of the detailed rules of implementation provides that all courts *should refer* to guiding cases when they adjudicate similar cases but this is the only provision that concerns the effect of guiding cases. Neither the "reference" nor the "similarity" is defined or explained. Some hold that "to refer to" shall be understood as "to follow," which would mean to be bound by the guiding case not to simply take the guiding case as a reference.[85] Concerning similarity, they are of the view that "similarity" shall include (a) similar facts; (b) similar legal relations; (c) similar disputes, or (d) similar legal issues involved.[86]

Others, on the other hand, argue that courts at all levels shall cite the guiding cases in their judicial reasoning and hence the application of guiding cases as a reference in similar cases is compulsory. According to the latter argument, guiding cases must be referred to by the lower courts. Yet, they are not, in themselves, authoritative. In other words, the *ratio decidendi* of guiding cases cannot be the legal ground for the lower courts' judgment. They can only be cited as a reason for explaining the judgment. The judgment of a guiding case is, therefore, more like an interpretation of specific provisions through which the higher courts clarify vague provisions and fill in legal loopholes. This approach is similar to the binding interpretation of the Federal Supreme Court in Ethiopia.

Another line of analysis in this respect is related to the spirit of the Chinese constitution. In the Constitution, the National People's Congress enjoys absolute sovereignty of law-making. Courts in China have no power to review primary legislation or secondary legislation, let alone the power to change or modify legislation. Thus, under the Constitution of China, the judges can't make law whilst judicial law-making is the essence of the Common Law tradition. For this reason, the Supreme People's Court creates a guiding case system instead of an authoritative precedent. The requirement of citing a guiding case in the judicial reasoning of a similar case is an indicator of the authoritative force of the guiding cases. Moreover, judges must quote the serial number of the guiding case and the main points of adjudication.[87] When litigating parties invoke a guiding case as a ground for the prosecution or defense, the judicial personnel should explicitly explain the decision to rely on or not.

[84] Detail Implementing Rule, *supra* note 10, Article 10.
[85] Wang Limin, Study on Several Issues Concerning the Guiding Case System of China, *Legal Science Studies*, Vol.1,No. 71,(2012), pp. 75–76.
[86] Id.
[87] Detail Implementing Rule, *supra* note 11, Article 9.

In Ethiopia, there had been uncertainty regarding the legal status of precedents previously. The 1960 proclamation declared that lower courts should follow the decisions of the highest court. However, when this proclamation was amended to modify the court structure, that provision was omitted.[88] Besides, since then there was no uniformity of opinion on the position of the doctrine of precedent in the Ethiopian legal system. However, the promulgation of Proclamation No. 454/2005 had somehow clarified this issue. According to Article 2(4) of the proclamation, interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges *shall be binding* on all levels of courts. Thus, lower Courts are statutorily obliged to follow the interpretation of law adopted by the Federal Supreme Court Cassation Division.[89] Similarly, the recently enacted Federal Supreme Court establishment proclamation, under Article 10(3), has adopted the same wording in terms of the status of binding interpretation..

Another related point is the hierarchy of guiding cases and cassation decisions with other laws. In the Chinese system, *the Detailed Implementing Rules* provide that a guiding case loses its guiding effect if it is (1) "in conflict with a new law, administrative regulation, or judicial interpretation" or (2) is "replaced with a new Guiding Case. However, no provision states explicitly that a guiding case loses its guiding effect if it is in conflict with a departmental rule issued by the State Council, a local regulation issued by a provincial legislature, or a local governmental rule issued by a local government. The lack of such provisions may prompt one to wonder whether guiding case rulings enjoy certain superiority over departmental rules, local regulations, and local government rules.

In Ethiopia, unlike the Chinese system, the proclamation does not explicitly provide the status of a cassation decision compared to other laws such as parliamentary legislation and regulation of the council of ministers. The proclamation only provides that the interpretation could be later amended or repealed by the same Court.

2.3. Repeal or Amendment of Guiding Cases *Vis-à-Vis* Cassation Court Binding Interpretation

[88] Mulugeta Mengstie, *supra* note 78.

How a guiding case or cassation decision could be amended or repealed is another important point of comparison between the Chinese and Ethiopian systems. As discussed before, in the common law tradition, courts of lower status are obliged to follow precedents set by superior courts unless the precedent is 'overruled' or 'distinguished.[90] A precedent is said to be overruled when it is set aside by a higher court in the hierarchy. If, in deciding cases, judges make rules and lower courts follow such rules as precedents, overruling kills precedents, and such precedents are repealed and are not laws to be followed.[91]

Yet, overruling should not be confused with 'reversing' where a superior court sets aside the decision of a lower court on the same case. Hence, reversing does not in principle involve creating or setting aside a precedent apart from settling a case. On the other hand, judges may excuse themselves from following a precedent through 'the principle of distinguishing', where the facts of the case before the court are significantly different from the facts of the case cited as a precedent.[92]

In the Chinese guiding cases system, it is provided under Article 12 of the detailed implementing rules that a guiding case loses its guiding effect if it is (1) "in conflict with a new law, administrative regulation, or judicial interpretation" or (2) is "replaced with a new Guiding Case. Therefore, the detailed rule also has empowered the Supreme People's Court to replace the already established guiding case with the new one alongside other criteria.

In Ethiopia, partly in a similar vein with the common law legal system, the federal Supreme Court Cassation Division is not bound by its own past decisions.[93] In other words, the federal Supreme Court cassation division has the power to repeal or amend its post decisions. This is deemed necessary to ensure that the law is not static and the Cassation Division of the Federal Supreme Court should not become a slave to its past mistake.

3. Limitations of Chinese Guiding Case and Ethiopian Cassation Binding Interpretation

[90] Benjamin N. Cardozo, *The Nature of the Judicial Process, Universal Law Publishing Co. Pvt. Ltd.*, (*1961*), p.139.
[91] Id.
[92] Id.
[93] Federal Courts Proclamation Re-Amendment Proclamation, Proclamation No. 454/2004, Federal Negarit Gazzeta ,(2005), Article 2(4).

Despite the concerted effort made by the Supreme People's Court to clarify the guiding case in China, there are still a number of limitations associated with it.Firstly, the numbers of guiding cases are small and address only a limited number of legal issues. As a result, guidance provided by the Supreme Court could not fully meet the needs arising from numerous legal disputes in the Country.[94] The second challenge is related to the limited application of the guiding case. Many judges are unwilling to use a guiding case because of the unclear legal status of these cases and/or are uncertain about how to use a guiding case in adjudication.[95]

Both challenges were rooted in the limitations of the *provisions of the guiding case*. As indicated earlier, Article 7 of the *provisions of guiding case, for example,* lacks expressions making judges formally bound by guiding case.[96] Yet, the 2015 Rules put an end to this debate, stipulating that lower courts "should quote the Guiding Case as a reason for their adjudication, but not cite it as the basis of their adjudication.[97] In other words, guiding cases should be invoked not as an independent source of law but instead as a necessary aid to judicial reasoning. Hence, judges must cite the serial number of the guiding case and the main point of the guiding case.[98] Judicial personnel should also independently "inquire about relevant Guiding Cases for any issue involving similar facts or law.[99] Litigating parties can also rely on guiding case as a ground for the claim, prosecution, or defense.[100] Therefore, the rules did much to legitimize the use and citation of guiding cases in lower court decisions while still supporting the view that guiding cases were binding *de facto* but not *de jure*.

[94]Seminar Summary: On Building China's New IP Case System: A Discussion with Chinese Judges as well as Legal and Big Data Experts, Stanford Law School China Guiding Cases Project, Guiding Cases Seminars, Oct. 19, 2017, <https://cgc.law.stanford.edu/event/guiding-cases-seminar-20171019>, (accessed on 12 February 2021).

[95]Seminar Summary: On Building China's New IP Case System: A Discussion with Chinese Judges as well as Legal and Big Data Experts, Stanford Law School China Guiding Cases Project, Guiding Cases *Seminar*, Oct. 19, 2017, <https://cgc.law.stanford.edu/event/guiding-cases-seminar-20171019 >, (accessed on 12 February 2021).

[96]Mei Gechlik *et al*, China's Case Guidance System: Application and Lessons Learned (Part I), Stanford Law School China Guiding Cases Project, Guiding Cases *Surveys*, Issue No. 3, (Mar. 1, 2018), http://cgc.law.stanford.edu/guiding-cases-surveys (accessed on 12 November 2020).

[97] Chinese judgments distinguish between a decision part and a reasoning part. The decision part includes the applicable sources of law and the reasoning part gives the detailed grounds of the decision.

[98] Detail Implementing Rule, *supra* note 11, Article 9

[99] Id., Article 11.

[100] Id.

The detailed implementing rules still give rise to other uncertainties about the hierarchy of guiding case compared with other bottom-level departmental rule. These rules only delineate the hierarchy between guiding case and the law of the National Congress, administrative regulation, judicial interpretation. No provision explicitly stated that a guiding case loses its guiding effect where it is in conflict with a departmental rule issued by a ministry under the State Council, a local regulation issued by a provincial legislature, or a local governmental rule issued by a local government. The lack of such provisions may confuse the legal status of guiding cases vis-a-viz departmental rules, local regulations, and local government rules..[101]Moreover, there is a contention inherent in the new system. As analyzed previously, an act of law-making by judges is constitutionally impossible. It is argued that the judges are only supposed to interpret the legislation in the judgments. Yet, it is impossible to avoid creation when judges interpret legislation. The creative aspect of interpretation may be translated into familiar *law-making*. To avoid this happening, judges may write judgments more rigidly than before, for example by adopting the approach of rigid originals to interpret the legislation. Eventually, more regulatory documents need to be issued by the Supreme People's Court to address these issues to improve the case guidance system.

In Ethiopia, as the practice is a relatively new phenomenon, there are challenges inherent to it. The first challenge is the unsettled controversies over the power of the Federal Supreme Court on regional matters. Ethiopia follows a federal state with a parallel court system, both Federal and Regional Courts having three tries of Court structure with independent jurisdiction. However, the Federal Supreme Court Cassation Division intervenes in reviewing the final decisions of the cassation decisions of the Regional Supreme Courts, which is technically called 'Cassation over Cassation'. Under Article 80(3(b)) of the Ethiopia Constitution, the State Supreme Court has the power of cassation over any final court decision on State matters that contains a basic error of law. This constitutional stipulation gives the state courts autonomous authority on their respective state matters.

While this issue is a point of controversy, scholars take three different lines of argument on the power of Federal Supreme Court's power of cassation over cassation.[102] Authors such as Murado Abdo take the position that the Federal Supreme Court has the power of reviewing cases from the regional Supreme

[101] Mei Gechlik *et al*, China's Case Guidance System: Application and Lessons Learned (Part I), Stanford Law School China Guiding Cases Project, Guiding Cases Surveys, Issue No. 3, (Mar. 1, 2018), <http://cgc.law.stanford.edu/guiding-cases-surveys>, (accessed on 24 April 2021).
[102] Id.

Courts. Murado holds that the Constitution authorizes the cassation division of the Federal Supreme Court to review Regional State laws. Yet, this is against the principle of justice and the very principle upon which the federal constitution is founded. Thus, according to this author constitutional amendment is necessary and the Federal Supreme Court should stop the review.[103]

The other group of scholars such as Mehari Redae takes a different view arguing that the Cassation Division of the Federal Supreme Court has no legal authority to review State matters and therefore the practice is against the constitution.[104] Still, another group argues in favour of cassation over cassation power of the Federal Supreme Court. They believe that the Federal Supreme Court's Cassation Division has the authority to review cases of regional matters. For example, Abebe Mulatu in one of his reflections states that:

> *… since the Federal system is a new experience to Ethiopia and regions do not have a well-developed judiciary, it is sensible to confer on the Cassation Division to review state matters Without cassation overstate matters, the federal government will not be in a position to implement or interpret its laws uniformly*.[105]

While these divergent scholarly arguments are alive on the constitutional stipulations, the newly enacted Federal Courts establishment proclamation takes a slight shift from the arguments advanced so far. It allows the Federal Cassation Division to review only decisions of Regional cassation decisions on restricted grounds. Further evidencing this, the cumulative reading of Article 2(4) and Article 10 of the Proclamation provides the requirements for Federal Supreme Court before entertaining cassation over cassations. The first category of cases are (1) the final decisions of regional supreme court cassation divisions which violate the Constitution(Article 2 Sub –Articles(4)(a) of this Proclamation) or (2) the regional supreme court decisions which contravene binding decision of the federal supreme court cassation division.

The second category of cases are the final decisions of the Regional Supreme Court Cassation division that contain fundamental errors by misinterpreting a legal provision or by applying an irrelevant law to the case (Article 2 Sub – Articles(4)(b) of this Proclamation) and when such decisions of Regional Supreme Court Cassation cases involve *high public interest and national*

[103] Muradu Abdo, *supera* note 25, p74.
[104] Mehari Radea, *supra* note *19*, pp. 201-213.
[105] Abebe Mulatu, *supra* note *19*, p. 150.

importance. However, the concept of *high public interest and national importance* is ambiguous. Unless further clarification is made by subsequent legislation, the scope and content of *public interest and national importance* will continue to be a point of disagreement in the future.

Looking more closely into the operation of the cassation practice, one can still observe more limitations such as the lack of depth in the decision from this division of the Supreme Court. The Cassation Division of the Federal Supreme Court is required to make a more detailed discussion of arguments and reasoning of the interpretation of laws. Also, the decision should not only be binding but also persuasive to lower courts and to legal practitioners to follow its interpretation. Yet, the writer observes that the majority of the decisions remain very brief and less persuasive.

This limitation is compounded with lack of an independent office for the selection, review, approval, and publication of cassation precedent. In spite the wide ranging effect of the cassation decision on the entire legal system and the society at large, there is no other stakeholder involvement in the process of establishing cassation-binding interpretation. Neither other courts nor external bodies can contribute *amicus brief* or any other form of opinion which would enhance the quality of decisions.

Conclusion

This article maps out similarities and differences between the Chinese guiding case system and the Ethiopian Cassation binding interpretation. Both systems aim to maximize the advantages of common law and civilian systems. Unlike the common law precedent system in which the decisions of the higher courts are binding on lower courts, both the Chinese and Ethiopian system confer power to the Supreme Court to establish, amend, or repeal its own decisions. The two systems are different in some aspects. In the Chinese system, a guiding case could be selected from the decision of other lower courts while in the Ethiopian system it is only the federal Supreme Court's cassation decision that has a binding effect. Also, the two systems differ in institutional authority to suggest cases. In China, there is a broad base to suggest a guiding case either internally from the Supreme Court or externally from other interested parties. In Ethiopia, only panels of three judges in the Supreme Court can select and bring cases to the attention of the Cassation Division of the Federal Supreme Court. The other difference lays in the status of the guiding case and cassation decision. In the Chinese system, whether or not the Supreme Court imposes a compulsory

reference is not yet clearly addressed. However, in Ethiopia, the decision of the federal Supreme Court is binding as though it is a law.

Overall, the article has identified three main best practices that could be drawn from the Chinese guiding case system. One, the Federal Supreme Court should take lessons from China on the benefit of having detailed rules to govern the whole process. Hence, the Federal Supreme Court should issue procedural directives necessary for its functions as authorized by the proclamation. Issuing a directive would help to establish the standards for the selection, review, publication, and distribution of cassation cases. This, in turn, would help to pass detailed and persuasive judgment. Having the detailed procedural directive also helps judges that have been trained in the context of civil law not to apply cassation decisions mechanically. Two, the Federal Supreme Court should consider external opinions, like the Chinese system, before the case is published. In this regard, the Federal Supreme Court can benefit from the recommendation of the Attorney General Office, Law schools, or other stakeholders' deliberation before the case is published. This is necessary as the cassation decision affects not only the particular litigants in that case but also the whole legal system in the country. Finally, a lesson should be drawn from the practice of China such as establishing an independent office within the Supreme Court in Charge of collecting, selecting, reviewing, releasing, studying, and compiling cassation decisions.

The Rights of Child Offenders in Ethiopia: A Case Comment on the Federal Supreme Court Cassation Decision on *Admasu Ageze Vs. ANRS Prosecutor*

Belayneh Berhanu[♦]

Introduction

Children who committed a crime are entitled to special rights needed by their condition. These rights are contained in various international and regional standards including the Convention on the Rights of the Child (CRC)[1] and the United Nations Standard Minimum Rules on the administration of Juvenile Justice (Beijing Rules).[2] These rights pertain to the due process rights, measures and penalties that are appropriate for or prohibited against child offenders. The same is true in the Ethiopian child justice system. The Criminal Procedure and Criminal Code have separate sections that are specific to children aged nine to fifteen. Thus, the purpose of this commentary is to analyze the decision of the Federal Supreme Court in the Case between Admasu Ageze *vs* ANRS prosecutor in light of these standards and the provisions of the Codes. The issues involved are the circumstances under which imprisonment can be imposed on a child; the legality of suspension of imprisonment; the problem with the issue framed by the Bench; the choice of the appropriate measure that could be imposed on the child; the right to court-appointed counsel; and the right to privacy.

Key Words: Child Offenders, Ethiopia, Suspension of Imprisonment.

1. Relevant facts of the case

The case was about the appropriateness of imprisonment for a person below the age of 15. The child, aged 11 years old, was sentenced to ten years of rigorous imprisonment by Guba Lafto Woreda court for committing a crime of sexual outrage on a minor (Article 627 (1) of the Criminal Code) which is punishable by rigorous imprisonment from 13 to 25 years. The case was appealed to the North Wollo High Court and confirmed.[3] The case then reached to the ANSR Supreme Court Cassation Division which affirmed the sentence of imprisonment

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[1] United Nations Treaty Series, Vol.1577, (1990), Articles 37 and 40.

[2] General Assembly Resolution 40/33, (1985).

[3] *Admasu Ageze v. ANRS Prosecutor*, Federal Supreme Court Cassation Decision, File No.118130 (December 9,2016), p.390.

but reduced the terms of imprisonment to five years[4] based on Article 168 (2) of the Criminal Code.[5] The minority of judges in the region's Cassation Division deviated from this decision and considered the sentence inappropriate. They stated that although Article 168(1) (a) of the Criminal Code envisages for such a child to be sent to a corrective center, there is no such institution in the region. Furthermore, they recalled the provision of the Code (Article 53) which prohibits the imprisonment of a child with adults. For these reasons, they opted for the child to be released to the community and supervised by the police.[6]

The applicant complained to the Federal Supreme Court Cassation Bench that he is not liable for the crime, and if liable, he should not be imprisoned with adults but released and supervised by parents. The Bench framed the issue as "the legality of imposing an ordinary penalty on a child below the age of 15 years old by the lower courts without stating why the provisions of the Criminal Code (Articles157-168) do not apply to the case."[7]

2. Procedure and decision of the cassation bench

The Federal Supreme Court Cassation Bench ordered a social inquiry report concerning the child to determine the appropriate penalty to be imposed. The report covered his personal, social, and family circumstances. The report indicated that the child has repented not to engage in similar activities; is humble and willing to comply with orders from his elders; has no criminal record; that criminality of the child is due to lack of proper parenting; his mother has pledged to discharge her responsibility properly in this regard and there was an effort to compensate the victim from the family of the child. The Bench took these as important considerations in the determination of the appropriate penalty.[8]

Taking into account the seriousness of the crime, the Bench considered the imposition of penalty as appropriate. However, it ruled that the manner of enforcement of the imprisonment i.e. sending the child to prison and imprisoning him with adults is detrimental to his morals and will create a social problem.[9] In this regard, the Bench recalled the principle of the best interest of the child as enshrined under Article 36 of the FDRE Constitution, Article 3(1) of

[4] Id., pp.390-91.
[5] Id., p.394.
[6] Id.
[7] Id.
[8] Id,. p.395.
[9] Id., p.396.

the CRC and Article 4(1) of the ACRWC (African Charter on the Rights and welfare of the Child). It further elaborated that the purpose of sentencing a child in the Ethiopian child justice system is rehabilitation, not "revenge".[10]

The Bench then decided for the child to be on probation for two years (as per Articles 171 and 192 of the Criminal Code) under the supervision of police. The Bench reasoned its decision with the absence of a corrective center envisaged under Article 168 (1) (a) of the Criminal Code and the prohibition of imprisonment of children below the age of 15 years old with adults (Article 53 of the same Code).[11]

3. Comments

3.1. When to impose imprisonment?

Under international child rights standards, imprisonment of child offenders is a measure of last resort.[12] Hence, deprivation of liberty including imprisonment shall not be imposed unless the child is convicted for a serious crime against a person or of persistence in committing other serious crimes and when there is no other appropriate response.[13] This is because deprivation of the liberty of a child poses a special problem for children who are still at a very sensitive stage of development.[14]

This requires the national child justice system to make available a wide variety of non-custodial measures including guidance and supervision orders; counseling; probation; community service; financial penalties; foster care; and education and vocational training programs.[15] Judges must first apply or try to apply these measures before depriving a child of his/her liberty.

The same is true in the Ethiopian child justice system although the same wording is not used. The Code makes the imposition of imprisonment a measure of last resort in that it may be imposed *if the measures provided under Articles*

[10] Id., p.393.
[11] Id., pp.396-97.
[12] CRC, supra note 1, Article 37(b); Beijing Rules, supra note 2, Rule 17.1(b); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly Resolution 45/113, (1990), Rule 2.
[13] Beijing Rules, supra note 2, Rule 17.1(c).
[14] Office of Higher Commissioner for Human Rights, The Rights of Children in the Administration of Justice, in OHCHR, *Human Rights in the Administration of Justice; A Manual for Judges, Prosecutors and Lawyers*, Professional Training Series No.9, (2003), p.420.
[15] CRC, supra note 1, Article 40 (4).

158-162 have been applied and failed.[16] It should be emphasized that this provision does not make any exception to this principle based on, for instance, the seriousness of the crime. In other words, a child who committed a serious crime for the first time will not face imprisonment unless s/he is subjected to one or two of the measures[17] but not reformed. Thus, judges must first impose one of the measures on a child found guilty of a crime irrespective of its nature and seriousness before imposing imprisonment.

Coming to the position of courts in the case at hand, they did not comprehend the last resort nature of imprisonment as enshrined in both the CRC and the Criminal Code. The lower courts sentenced the child (Admasu), who committed the crime for the first time, to imprisonment. The Federal Supreme Court Cassation Bench as well concurred with the legality of *punishing* a child who has committed a serious crime.[18] But, it disagreed on the manner of enforcement of the sentence and suspended the sentence for two years as per Articles 171 and 192 of the Criminal Code. The Bench grounded its decision with the general objective of responses to child criminality; the absence of a corrective center of a kind envisaged in Article 168(1) (a) of the Criminal Code and the prohibition of imprisonment of children with adults. Thus, it relied on Article 168(1) (a) and Article 53 of the Criminal Code instead of Article 166.[19] By this, the Cassation Bench has also failed to comprehend the last resort nature of imprisonment in the Ethiopian child justice system. Had the Bench comprehended so, it would have examined which measure provided under Articles 158-162 of the Criminal Code could fit the case than referring to Article 168 which talks about corrective detention and imprisonment that must be imposed after the failure of the measures (Article 166). Furthermore, the reliance on Article 53 could also send a wrong message to other courts that imprisonment can be imposed on a child who is a first offender *if there are separate prisons/cells for children to ensure segregation.*

3.2. The legality of suspension of the enforcement of the imprisonment

The Cassation Bench, after concurring with the legality of imposition of a penalty on the child, argued that the manner of enforcement should take into account the best interest of the child and the general aim of the child justice system. Accordingly, it did not accept the imprisonment of the child as there is

[16] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, *Federal Negarit Gazeta*, (2004), Article 166, [hereinafter Criminal Code].
[17] See Id., Artilces 157 and 160 (2), paragraph 2.
[18] *Admasu Ageze v. ANRS Prosecutor*, p.396.
[19] Id.

no separate prison for children and the imprisonment of children with adults is prohibited by Article 53 of the Criminal Code. Hence, the Bench decided for the enforcement of the sentence to be suspended for two years under the supervision of the police and parents of the child as per Articles 171 and 192 of the Criminal Code.

However, it must be noted that suspension of the enforcement of sentences in general[20] and suspension of sentences involving children in particular is not without limits. For cases involving children, Article 171 of the Criminal Code provides that:

> *The general rules regarding suspension of the sentence or of its enforcement with submission for a specific time to a period of probation under supervision (Articles 190-200) shall, as a general rule, remain applicable to [children] if the conditions for the success of such a measure seem to exist and subject to the rule concerning serious crimes as defined in Article 168.*

As it is clear from this provision, an exception to the rule of suspension of a sentence is provided in that a child who committed a crime of the nature defined in Article 168 is not eligible for suspension. By this, the Code makes a differential treatment for children by confining the exception to suspension of sentence to crimes of serious nature than applicable for adults. In the latter case, the threshold of prohibited suspension is five years of rigorous imprisonment.[21] Thus, the grounds of disallowance of suspension of enforcement in the child cases are not those listed under Article 194 of the Criminal Code, but the limit provided under Article 171.

Article 171 is provided under the sub-section "common provisions" i.e. common to the provisions governing measures and those governing penalties. This can be interpreted to mean that suspension of a sentence can be a measure of first or last resort depending on the circumstances. However, making suspension of a sentence a measure of last resort, and preferring measures that could deprive a child of his/her liberty such as admission to a corrective institution[22], can be challenged based on the principle that detention of children shall be a measure of last resort as enshrined under Article 37 of the CRC. Suspension of a sentence (probation) is one of the non-custodial measures (that should be used first)

[20] See Criminal Code, supra not 16, Article 194.
[21] Id., Article 194 (1) (b)
[22] Id., Article 162.

incorporated in Article 40 (4) of the CRC, Rule 18.1 (b) of the Beijing Rules and Rule 8.2 (h) of the Tokyo Rules.[23]

Setting aside this critique, the Cassation Bench committed an error by suspending the sentence in this particular case. This is because Article 171 does not allow suspension of enforcement of a sentence for the crime punishable with rigorous imprisonment of ten years or more or with death as stipulated under Article 168. The Bench ordered suspension even though the penalty provided in the provision violated (Article 627 (1) falls in this category and was determined as such by the trial court. Furthermore, the Bench did not explicitly state the fulfillment of the conditions provided under Article 197 of the Criminal Code apart from reciting the positive results of the social inquiry report.

3.3. Problem with the issue framed by the Bench

In criticizing the decisions of the lower courts, the Cassation Bench has framed the issue, "why the lower courts applied the ordinary provisions of the Criminal Code *without indicating the reason for not applying the provisions of the Code governing measures and penalty for a young offender*." This framing particularly the italicized phrase is problematic as it indicates the possibility of applying an exception to the provisions of Articles 157-168 of the Criminal Code. However, nowhere in this section of the Code exists a provision that indicates an exceptional circumstance to deviate from the provisions. The Code obliges courts to apply one of the measures provided therein for a child found guilty of committing a crime (Article 157). If the measure failed (Article 166), the court may sentence a child either to a fine (Article 167), corrective detention, or imprisonment (Article 168). Regarding imprisonment, Article 168 of the Criminal Code includes the most serious crime which is punishable with death; and for this crime, the maximum penalty is ten years imprisonment (Article168 (2)). Thus, there is no room to deviate from this provision. Therefore, the insertion of this phrase in the decision of the Cassation Bench could send a wrong message to the lower courts that they may deviate from the provisions of Articles 157-168 of the Criminal Code.

3.4. The appropriate measure that could have been imposed on the child

As it is indicated above, imprisonment of a child who committed a crime for the first time is not allowed both under the international standards and under the

[23] United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), General Assembly Resolution 45/110, (1990).

Ethiopian Criminal Code. Furthermore, suspension of enforcement of sentence is not allowed for serious crimes under the Criminal Code, which the Bench failed to comply with. Therefore, the question is what measure provided under the Code is appropriate for the case at hand? This author suggests that a measure of supervised education is the pertinent and appropriate measure that the Bench could have ordered. Supervised education *shall* be imposed on a child who is not properly up brought (added in the Amharic version), morally abandoned or is in need of care and protection or is exposed to the danger of corruption or is corrupted.[24] Article 159 of the Criminal Code does not qualify the nature of the crime. What matters for this measure is the personal circumstance of the child who has committed the crime. Therefore, it is possible to argue that supervised education can be imposed on a child who committed even a serious crime. Furthermore, the social inquiry report compiled by the Child Justice Project Office of the Federal Supreme Court revealed that the child was not under the proper supervision of his parents, a situation which could fall under one of the circumstances mentioned under the said Article. Hence, the Bench could have sentenced the child to this measure in light of the principle that custodial measures should be the last resort. The Bench thus could have placed the child under the supervision of his mother with conditions like regular attendance to school, a prohibition to associate with certain persons or resort to certain places.[25]

It must be noted that this Article of the Code mandates the child to be under the supervision of relatives or other reliable persons. By this, the Code takes the presumption that the child under one of the conditions has no parents or they have failed to properly up bring him and considered necessary to deprive their parental authority. However, under international child rights law, removal of the child from the family environment must be a measure of last resort when it is absolutely necessary.[26] Hence, this author contends that the position of the Code is not appropriate and the court can place the child under the supervision of the parents with a strict warning for them to discharge their parental responsibility. In the case at hand, the mother was willing to do so[27], and that is why this author argued for the child to be under the supervision of the mother than placing him under the supervision of relatives.

[24] FDRE Criminal Code, supra note 16, Article 159 (1).
[25] Id., Article 159 (1) and (2).
[26] Beijing Rules, supra note 2, Rule 18.2.
[27] *Admasu Ageze v.ANRS Prosecutor*, p.395.

Usually, when a child committed a serious crime, the measure to be imposed is admission to a corrective institution (Article 162 of the Criminal Code).[28] However, a measure of admission to a corrective institution is not the proper measure that the court could have ordered in this particular case for the following reasons. First, the law under this Article provides another condition i.e. the child must have a bad character or antecedent, which is not the case at hand as the social inquiry report has shown. Second, there is no corrective center in the place of residence/region of the child and sending him to the remand home in Addis Ababa[29] far from his family and community may not be in line with his best interest and favorable to his rehabilitation. In this regard, the Beijing Rules provide that a child offender should not be removed from parental supervision, either partly or entirely, unless the circumstances of her or his case make this necessary.[30] The social inquiry report revealed that the child has repented and pledged not to engage in similar activities, and his mother as well pledged to discharge her responsibility for his proper upbringing. Thus, in the face of these situations, it is not necessary to remove the child from his family and community. Third, under the CRC, detention of a child shall be a measure of last resort and hence, primacy should be given to non-custodial measures. Thus, the non-custodial measure of supervised education that does not deprive the liberty of the child, and leaves him in his community and family is in the best interest of the child and promotes the aim of rehabilitation.

Setting aside the legal basis of the argument, one may however wonder whether the two measures (probation and supervised education) have a difference in terms of their effect on the liberty of the child. At their face value, it seems apparent that they do not have such a difference as both leave the child in the family and community. However, a deeper insight into the provisions shows that the two have a different effect in this regard as the liberty of the child is more restricted in case of probation than supervised education. This is because the imposition of conditions (attending school regularly and taking apprenticeship) on a child sentenced to supervised education is discretionary[31] while mandatory in case of probation[32] although the Bench did not impose them. It is clear that

[28] The Amharic version clearly indicates this.
[29] There is a practice of sending child offenders from the regions to the Remand Home in Addis Ababa. See Addis Ababa University Office of Research Director, The System of Justice for Children in Ethiopia: An Assessment of Key Processes, Actors and Initiatives, Part I (unpublished), (2017), p.78.
[30] Supra note 2, Rule 18.2.
[31] See FDRE Criminal Code, supra note 16, Article 159 (2).
[32] Id., Article 198 (1).

the rules of conduct provided under the adults' provision[33] also apply to children as per Article 171. The most significant difference between these measures relates to their effect on the criminal record of the child. A measure of supervised education does not have the effect of entailing a criminal record as a child sentenced to it is not considered as punished under the criminal law[34] while suspension of enforcement of imprisonment does.[35] Maintaining a criminal record for the child has a repercussion on the future life of the child. The absence of a criminal record is one of the recruitment criteria for some government jobs including the military sector in Ethiopia.[36] Hence, if a record is maintained against the child, s/he will not qualify for such jobs until and unless it is canceled by reinstatement (Article 175 of the Criminal Code).

3.5. Children's right to court-appointed counsel

The right to counsel at the state expense (free legal representation) of an accused person is a duly recognized right under international human rights law. This is the case when the person has no means to hire his/her own and justice requires it.[37]

Both the CRC and ACRWC are not explicit on the issue of free legal aid as well as on the "means" and "justice" test. They simply provide that a child has the right for the matter to be determined in the presence of legal assistance[38] or afforded legal assistance in the preparation and presentation of the defense.[39] On the other hand, Rule 15.1 of the Beijing Rules provides that free legal aid can be provided if available in the legal system of the country while the Vienna Guidelines qualified it by the phrase "if needed".[40] Similarly, the UN Principles and Guidelines on Access to Legal Aid in the Criminal Justice Systems provide that "[c]hildren should have access to legal aid under the same conditions as or

[33] Id., Article 198 (1), paragraph 2.
[34] Id., Article 165.
[35] Id., Article 192.
[36] See for instance, የአማራ ክልል ሰላምና ፀጥታ ቢሮ፣የቅጥር ማሰታወቂያ፣የአማራ ልዩ ሃይል ፖሊስ የመመልመያ መስፈርቶች,https://www.facebook.com/110652467024429/posts/pfbid024apjWg3EBfUFBNeL5dgGNEEquBLFy5aqq4gQHEAyKX6HV9Rme8UmY61CA3e99T3Pl/?app=fbl (accessed Aug 15, 2022).
[37] The International Covenant on Civil and Political Rights, United Nations Treaty Series, Vol.171, (1976), Article 14 (3) (d).
[38] CRC, supra note 1, Article 40 (2) (b) (iii).
[39] The African Charter on the Rights and Welfare of the Child (ACRWC) (1999), Article 17 (2) (c) (iii).
[40] Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) (Recommended by ECOSOC Res 1997/30), paragraph 16.

more lenient conditions than adults"[41] and legal aid to children should be prioritized and free from the means test.[42] The exemption of children from the means test implies that children should get free legal aid.

The CRC Committee is explicit in this regard and recommends States parties to provide effective legal representation, free of charge, for all children who are facing criminal charges from the outset of the proceedings, in the preparation and presentation of the defense, and until all appeals and/or reviews are exhausted.[43] This seems the case irrespective of the seriousness and complexity of the crime and the available resource. Hence, the conditions "when justice requires" and the lack of sufficient means to hire own counsel stated under Article 14 (3) (d) of the ICCPR do not apply.[44]

Coming to the Ethiopian criminal/child justice, the Constitution recognizes the inability to hire one's counsel and the possibility of miscarriage of justice that would result if a person is tried without counsel as two condition precedents for an accused person to have a counsel at the state expense.[45] Contrary to this constitutional provision, the Criminal Procedure Code provides the conditions under which a child would have a court-appoint counsel. This is when the child is not accompanied by his/her parents or legal guardians (irrespective of the nature of the crime and the capacity of the child to hire a counsel) or when s/he is charged with a crime punishable with rigorous imprisonment exceeding ten years or with death[46] (irrespective of the fact that the child is accompanied by his/her parents or legal guardians and irrespective of the capacity of the child or the parents to hire a counsel). Thus, unlike the Constitution, the Criminal Procedure Code does not use the means test, and the child can get free legal aid irrespective of his/her means.

In the case at hand, the child has the right to court-appointed counsel since the crime for which he is charged and/or convicted is punishable with rigorous imprisonment exceeding ten years (from 13-25 years) unless, of course, the

[41] General Assembly Resolution 67/187, (2012), paragraph 22.
[42] Id., paragraph 35.
[43] Committee on the Rights of the Child, General Comment No.24, Children's Rights in Child Justice System (18 September 2019) CRC/C/GC/24, paragraphs 49 and 51, [hereinafter General Comment No.24].
[44] John Tobin and Cate Read, Article 40:The Rights of the Child in the Juvenile Justice System, in John Tobin, (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, (2019), p.1629.
[45] Constitution of the Federal Democratic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, (1995), Article 20 (5).
[46] Criminal Procedure Code of the Empire of Ethiopia, Proclamation No.185/1961, *Negarit Gazeta*, (1961), Article 174.

child hired one. The child in this case has not hired a private lawyer. It was his sister that appeared before the Bench as a guardian, not as a counsel. Had she appeared as a counsel, this would have been indicated in the decision. Instead, the decision indicated that she was a person that follows the case or *"ጉዳይ የምትከታተል*". Therefore, it was the duty of the Bench to appoint counsel as this right of the child should not be confined to trial or appellate stages. As noted by the CRC Committee, this right should extend to all stages through which the child passes including appeal and review, for this case to the cassation. Even though there is no oral hearing in the Cassation Bench, the role of the counsel at this stage is not negligible as s/he can submit a well-reasoned and legally substantiated application to the Bench which might influence its decision.

3.6. The right to privacy of child offenders

The right to privacy of child offenders is one of the minimum guarantees that states should comply with. Article 40(2) (b) (vii))) of CRC provides that a child accused of a crime has the right for his or her privacy to be fully respected at all stages of the proceedings. The principal way of ensuring privacy is by conducting child justice hearings behind closed doors. Furthermore, the right to privacy also requires court files and records of children to be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of the case.[47] Moreover, case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.[48]

Coming to the Ethiopia child justice system, Article 174 of the Criminal Code prohibits the publication of a judgment concerning a child through the mass media and provides that the entry into the judgment register of measures and penalties be for the mere information of the official, administrative or judicial authorities. As it is clear from the first prong of this Article, what is prohibited is the publication of the judgment through mass media yet it does not define what mass media consist of. It simply cross-refers to Article 155 which is of no help in defining mass media. However, the Criminal Code section which criminalizes crimes committed through mass media defines the term and includes newspapers, books leaflets, journals, posters, pictures, cinemas, radio or television broadcasting or any other means of mass media.[49]

[47] General Comment No.24, supra note 43, paragraph 67; Beijing Rules, supra note 2, Rule 21.1.
[48] General Comment No.24, supra note 43, paragraph 68.
[49] Criminal Code, supra note 16, Article 42 (2).

Nonetheless, it should be borne in mind that the medium of publication is of no concern as far as the privacy of a child is concerned and hence, other means of publication like case law reporting should be anonymous.[50] Therefore, what matters is whether the medium used is capable of being accessed by other people other than justice officials. In the case at hand, the Cassation Bench mentioned the real name of the child in its decision published online, which is a violation of the privacy of the child. This is because; its volumes are accessible online to the general public. Therefore, the Bench was duty-bound to respect the privacy of the child by using a pseudo name and without mentioning the origin of the case.

Conclusion

One of the important safeguards in the child justice system is the primacy of non-custodial measures. This is indicated in Article 37(b) of the CRC and reinforced by Article 40(4) of the same Convention. Provision akin to these Articles is incorporated in Article 166 of the Criminal Code of Ethiopia, which provides that penalties including imprisonment may be imposed once the measures applied have failed to achieve their aim (reformation of the child). Therefore, a child must first be subject to one of the measures provided in the Criminal Code (Articles 159-162) before facing a sentence of imprisonment irrespective of the nature and seriousness of the crime. No exception to this rule is provided in the Code.

In the case at hand, however, this author found that the Bench has failed in upholding this basic principle as it concurred with the decision of the lower courts that sentenced the child who is a first offender to imprisonment instead of measures. This writer suggests that the proper measure that the Bench could have ordered against the child was supervised education (Article 159 of the Criminal Code) instead of suspension of enforcement of the imprisonment.

The decision of suspension of imprisonment by the Cassation is not also in line with Article 171 of the Criminal Code. As per this Article, suspension of sentence is not allowed for crimes of the nature mentioned in Article 168 of the Criminal Code (which is the scenario in the case at hand) i.e. crimes punishable with rigorous imprisonment of ten years or with more are not eligible for suspension.

[50] General Comment No.24, supra note 43, paragraph 68.

Furthermore, this commentary also addresses the due process right to court-appointed counsel and the right to privacy of a child offender as recognized under the CRC. The right to counsel applies to all stages of the proceeding including appeals and reviews. In the Ethiopian child justice system, it applies to a child accused of a crime punishable with imprisonment exceeding ten years, which is similar to the case at hand. However, the cassation review was made without counsel. Regarding the right to privacy, there is no explicit mention in the Ethiopian child justice system. The international and regional child rights standards are however explicit in this regard that the privacy of a child shall be respected at all stages of the proceeding.[51] This right also applies to the post-sentencing stage including case reporting and hence, a case report shall not contain the real name of the child. This is not respected in the case at hand.

[51] CRC, supra note 1, Article 40 (2) (b) (vii).

Selected Decisions from the Federal Supreme Court Cassation Bench
(ከፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ዉሳኔወች የተመረጡ ፍርዶች)

Case 1 (ፍርድ 1)፡- የሰበር መዝገብ ቁጥር 208865፣ የካቲት 29 ቀን 2014 ዓ.ም

ዳኞች፡-

1. ተፈራ ገብሩ (ዶ/ር)
2. ቀነዓ ቂጣታ
3. ፈይሳ ወርቁ
4. ደጀኔ አያንሳ
5. ብርቅነሽ እሱባለው

አመልካች፡- ወ/ሮ እቴነሽ መለሰ - መከተ አዘናው ተወካይ -ቀርበዋል

ተጠሪ፡- ማራናታ የቤት ህብረት ማህበር -አልቀረበም

ለምርመራ ተቀጥሮ የነበረው መዝገብ ተመርምሮ ቀጣዩ ውሳኔ ተሰጥቷል።

ፍርድ

የሰሜን ሸዋ መስተዳደር ዞን ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 133343 ህዳር 25 ቀን 2013 ዓ.ም በዋለው ችሎት ተጠሪ አመልካችን ከማህበሩ ማሰናበቱ አግባብ ነው በማለት የሰጠውን ውሳኔ የአማራ ብሔራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት ደብረ ብርሃን ምድብ በመዝገብ ቁጥር 0121252 ጥር 28 ቀን 2013 ዓ.ም በዋለው ችሎት ማጽናቱ እንዲሁም ሰበር አጣሪ ችሎት መጋቢት 8 ቀን 2013 ዓ.ም በዋለው ችሎት በሰበር መዝገብ ቁጥር 1030171 የሰር ፍርድ ቤቶች ውሳኔ መሰረታዊ የህግ ስህተት አልተገኝበትም በማለት የአመልካችን የሰበር አቤቱታ ውድቅ ማድረጉ መሰረታዊ የህግ ስህተት የተፈጸመበት ነው በማለት ለሰበር ለማሳረም አመልካች ሰኔ 7 ቀን 2013 ዓ.ም የሰበር አቤቱታ ስላቀረቡ መዝገቡ ለችሎት ቀርቧል።

ጉዳዩ አመልካችን ከተጠሪ ማህበር አባልነት በማሰናበት የተሰጠ ውሳኔ እንዲሰረዝ ለሸዋሮቢት ከተማ አስተዳደር ወረዳ ፍርድ ቤት የቀረበ ክስ ሆኖ አመልካች በከሳሽነት ተጠሪ ደግሞ በ1ኛ ተከሳሽነት ተከራክረዋል። የክስ አቤቱታው ይዘትም፡- አመልካች ተወልደው ለ17 ዓመታት በመምህርነት ባገለገሉበት ሸዋሮቢት ከተማ የቤት መስሪያ ቦታ ስላልነበራቸው በመምህርነታቸው በተጠሪ ማህበር ተደራጅተው ለአምስት ዓመት የቤት መስሪያ ቦታ ለማግኘት በመጠባበቅ ላይ እያሉ ባለቤታቸው የፌዴራል ፖሊስ ኮሚሽን ወንጀል መከላለል ባልደረባ በመሆናቸው ከጥቅምት ወር 2012 ዓ.ም የትዳር አጋራቸው ወዳለበት አዲስ አበባ ከተማ ትምህርት ቢሮ ዝውውር ተደርጎላቸው በከተማው በማስተማር ላይ ቢሆኑም ዋና መኖሪያቸው ሸዋሮቢት ሆኖ እያለ የአማራ ክልል ባወጣው ደንብ ቁጥር 150/2000 እና መመሪያ ቁጥር 28/2009 አንድ መምህር ሲያስተምርበት ከነበረው ከተማ ወደ ሌላ ከተማ ሲዛወር ከማህበር እንደሚሰናበት ባልተደነገገበት ሁኔታ እንዲሁም የሰር 2ኛ ተከሳሽ አመልካችን ከማህበር አባልነት

ለማሰናበት ስልጣን ሳይኖረው አመልካች ወደ አዲስ አበባ ከተማ ስለተዛወሩ ተጠሪን ከማህበሩ እንዲያሰናብት የፃፈለትን ደብዳቤ መሰረት አድርጎ ተጠሪ አመልካችን ከማህበሩ ማሰናበቱን የገለፀለት መሆኑን በመግለጽ መደበኛ ነዋሪነታቸው ሸዋሮቢት ሆኖ እያለ እና በአዲስ አበባ ከተማ የመኖሪያ ቤት ተጠቃሚ እንዳልሆነች በማስረጃ ተረጋግጦ ባለቤት ተጠሪ አመልካች ከማህበር እንድትሰናበት መወሰኑ አላግባብ ስለሆነ ውሳኔው ተሰርዞ አመልካች ወደ ማህበሩ እንድትመለስ እንዲወሰን ጠይቀዋል።

ተጠሪም በመልሱ፡- አመልካች የማህበሩን የስራ ክልል ለቃ ስለሄደች በማህበሩ መተዳደሪያ ደንብ አንቀጽ 14(4) መሰረት ከማህበሩ እንድትሰናበት የስር 2ኛ ተከሳሽ እንዳሳወቃቸው ለአመልካች በማሳወቅ ከ23 ማህበሩ አባላት አራቱ ብቻ ባልተገኙበት ምልዐት ጉባኤ ተሟልቶ አመልካች ከማህበሩ እንድትሰናበት የተለለፈ ውሳኔ በመሆኑ አመልካች ያቀረቡት ክስ ውድቅ ሆኖ ተጠሪ ከማህበሩ እንድትሰናበት ያስተላለፈው ውሳኔ ተቀባይነት አግኝቶ እንዲጠና ጠይቀዋል። የስር 2ኛ ተከሳሽም አመልካችን ከማህበር ስላሰናበቱ የቀረበበት ክስ ተገቢነት የለውም በማለት ተቃውሞ በፍሬ ነገር ላይም መልስ ሰጥቷል። ፍርድ ቤቱም በስር 2ኛ ተከሳሽ የተነሳውን መቃወሚያ በመቀበል ክክርክሩ አሰናብቶ በፍሬ ነገሩ ላይ ግራና ቀኙን አከራክሮ እና የአመልካችን ምስክሮች ሰምቶ በሰጠው ውሳኔ አባላት ከማህበሩ የሚሰናበቱበት ምክንያት በአዋጁ የተሻረ ሲሆን በማህበሩ መተዳደሪያ ደንብ አንቀጽ 14(4) ሥር የተቀመጠው አንድ አባል የማህበሩን የስራ ክልል ለቆ ከሄደ ከማህበሩ ይሰናበታል በማለት የሚደነግግ ቢሆንም በአዋጅ ቁጥር 64(2) ስር ማንኛውም ከአዋጁ ጋር የሚቃረን ማንኛውም ሕግ፣ ደንብ ፣መመሪያ እና የተለምዶ አሰራር በአዋጅ ውስጥ በተመለከቱት ጉዳዮች ላይ ተፈፃሚነት እንደማይኖረው የደነገገ በመሆኑ የማህበሩ መተዳደሪያ ደንብ አንቀጽ 14(4) ሥር የተመለከተውን አዋጁን የሚቃረን በመሆኑ ተፈጻሚነት ሊኖረው የማይገባ ሲሆን መተዳደሪያ ደንቡ አዋጁን አይቃረንም ቢባል እንኳን አመልካች የምትተዳደርበት ንብረቷ መኖሪያዋ እና ማህበራዊ ህይወቷ ያለው ሸዋሮቢት ከተማ በመሆኑ በዝውውር ምክንያት የስራ ቦታዋ አዲስ አበባ ቢሆንም እየተመላለሰች የምትሰራ መሆኑ በማስረጃ ስለተረጋገጠ እንዲሁም አመልካች ከማህበሩ እንድትሰናበት የተያዘው ቃለ ጉባኤ አባላት ሳይሰባሰቡ በአንድ ሰው ብቻ ቀደም ብሎ የተዘጋጀ በጉዳዩ ላይ አባላት የሰጡትን ሃሳብ ያላካተተ በመሆኑ አመልካች ከማህበሩ መሰናበቷ አግባብ አይደለም በማለት ወስኗል።

ጉዳዩን ተጠሪ ባቀረቡት ይግባኝ የተመለከተው የሰሜን ሸዋ ዞን መስተዳደር ከፍተኛ ፍርድ ቤት የመምህራን መሆሪያ ቤት መስሪያ ቦታ አሰጣጥና የተገነቡ ቤቶች ድልድል ማስፈፀሚያ ደንብ ቁጥር 150/2009 ተፈፃሚነት ወሰኑ በክልሉ በመንግስት ትምህርት ቤቶች በማስተማር ስራ ላይ ተሰማርተው ለሚገኙ መምህራን ብቻ ሆኖ የደንቡ መሰረታዊ አላማም በመንግስት ትምህርት ቤቶች ለሚያስተምሩ መምህራን ምቹ ሁኔታን በመፍጠር የመምህራን ፍላጎት በመቀነስ የትምህርት ጥራትን ማረጋገጥ መሆኑን መረዳት የሚችል ሲሆን አመልካች አዲስ አበባ ከተማ ተዛውራ የምትሰራ መሆኑን በራሷ ምስክሮች ጭምር የተረጋገጠ መሆኑን፣ በአማራ ክልል ውስጥ በሚገኙ የመንግስት ትምህርት ቤቶች ለሚያስተምሩ መምህራን በልዩ ሁኔታ ተጠቃሚ

ለማድረግ በወጣው የህግ ማዕቀፍ መሰረት ለመጠቀም የምታቀርበው ክርክር ተገቢነት የሌለው ሆኖ ተጠሪ አመልካችን ከማህበሩ ያሰናበተበት አግባብ የማህበሩን ህግ ደንብ እና ሌሎች ህጎችን መሰረት ያደረገ ነው ከሚባል በቀር ስንብቱ ህገ ወጥ ሊባል የሚችል አይደለም በማለት የስር ፍርድ ቤት ውሳኔ የሻረ ሲሆን፣ይግባኝ ሰሚው የክልሉ ጠቅላይ ፍርድ ቤትም አመልካች በመምህርነት ከሸዋሮቢት ወደ አዲስ አበባ ከተማ ዝውውር የተደረገላት መሆኑ የታመነ ፍሬ ነገር በመሆኑ መምህርነት የሙሉ ጊዜ ስራ በመሆኑ ምንም እንኳን የአመልካች ምስክሮች ሸዋሮቢት ከተማ ለቃ እንዳልሄደች እና እንደምትመላለስ የገለጹ ቢሆንም ከቦታ እርቀት አንፃር እና አመልካች ወደ አዲስ አበባ ለመዛወር ከጠየቀችበት ምክንያት አንፃር አሳማኝ ባለመሆኑ እና የፍትሀብሔር ህግ ቁጥር 185 ድንጋጌን ሊያስነሳ የሚችል አጠራጣሪ የመስሪያ ስፍራ ስለሌለ በፍትሀብሔር ህግ ቁጥር 183 ድንጋጌ መሰረት የንዳዮቿ እና ጥቅሞቿ ዋና ስፍራ የሙሉ ጊዜ ስራዋን የምትሰራበት አዲስ አበባ ከተማ ሲሆን ተጠሪ የስራ ክልል የለቀቀች በመሆኑ በማህበሩ መተዳደሪያ ደንብ ቁጥር 9(2) እና 14(4) ስር የተደነገገውን በመተላለፍ ግዴታዋን ባለመወጣቷ የተሰጠው ውሳኔ የሚነቅፍ አይደለም በማለት የሰሜን ሸዋ ዞን መስተዳደር ከፍተኛ ፍርድ ቤት ውሳኔን ያፀና ሲሆን የአማራ ብሄራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት የሰበር አጣሪ ችሎቱም የስር ፍርድ ቤቶች ውሳኔ መሰረታዊ የህግ ስህተት አልተገኘበትም በማለት የአመልካችን የሰበር አቤቱታ ሰርዞታል።

አመልካች በስር ፍርድ ቤቶች የተሰጠውን ውሳኔ በሰበር ለማሳረም ያቀረቡት አቤቱታ ይዘት፡- አመልካች በሳምንት አልያም በአስራ አምስት ቀን የምትመላለስ መሆኑ ማህበራዊ ህይወቷ ዕድሯ እና የቤት ንብረቷ በሸዋሮቢት ከተማ እንደሚገኝ ከአዲስ አበባ ከተማ የቤት ተጠቃሚ ያለመሆኗ ተረጋግጦ እያለ የፍትሐብሔር ህጉን ቁጥር 185 ድንጋጌ በሚፃረር መልኩ የስራ ዝውውር በማድረግ ብቻ የኢፌዲሪ ህገ መንግስት አንቀጽ 20፣32 እና 41 በሚቃረን መልኩ፣ መደበኛ መኖሪያዋን እንደቀየረች መቆጠሩ የማህበሩ መተዳደሪያ ደንብ በጠቅላላ ጉባኤ ያልዐደቀ ረቂቅ ሆኖ ተፈፃሚነት የሌለው ከመሆኑም በላይ አዋጅ ቁጥር 220/2007 ቁጥር 18 ስር ከተደነገገው ውጭ አንድ አባል የማህበሩን የስራ ክልል ለቆ ከሄደ እንደሚሰናበት ተጨማሪ መስፈርት መደንገጉ አዋጁን የሚቃረን በመሆኑ ተፈፃሚነት የሌለው ሆኖ ሳለ የስር ፍርድ ቤቶች ለውሳኔያቸው መሰረት ማድረጋቸው፣ አመልካች በመምህርነት ሳይሆን እንደማንኛውም ነዋሪ ቦታ ለማግኘት ተደራጅታ ሁሉን ነገር ብታሟላም መንግስት በጊዜ ቦታውን ባለማቅረቡ ምክንያት የቤት መስሪያ ቦታ ሳታገኝ የስራ ዝውውር በማድረግ ተወልዳ አድጋ ለ17 አመት በመምህርነት ባገለገለችበት ከተማ የቤት መስሪያ ቦታ እንዳታገኝ ከተጠሪ ማህበር መሰናበቷ መሰረታዊ የህግ ስህተት በመሆኑ ውሳኔው ተሸሮ የወረዳ ፍርድ ቤት ውሳኔ ፀንቶ ወደ ማህበሩ እንድትመለስ እንዲወሰን አመልክተዋል። የሰበር አጣሪ ችሎቱ አመልካች በስራ ዝውውር እንጅ መደበኛ የመኖሪያ አድራሻቸውን ያልቀየሩ መሆኑን፣ ማህበራዊ ኑሮአቸው ሸዋሮቢት ከተማ መሆኑን የሸዋሮቢት ከተማ አስተዳደር ወረዳ ፍርድ ቤት በሰነድ እና በሰው ማስረጃ አጣርቶ የሰጠው ውሳኔ ጉዳዩን

በይግባኝ ያዩት ፍርድ ቤቶች አመልካች ከማህበሩ ሊሰናበቱ ይገባል ያሉበትን አግባብነት ከአዋጅ ቁጥር 220/2007 አላማ አንፃር መጣራት አለበት በማለቱ ተጠሪ በሰጠው መልስ፡- አመልካች በቋሚነት በዝውውር አዲስ አበባ ከተማ በመምህርነት እየሰራች ለመሆኑ በአቤቱታዋ ጭምር አረጋግጣ ባለችበት ሁኔታ አድራሻየ ሸዋሮቢት ነው የሚለው መከራከሪያ አግባብነት የሌለው ከመሆኑም ባሻገር የመንግስት ሰራተኞች ስራቸውን የሚከናውኑበት ቦታ አንድ መኖሪያ እንደሚኖራቸው የሚደነግገውን የፍትሐብሔር ህጉን ቁጥር 179 የሚቃረን ተቀባይነት የሌለው መሆኑን፣ የማህበሩ የስራ ክልል ሸዋሮቢት ከተማን ሊቃ በዝውውር አዲስ አበባ ከተማ በቋሚነት እየሰራች በመሆኑ በማህበሩ ደንብ መሰረት በጠቅላላ ጉባኤ ውሳኔ ከአባልነት መሰናበቷ ህጋዊ ሆኖ እያለ አመልካች ያቀረበችው የሰበር አቤቱታ ተቀባይነት ሊኖረው የማይገባ መሆኑን አባላት በበቂ ምክንያት ከማህበር ሊሰናበቱ እንደሚችሉ በአዋጁ የተቀመጠ ሲሆን ለማሰናበት የሚያበቁት ምክንያቶች ደግሞ በማህበሩ ደንብ ላይ በግልጽ በመቀመጣቸው በአዋጅ ቁጥር 220/2007 አንቀጽ 18 መሰረት ጠቅላላ ጉባኤ አባላትን ሲያሰናብት የሰሩትን ጥፋት በዝርዝር ማስቀመጡ አስፈላጊ በመሆኑ አመልካች በጠቅላላ አባላት በፀደቀው ደንብ መሰረት በበቂ ምክንያት ከማህበሩ ተሰናብታ እያለ የማህበሩ ደንብ ቁጥር 14(4) ድንጋጌ የአዋጅ ቁጥር 220/2007 ቁጥር 18 ድንጋጌን እንደሚቃረን የቀረበው መከራከሪያ የአዋጁንና የደንቡን ዓላማ ከግምት ያስገባ አለመሆኑን፣ አመልካች ከአማራ ክልል ውጭ በመምህርነት እየሰራች የደንብ ቁጥር 150/2009 ቁጥር 3 እና 4 ድንጋጌን በሚቃረን መልኩ ወደ ማህበር አባልነት ለመመለስ የምታቀርበው አቤቱታ አግባብነት የሌለው መሆኑን፣ በጠቅላላ ጉባኤ ፀድቆ እና አግባብ ባለው ባለስልጣን ተመዝግቦ ለማህበሩ ህጋዊ ሰርተፍኬት ተሰጥቶ ባለበት የማህበሩን መተዳደሪያ ደንብ ረቂቅ ነው በማለት አመልካች የምታቀርበው መከራከሪያ ተገቢ ባለመሆኑ ይግባኝ ሰሚዎች የስር ፍርድ ቤቶች የሸዋሮቢት ከተማ አስተዳደር ወረዳ ፍርድ ቤት ውሳኔን መሻራቸው የሚነቀፍ ባለመሆኑ ለሰበር ቅሬታው መሰረት የሆነው ውሳኔ ፀንቶ የአመልካች የሰበር አቤቱታ ውድቅ ሆኖ ከወጭና ኪሳራ ጋር እንዲወሰንላቸው ጠይቀዋል። አመልካችም የሰበር አቤቱታውን በማጠናከር የመልስ መልስ አቅርበዋል።

የጉዳዩ አመጣጥ ከላይ የተመለከተውን ሲመለከት የስር ፍርድ ቤቶች መሰረታዊ የህግ ስህተት የተፈፀመበት መሆን አለመሆኑ እንደሚከተለው ተመርምሯል። አመልካች ለ17 አመታት በመምህርነት ባገለገሉበት ሸዋሮቢት ከተማ የቤት መስሪያ ቦታ ስላልነበራቸው የአማራ ክልል ባወጣው ደንብ ቁጥር 150/2000 እና መመሪያ ቁጥር 28/2009 መሰረት አድርጎ በተጠሪ ማህበር ተደራጅተው ለአምስት አመት የቤት መስሪያ ቦታ ለማግኘት በመጠባበቅ ላይ እያሉ ባለቤታቸው የፌደራል ፖሊስ ኮሚሽን ወንጀል መከላከል ባልደረባ በመሆናቸው የትዳር አጋራቸው ወዳሉበት አዲስ አበባ ከተማ ትምህርት ቢሮ በጥቅምት ወር 2012 ዓ.ም ዝውውር ተደርጎላቸው በከተማው በማስተማር ላይ ቢሆኑም መደበኛ መኖሪያቸው ሸዋሮቢት ከተማ ሆኖ እያለ እና በአዲስ አበባ ከተማ የመኖሪ ቤት ተጠቃሚ እንዳልሆኑ ተረጋግጦ እያለ ተጠሪን የስር 2ኛ ተከሳሽ ከማህበሩ እንዲያሰናብት የፃፉትን ደብዳቤ መሰረት አድርጎ ተጠሪ

አመልካችን ከማህበሩ ማሰናበቱን አግባብ ባለመሆኑ ውሳኔው ተሰርዞ ወደ ማህበር አባልነታቸው እንዲመለሱ እንዲወሰንላቸው ላቀረቡት ክስ ተጠሪ በሰጠው ምላሽ የስራ ክልል ለቃ ስለሄደት በማህበሩ መተዳደሪያ ደንብ አንቀጽ 14(4) መሰረት ከማህበሩ እንድትሰናበት የስር 2ኛ ተከሳሽ እንዳሳወቃቸው ለአመልካች በመግለጽ ምልዐተ ጉባኤ ተሟልቶ አመልካች ከማህበሩ እንድትሰናበት የተላለፈ ውሳኔ እንደሆነ ጠይቀዋል። አመልካች በተጠሪ ማህበር የመኖሪያ ቤት መስሪያ ቦታን ለማግኘት የተደራጁት በመምህርነት ባገኙት ልዩ መብት መሆን አለመሆኑ? በመምህርነት ያገኙት ልዩ መብት ነው ከተባለ በመምህርነት ሙያቸው የትዳር አጋራቸው ወደ አለበት አዲስ አበባ ከተማ ዝውውር በማግኘታቸው ለመምህራን የተሰጠውን ልዩ መብት ያላግባብ ተጠቅመዋል ተብሎ ከማህበር አባልነታቸው ሊሰረዙ ይገባል? የሚሉትን ጭብጦች ለጉዳዩ ተገቢነት ካለው ህግ አንፃር ማየት ተገቢ ሆኖ ተገኝቷል። የመምህርነት ሙያ ለሀገር ሁለንተናዊ እድገት የሚጫወተው ቁልፍ ሚና ለማሳካት የበኩሉን ጉልህ አስተዋጽኦ የሚያበረክት በመሆኑ መምህራን የሚጠበቅባቸውን ሙያዊ ግዴታቸውን በተነቃቃ መንፈስ መወጣት እንዲችሉ ጥራት ያለው ትምህርት ለመስጠት በሙያው ብቃት ያላቸው መምህራን ፍልሰት ለመቀነስ የመኖሪያ አካባቢን በማመቻቸት ማህበራዊ እና ኢኮኖሚያዊ ችግሮቻቸውን በማቃለል ቤተሰቦቻቸው እና መላው ህብረተሰቡ ለሙያው አወንታዊ አመለካከት ኖሯቸው የበኩላቸውን ድጋፍ እንዲያደርጉ የህግ ማዕቀፍ አውጥቶ ተግባራዊ ማድረግ ታምኖበት የአማራ ብሄራዊ ክልላዊ መንግስት የመምህራን መኖሪያ ቤት መስሪያ ቦታ አሰጣጥና የተገነቡ ቤቶች ድልድል ለማስፈፀም ደንብ ቁጥር 150/2009 የወጣ መሆኑን ደንቡ ያመለክታል። እነዚህ ለመምህራን የሚደረጉት በሚያስተምሩት አካባቢ በመንግስት ወይንም በህዝብ ተሳትፎ የሚሰሩ ቤቶች በነፃ ወይም በተመጣጣኝ ኪራይ ማግኘት በሚያስተምሩበት ቦታ ወይንም አካባቢ በሚገኝ ቀበሌ እና ከተማ የቤት መስሪያ ቦታ እንዲሰጣቸው ጥያቄ ባቀረቡ ጊዜ እንደማንኛውም ዜጋ በማህበር ተደራጅተው በህጉ የተመለከተውን መስፈርት አሟልቶ የቤት መስሪያ ቦታን ከአነስተኛ፣መካከለኛ እና ሜትሮፖሊያን ከተሞች ማግኘት የሚችሉ መሆኑን ከደንቡ ቁጥር 6 እና ተከታይ ድንጋጌዎች መረዳት ይቻላል። መምህራን በሚሰሩበት ወረዳ ውስጥ ካሉት ከተሞች መካከል በመረጡት ከተማ ቤት የመስራት ፍላጎት ኖሯቸው መመሪያ ቁጥር 28/2009 በሚፈቅደው መሰረት እንደማንኛውም ዜጋ 14 እና ከዚያ በላይ ሆነው በማህበር ተደራጅተውና ከቤት መስሪያ ዋጋው 20 በመቶ መቆጠባቸውን አረጋግጦ ቦታ መጠየቅ የሚችሉ መሆኑን ቁጥር 6(4) ያመለክታል፣ ደንብ ቁጥር 150/2009 መምህራን ተደራጅተው የመኖሪያ ቤት መስሪያ ቦታ ለማግኘት በተለየ ያስቀመጠው ነገር ቢኖር በከተማ ለመኖሪያ ቤት መስሪያ ከሚዘጋጀው ቦታ ውስጥ 20-30 በመቶ የሚሆነው ለመምህራን ቅድሚያ ተሰጥቶ የሚመደብ መሆኑን ከቁጥር 6()፣7(5) እና 9(5) ድንጋጌዎች መረዳት ይቻላል። መምህራን እንደ ማንኛውም ዜጋ በመኖሪያ ህብረት ስራ ማህበራት ተደራጅተው የከተማ መኖሪያ ቤት መስሪያ ቦታን ከሚያገኙ በቀር በመምህርነታቸው የተለየ መብት ተሰጥቷቸዋል ብሎ ለመናገር ብዙም የሚያስደፍር አይደለም። የተለየ መብት ተሰጥቷቸዋል ቢባል እንኳን በመጀመሪያ ደንቡ የወጣበት

ዓላማ መነሻ ያደረገው የአማራን ብሄራዊ ክልላዊ መንግስትን ቢሆንም ጥራት ያለው ትምህርት ለዜጎች ማዳረስ እንደ ሀገር መብቱን ከዓላማው ውጭ ተጠቅሞበታል የሚያስብል አይሆንም። ሁለተኛ አመልካች በህገ መንግስቱ አንቀጽ 33(2) በዜግነታቸው ህግ የሚያስገኘውን መብት ጥበቃ እና ጥቅም የማግኘት መብት ያላቸው መሆኑ በአንቀጽ 41(1) እና 32(1) መሰረት እንደቅደም ተከተላቸው በመረጡት የመምህርነት ሙያ መሰማራት እና በመረጡት የሀገሪቱ አካባቢ የመኖር መብታቸውን ማንኛውም የመንግስት አካል የማክበርና የማስከበት ሀላፊነት እና ግዴታ ያለበት መሆኑን የህገ መንግስቱ አንቀጽ 13(1) ይደነግጋል። አመልካች ባለትዳር መሆናቸውን እና የባለቤታቸው ስራ ቦታ አዲስ አበባ መሆኑ ግራቀኑን ያላከራከረ ሲሆን ባልና ሚስት አብሮ ለመኖር የሚገደዱ መሆኑና ተለያይተው መኖር የሚችሉት ለተወሰነ ጊዜ መሆኑን የአማራ ብሔራዊ ክልላዊ መንግስት የቤተሰብ ህግ አንቀጽ 64(1) እና 66(1) ያስገነዝባል። አመልካችን ከትዳር አጋራቸው ለማገናኘት ሲባል ዝውውር መደረጉ በቤተሰብ ሕጉም ሆነ በሲቪል ሰርቢስ ህጉ ተቀባይነት ያለው ሆኖ እያለ አመልካች በመምህርነታቸው ከአዲስ አበባ ከተማ የቤት ተጠቃሚ መሆናቸው ባልተረጋገጠበት ፣አመልካች በደንብ ቁጥር 150/2009 ቁጥር 10 መሰረት በራሳቸውም ሆነ በትዳር አጋራቸው ስም አስቀድሞ የተመዘገበ የመኖሪያ ቤት መይንም ቦታ ያላቸው መሆኑ ክርክር እና ማስረጃ ባልቀረበበት፣ እንዲሁም ቦታ ለማግኘት የተደራጀ ሰው በስራ ወደ ሌላ ቦታ በመዛወሩ ምክንያት ከመኖሪያ ቤት የህብረት ስራ ማህበር አባልነቱ ይሰረዛል የሚል በአዋጅ ቁጥር 220/2007 ቁጥር 18 ሥር ባልተደነገገበት የአለምክት ከማህበር አባልነት መሰረዝ ህጉን የተከተለ አይደለም። በአነስተኛ፣ መካከለኛ እና ሜትሮፖሊታን ከተማ አስተዳደሮች የሚያስተምሩ መምህራን ቁጥር ከ14 በታች በሆነ ጊዜ በተናጠል በሊዝ መነሻ ዋጋ የቤት መስሪያ ቦታ የማግኘት መብት አላቸው። (ደንብ ቁጥር 7(3)፣8(3)፣ 9(3) ድንጋጌን ይመለከታል) ስለዚህ የመኖሪያ ቤት መስሪያ ቦታ ማግኘት መብት በማህበር በመደራጀት የሚገኝ ሳይሆን ከህግ የሚመነጭ ነው። በአዋጅ ቁጥር 220/2007 የመደራጀት አላማው ኢኮኖሚያዊና ማህበራዊ ችግሮችን በጋራ ጥረት በመቋቋምና በማስወገድ በግል ቢሰራ የሚደርሰውን ጉዳት እና ኪሳራ በመከላከል የኢኮንዳንዱን ጉዳት እና ኪሳራ በመቀነስ የአባልነቱን ጥቅም ማስከበር መሆኑን ከቁጥር 4(4) እና 4(6) ድንጋጌ መረዳት ይቻላል። ምንም እንኳን የማህበሩ መተዳደሪያ ደንብ አባላት ከማህበሩ የሚወጡበትና የሚመለሱበትን ሁኔታ የሚያካትት መሆኑ በአዋጅ ቁጥር 14(2) () ስር የተደነገገ ቢሆንም ድንጋጌው መታየት ያለበት ከአባልነት መብት እና ግዴታቸውን ከመወጣት አንጻር እንጅ የአባልነቱን ጥቅም በተሻለ መልኩ ለማስጠበቅ የተቋቋመ ማህበር በህጉ ያልተቀመጠውን መስፈርት በመተዳደሪያ ደንቡ ላይ በማስፈር አባልነቱን ባልተገባ ምክንያት ከማህበር በማሰናበት በህግ የሚያገኙትን መብት ማሳጣት በማህበር የመደራጀት ዓላማ አይደለም። ሲጠቃለል አመልካች በመምህርነታቸው የቤት መስሪያ ቦታ ለማግኘት በተጠሪ ማህበር ተደራጅተው በመጠባበቅ ላይ እያሉ በመምህርነት ሙያቸው የትዳር አጋራቸው ወደሚሰሩበት አዲስ አበባ ከተማ በመዛወራቸው ምክንያት ከተጠሪ ማህበር መሰናበታቸው ከላይ በዝርዝር በተመለከቱት ምክንያቶች ተገቢነት የሌለው በመሆኑ ቀጣዩ ተወስኗል።

ውሳኔ

1. የአማራ ብሔራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት ሰበር አጣሪው ችሎት በመዝገብ ቁጥር 103071 መጋቢት 8 ቀን 2013 ዓ፣ም በዋለው ችሎት የሰጠው ትዕዛዝ፣ የአማራ ብሔራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚው ደብረ ብርሀን ምድብ በመዝገብ ቁጥር 0121252 ጥር 28 ቀን 2013 ዓ.ም በዋለው ችሎት የሰጠው ፍርድ፣ ውሳኔ እና ትዕዛዝ እንዲሁም የሰሜን ሸዋ መስተዳደር ዞን ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 013343 ህዳር 25 ቀን 2013 ዓ.ም በዋለው ችሎት የሰጠው ፍርድ፣ ውሳኔ እና ትዕዛዝ በፍ/ሥ/ሥ/ሕግ ቁጥር 348(1) መሰረት ተሸሯል።

2. የሸዋሮቢት ከተማ አስተዳደር ወረዳ ፍርድ ቤት በመዝገብ ቁጥር 17584 ሐምሌ 14 ቀን 2012 ዓ.ም በዋለው ችሎት የሰጠው ፍርድ፣ ውሳኔ እና ትዕዛዝ በፍ/ሥ/ሥ/ሕግ ቁጥር 348(1) መሰረት ፀንቷል።

3. በሰበር ክርክሩ የደረሰውን ወጪ እና ኪሳራ ግራ ቀኙ የግላቸውን ይቻሉ።

4. ውሳኔው መጋቢት 5 ቀን 2014 ዓ፣ም በችሎት ተነቧል። መዝገቡ ውሳኔ ስላገኘ ተዘግቷል።

Case 2 (ፍርድ 2)፦ የሰበር መዝገብ ቁጥር 181649፣ መስከረም 26 ቀን 2013 ዓ.ም

ዳኞች፦

1. ተፈራ ንብሩ (ዶ/ር)
2. ተነዓ ቂጣታ
3. ፈይሳ ወርቁ
4. ደጀኔ አያንሳ
5. ብርቅነሽ እሱባለው

አመልካች፦ አቶ ደጋረገ ሙሉ - የቀረበ የለም

ተጠሪ፦ ወ/ሮ ውብናት ላቀ - የቀረበ የለም

ይህ መዝገብ ተመርምሮ የሚከተለውን ፍርድ ተሰጥቷል።

ፍርድ

ይህ የባልና ሚስት የንብረት ክፍፍል ክርክር የተጀመረው በአማራ ክልል በሜጫ ወረዳ ፍ/ቤት ሲሆን የአሁን አመልካች የሰር ተጠሪ፣ የአሁን ተጠሪ የሰር አመልካች ሆኖ ሲከራከሩ ነበር። ጉዳዩ ለዚህ ችሎት ሊቀርብ የቻለው የአሁን አመልካች የአማራ ክልል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ. 74190 ግንቦት 13 ቀን 2011 ዓ.ም የሰጠው ውሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ስለሆነ እንዲታረምልኝ በማለት በማመልከታቸው ነው።

የአሁን ተጠሪ በሰር በወረዳው ፍ/ቤት ባቀረቡት ክስ ከአሁን አመልካች ጋር ያለን ጋብቻ እንዲፈርስ በጋራ ያፈራናቸው ንብረቶች እንድንካፈል በማለት ዘርዝራ በማቅረብ እንዲወሰንላት ዳኝነት ጠይቃለች።

የአሁን አመልካች በዚህ ክስ ባቀረቡት መልስ ተጠሪዋ ባቀረበችው የንብረት ጥያቄ ላይ ተገቢ ነው ያለውን ክርክር ያቀረበ ሲሆን በራሱ በኩል ባቀረበው የተከሳሽ ክሳሽነት ክስ ከተጠሪ ጋር ልንካፈል ይገባል የሚላቸውን ንብረቶች በመዘርዝር በመጠየቅ፣ የሰራተኛ ዕዳ አራት ኩንታል በቆሎ አንድ ኩንታል ዳጉሳ፣ አንድ ኩንታል ጓያ አለብን ልንከፍል ይገባል በማለት ጠይቋል። የአሁን ተጠሪ በዚህ በተከሳሽ ክሳሽነት ክስ ላይ መልስ ያቀረቡት ሲሆን፣ የሰራተኛ የጋራ ዕዳ አለብን በማለት የቀረበው ሐሰት ነው። ይህ ተቀጠረ የተባለው ልጅ የአሁን አመልካች የግል ልጅ ነው የኔም ሶስት ልጆች የግል ነበረች የግል ከብቶች ነበራቸው እነዚህ ልጆች አብረው ከእኛ ጋር ያደጉ ሲሆን ለሰሩበት ልንከፍላቸው አልተስማማንም አልቀጠርናቸውም፡ የአሁን አመልካች ልጅ እንደልጅ ከቤት ነበረ እንጅ የተቀጠረ አይደለም።

ከዚህ በኋላ የወረዳው ፍ/ቤት የሰው ምስክሮች በመስማት በሰጠው ውሳኔ የአሁን አመልካች በተከሳሽ ክሳሽነት የጋራ ዕዳ በማለት ያቀረበው የሰራተኛው ዕዳ 6 (ስድስት)

ማዳበሪያ እህል በጋራ ሊከፍሉ ይገባል፣ የባልና ሚስት ንብረቶች ላይ ተገቢ ነው ያለውን ውሳኔ ሰጥቷል። የአሁን ተጠሪ በዚህ ውሳኔ ቅር በመሰኘት ይግባኝ ለባህር ዳርና አካባቢዋ ከፍተኛ ፍ/ቤት ያቀረበች ሲሆን ፍ/ቤቱም ግራ ቀኙን በማከራከር በሰጠው ውሳኔ የባልና ሚስት ንብረት በተመለከተ በተወሰኑ ንብረቶች ላይ የስር ፍ/ቤት ጉዳዩን ድጋሜ አጣርቶ እንዲወስን የመለሰ ሲሆን፣ የሰራተኛ ዕዳ የተባለውን የስር ውሳኔ በማፅት ወስኗል።

የአሁን ተጠሪ አሁንም በዚህ ውሳኔ ቅር ተሰኝቶ የሰበር አቤቱታ ለአማራ ክልል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ያቀረበች ሲሆን ችሎቱም ግራ ቀኙን በማከራከር በሰጠው ውሳኔ ለአራሽ ሰራተኛ አበል የተባለውን 6 (ስድስት) ማዳበሪያ እህልን በተመለከተ የእርሻ ስራ ሰራሁ የሚለው ግርማው ደጋረገ የተባለው ሰው ቀርቦ ሳይጠየቅ የአሁን አመልካች መብት የለውም እና ስለ ግርማው ደጋረገ ውክልና ባልያዘበት ሁኔታ የአሁን ተጠሪ ለአራሽ አበል ከሆነው 6 (ስድስት) ማዳበሪያ እህል ውስጥ ዕዳ በመሆን ድርሻዋን ትክፈል በማለት በዚህ ረገድ የስር ፍ/ቤቶችን ውሳኔ በመሻር የአሁን ተጠሪ ይህን ዕዳ ልትከፍል አይገባም። የጋራ ንብረቶችን በተመለከተ ተገቢ ነው ያለውን ውሳኔ በመስጠት የስር ፍ/ቤቶችን ውሳኔ በመሻሻል ወስኗል። የአሁን የሰበር አቤቱታ የቀረበው በዚህ ውሳኔ ቅር በመሰኘት ለማስለወጥ ነው።

የአሁን አመልካች በ6/10/2011 ዓ.ም በተፃፈ የሰበር አቤቱታ የስር ፍ/ቤት የሰራተኛ ደመወዝ 6 ማዳበሪያ ሰብል ዕዳ የአብን ስለመሆኑ በግራ ቀኝ ምስክሮቻችን ተጣርቶና ተረጋግጦ እያለ ተጠሪም ይህን አምናበት የሰራተኛ ደመወዝ ሰብሉን የከፈለች ሆኖ እያለ የስር ፍ/ቤቱ ግን የሰራተኛ ደመወዝን እዳ ያለብንን ባለገንዘቡ ከሶ ይጠይቅ በማለት ለሌላ ወጭ በሚዳርግ መልኩ በምስክሮቻችን የተረጋገጠውን እዳ ውድቅ ማድረጉ የህግ ስህተት ስለሆነ እንዲሻሻልልኝ በማለጽ በሌሎች ጉዳዮችም ላይ ቅሬታውን አቅርበዋል።

የሰበር አጣሪ ችሎት ጉዳዩን በማየት የስር የክልል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በሰጠው ውሳኔ ተጠሪ ለእርሻ ሰራተኛ የተከፈለ እዳን በድርሻዋ ለአመልካች ልከፍላት አይገባም በማለት የመወሰኑን አግባብነት ለመመርመር ሲባል የሰበር አቤቱታው ያስቀርባል በማለት ተጠሪ መልስ እንድትሰጥ ባዘዘው መሰረት በ6/2/2012 ዓ.ም በተጻፈ መልስ፣ የአማራ ክልል ጠቅላይ ሰበር ሰሚ ችሎት በዚህ ጉዳይ የአሁን ተጠሪ የሰራተኛ ደመወዝ የተባለውን በድርሻዋ ለአሁን አመልካች መክፈል አይገባም በማለት የሰጠው ውሳኔ ተገቢና ሕጋዊ ስለሆነ እንዲፀናልኝ በማለት በዝርዝር ክርክሯን አቅርባለች። የአሁን አመልካች የሰበር አቤቱታውን በማጠናከር የመልስ መልስ አቅርበዋል።

የጉዳዩ አመጣጥ ከፍ ሲል የተመለከተው ሲሆን ይህ ችሎት የግራ ቀኙ ክርክር አግባብነት ካላቸው የህግ ድንጋጌዎች ጋር በማገናዘብ እንዲሁም የሰበር አቤቱታው ያስቀርባል ሲባል ከተያዘው ጭብጥ አንጻር እንደሚከተለው መርምሮታል።

እንደመረመርነው የአሁን አመልካች የእርሻ ስራን ለሰራልን ለአቶ ግርማው ደጋረገ ሊከፈል የሚገባው ደመወዝ የአሁን ተጠሪ ድርሻዋን ልትከፍ ይገባል በማለት ዳኝነት ለመጠበቅ መብትና ጥቅም አለው ወይስ የለውም የሚለውን ነጥብ መታየት ያለበት ጉዳይ መሆኑን ተገንዝበናል። እንግዲህ አቶ ግርማው ደጋረገ የአሁን አመልካች ልጅ መሆኑን ከግራ ቀኝ እና ከስር ፍ/ቤት የውሳኔ ግልባጭ መገንዘብ ይቻላል። አቶ ግርማው ደጋረገ በግራ ቀኙ ተቀጥረው የእርሻ ስራ የሰራላቸው ከሆነ እና ሊከፍሉት የሚገባው የስራ ዋጋ ወይም ደመወዝ ካለና መብት አለኝ የሚል ከሆነ አግባብነት ባለው የህግ ድንጋጌ መሰረት በማድረግ ፣በህግ አግባብ ስልጣን ባለው ፍ/ቤት ክስ አቀርቦ ከመጠየቅ የሚከለክለው ነገር አልነበረም። የአሁን አመልካች ግን ይህን ግለሰብ ወክለው በዚህ ጉዳይ ዳኝነት የመጠየቅና እንዲወሰንልኝ ብሎ ለመጠየቅ በሕግ አግባብ የውክልና ስልጣን የተሰጣቸው ወይም ከሕግ የመነጨ መብት ያላቸው መሆኑን የሚያሳይ ነገር የለም። ይህ ከሆነ ደግሞ አንድ ከሳሽ ለክስ ምክንያት በሆነው ነገር ወይም ክሱ በተመሰረተበት ነገር ሀብት ላይ ጥቅም ወይም መብት ያለው መሆኑን ካላረጋገጠ ክስ አቅርቦ ዳኝነት ለመጠየቅ እንደማይፈቀድለት የፍ/ብ/ሥ/ሥ/ሕ/ቁ.33 (2) ሥር ተመልክቷል። በዚህ አግባብ የተያዘው ጉዳይ ሲታይ የአሁን አመልካች አቶ ግርማው ደጋረገ የእርሻ ስራ ስለሰራልን በዚህ ምክንያት ልንከፍለው የሚገባውን ደመወዝ የአሁን ተጠሪ ድርሻዋን እንድትከፈል በማለት ስለ ግርማው ደጋረገ ክስ አቅርቦ ዳኝነት ጠይቆ እንዲወሰንለት የሚጠይቅበት የሕግ አግባብ የለም። ስለሆነም የአሁን አመልካች ለሰራተኛ የሚከፈል እዳ ቢኖር እንኳን የአሁን ተጠሪ ድርሻዋን ለገንዘብ ጠያቂው እንጅ ለአመልካች የምትከፍልበት አግባብ የለም፣ የስር ወረዳው ፍ/ቤት እና የስር ከፍተኛው ፍ/ቤት አመልካች በዚህ ጉዳይ መብትና ጥቅም የለውም ብሎ የአመልካች ዳኝነት ጥያቄ ውድቅ ማድረግ ሲገባቸው የሰጡት ውሳኔ የስር የክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመሻር የአሁን አመልካች ስለ ግርማው ደጋረገ ዳኝነት እንዲወሰንለት ለመጠየቅ መብትና ጥቅም የለውም በማለት በማረም የሰጠው ውሳኔ በህጉ አግባብ ነው ብለናል።

ሲጠቃለል የስር የክልል ፍ/ቤት ሰበር ሰሚ ችሎት የአሁን አመልካች በእርሻ ስራ ተቀጥሮ አገልግሏል በማለት የጠቀሰውን አቶ ግርማው ደጋረገ መብት በተመለከተ ይህ ግለሰብ ራሱ ሳይጠይቅ ስድስት ማዳበሪያ እህል እዳ አለብን ከዚህ ውስጥ ተጠሪ ድርሻዋን ለአመልካች ልትከፍል አይገባም በማለት የሰጠው ውሳኔ በህግ አግባብ የተሰጠ እና መሰረታዊ የሆነ የህግ ስህተት ያልተፈፀመበት ስለሆነ የሚከተለው ተወስኗል።

<u>ውሳኔ</u>

1. የአማራ ክልል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ.74190 ግንቦት 13 ቀን 2011 ዓ.ም የሰጠው ውሳኔ መሰረታዊ የህግ ስህተት ያልተፈፀመበት ስለሆነ በፍ/ብ/ሥ/ሥ/ሕ/ቁ.348(1) መሰረት በአብላጫ ድምፅ ፀንቷል።

2. የዚህ ውሳኔ ግልባጭ በስር ፍ/ቤቶች ይድረስ።

3. ግራ ቀኝ በዚህ ችሎት የደረሰባቸውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ።

4. ይህ ችሎት በ27/12/2011 ዓ.ም የሰጠውን አፈጻጸም የእግድ ትዕዛዝ በዚሁ ውሳኔ ተክስቷል። ይፃፍ። መዝገቡ ተዘግቷል።