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Preface

Hawassa University Journal of Law (HUJL) aims to expand legal scholarship in Ethiopia, publishing double-blind peer-reviewed articles, along with notes, reflections, case comments and book reviews on legal issues relevant to Ethiopia in national and international contexts. HUJL is a diamond open-access that offers a forum for researchers, lawmakers, judges, practitioners, and policymakers to contribute free of charge. In the past eight volumes, the journal has published the contributions of these stakeholders that are freely accessible. This volume features eight articles, a reflection, and a book review submitted from July to September 2024.

The peer-reviewed articles offer insights into socio-legal issues, including institutional challenges, gender and law, inconsistent legal interpretations, transitional justice, VAT reforms, and torture in Ethiopia. It opens with 'The Interaction of State and Traditional Justice Institutions in Ethiopia', which discusses the *Gereb* institutions in Northern Ethiopia, demonstrating interactions between state and customary authorities against a backdrop of legal pluralism. The second article evaluates 'The Role of Judicial Independence in the Protection of Human Rights in Ethiopia', highlighting challenges due to weak independence within the judiciary. The third article, 'Real Rape Myth and Legal Process', explores how gender stereotypes affect rape prosecutions in South Ethiopia, compromising fairness in legal proceedings. The fourth article analyses the lack of anti-stalking law in Ethiopia, advocating for legal reform. The fifth examines the Federal Supreme Court's inconsistencies in handling deception-based crimes. The sixth critically appraises transitional justice efforts, identifying challenges in truth-seeking and restorative mechanisms. The seventh article discusses recent VAT reforms and practical ambiguities affecting financial services and foreclosure. An Amharic article questions the absolute prohibition of torture and argues for its realisation despite state practices.

In addition to these articles, an Amharic reflection on the Kembata customary justice system highlights its potential to establish truth and accountability and complement state-led justice. Lastly, a book review critically engages with Antony Anghie's work titled 'Imperialism, Sovereignty and the Making of International Law' and highlights its implications for international law. Collectively, this volume presents interrelated analyses of Ethiopia's legal landscape concerning traditional justice, human rights, gender justice, taxation, and transitional justice in the national and international contexts.

At this end, I would like to extend my appreciation and gratitude to all the contributors, internal and external reviewers and language editors in addition to members of the Editorial Board. Your collective efforts have been instrumental in bringing this volume to reality and ensuring the quality, ethical integrity and success of the scholarly contributions made in this publication.

Yidneckachew Ayele Zikargie (PhD)

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Contents

Articles

Reflection

Book Review

ISSN (Print): 2664-3979 ISSN (Online): 2791-2752
https://journals.hu.edu.et/hu-journals/index.php/hujl
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The Interaction of State and Traditional Justice Institutions in Ethiopia: The Case of Gereb Institutions in North-East Ethiopia

Awet Halefom Kahsay ♣

Abstract

The existing literature on the relationship between state and traditional justice institutions presents a range of analytical perspectives but faces several limitations. First, much of the legal pluralism literature, focusing on customary laws and formal (state) laws, narrowly associates traditional institutions with the state justice sector, neglecting broader institutional interactions. Second, it often provides models of relationships without adequately considering the diverse regional contexts and traditional institutions found in federal systems like Ethiopia. Third, the existing case studies frequently fail to compare or establish connections between and among similar cases. This article, using the Gereb traditional institutions as the primary case study alongside comparable research conducted in Ethiopia, examines the relationship between the state institutions and the Gereb traditional institutions from legal and institutional perspectives. The findings reveal that formal legal and policy frameworks governing the Gereb institutions are absent. However, the regional states adopt a dual approach toward the Gerebs. In inter-communal conflicts, the Gerebs have de facto legal recognition; whereas, in intra-communal conflicts, the Gerebs lack such recognition but are allowed to settle conflicts through irq or 'reconciliation'. Based on findings from the Gereb case study and other relevant studies, the article suggests that instead of imposing a uniform national framework or typologies, in this regard, such legal and policy frameworks should be left to the regional states.

Keywords: *Gerebs*, Interaction, Traditional Institutions, State institutions, Legitimacy, Cooperation

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1. Introduction

Legal pluralism refers to the coexistence of multiple legal systems within a given society or state. Although the literature on legal pluralism acknowledges this coexistence, it often neglects the roles of the institutions themselves and remains focused primarily on legal jurisprudence.[1] According to Berman, 'legal pluralism applied to the insights of sociolegal scholarship' needs to 'turn its gaze away from abstract questions of legitimacy and toward empirical questions of efficacy and more complex accounts of institutionalised collective action.'[2] Thus, a comprehensive analysis of the relationship between traditional institutions and state institutions requires national and local level analysis. These analytical lenses are essential for examining the extent to which legal, policy, and institutional frameworks adequately address the dynamics of this relationship. Existing literature in Ethiopia highlights an unclear and inconsistent relationship between state and traditional institutions, with notable variation across regions[3]. First, a complex and often contentious relationship between the state and traditional institutions necessitates a thorough examination to understand the dynamics at play. Second, traditional institutions, which are deeply embedded in the broader socio-legal landscape, interact with state institutions in various ways, either in cooperation or competition, requiring careful consideration of which path should be pursued. Third, traditional institutions do not exist in isolation but are part of a broader societal framework that includes state institutions and state laws, making it necessary to analyse their interactions with these entities. Lastly, examining the relationship between state and traditional institutions can offer valuable insights into how these systems can complement each other and identify areas of synergy, enabling policymakers and practitioners to develop strategies that enhance cooperation and improve the overall effectiveness of conflict resolution mechanisms and beyond.

This article critically examines the current relationship between *Gereb* traditional institutions in north-east Ethiopia and various state entities, focusing on both intra-communal and inter-communal conflicts at the local level. While existing literature has primarily focused on the

[1]See for instance Susanne Epple and Getachew Assefa (eds.) *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions* (Transcript, 2020). See also Alula Pankhurst and Getachew Assefa (Eds), *Grass-Root Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (Centre Francais d'etudes Ethiopianes. Addis Ababa,2008).
[2] Paul Berman, 'Understanding Global Legal Pluralism from Local to Global, from Descriptive to Normative' in Paul Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press, New York, 2020), p.2.
[3] See, for example, Susanne and Getachew, *supra* note 1. This edited volume presents various cases from across Ethiopia's regional states, illustrating both cooperation and competition between state and traditional institutions.

relationship between the state and traditional institutions from the perspective of conflict resolution and justice sector institutions, highlighting only one role of these traditional institutions, this article broadens the scope to examine the full range of activities undertaken by traditional institutions and their interactions with state institutions. This analysis includes the legal frameworks that shape these interactions at the local, regional, and national levels. It is guided by the existing legal, institutional, and policy frameworks that define the interaction between these two institutions. By adopting this expansive approach, the article offers a more nuanced understanding of the relationship between *Gereb* institutions and state entities, surpassing earlier analyses that were typically confined to the justice sector. It not only examines specific case studies but also proposes solutions to regulate the relationship between the two, taking into account the current state structure.

The study adopts a socio-legal research methodology, combining empirical fieldwork with legal doctrinal analysis to examine the role of *Gereb* institutions within Ethiopia's legal pluralism framework. The *Gereb* institutions, whose name translates to streams, rivers, or forests, serve as traditional justice mechanisms along the Tigray-Afar boundary, stretching from southern to northern Tigray.[4] These institutions function as both judicial and non-judicial bodies, with *Abo-Gerebs* (*Gereb* representatives) overseeing conflict resolution. Their jurisdiction extends to both inter-communal conflicts (Enderta and Ab'ala districts) and intra-communal conflicts (Raya-Alamata district).[5]

For empirical data collection, fieldwork was conducted from January to April 2020, utilising semi-structured interviews with forty key informants, including community leaders, government officials, and Abo-*Gerebs*.[6] Additionally, six focus group discussions were held with

[4] Haregot Zeray, '*Women's Community Leadership at Grass Root Level: The Case of Gereb Customary Court in Raya Alamata District, Southern Zone of Tigray Region,* (MA thesis, Centre for Human Rights, AAU, 2018), p.56. Also interview with Ato Dereje, Chairman of the *Gereb* institutions, Mekelle, on 12 March 2020.

[5] In this research intra-communal conflicts refers to conflicts that occurred within an ethnic group whereas inter-ethnic conflicts refer to conflict of occurred between two ethnic groups (Afar and Tigray in this case). Enderta *Wereda* is found in Southeast zone of Tigray whereas Ab'ala *Wereda* is found in Afar region zone 2. Both *Weredas*' share the same boundary. Raya Alamata *Wereda* was found under the Southern Tigray zone before the Tigray war.

[6] While the data was primary collected in before the eruption of the north Ethiopia war, it was updated in January in 2024 through participant follow-up interviews with original participants, supplemented by new data from relevant stakeholders. As the region was in war for two years, there is no substantial difference on institutional, legal as well as policy frameworks regarding *Gereb* traditional institutions. In fact, the researcher has contact after the war with the key informants so that they confirmed that the *Gereb*s are still actively functioning according to their tradition. Interviews with Afar regional state officials and experts was conducted in August 2023.

representatives from both communities to explore their perceptions of *Gereb's* jurisdiction, enforcement, and legitimacy. A fifteen-year compilation of the minutes of discussion (hereafter MoD) of the Abo-*Gerebs* was analysed to track patterns of conflict resolution, institutional changes, and interactions with the state legal system.[7] For the legal analysis, the study examines pertinent federal and regional laws, constitutional provisions, and policy frameworks governing customary justice institutions in Ethiopia. Particularly, it has considered the new transitional justice policy to position the *Gereb* system within Ethiopia's evolving transitional justice landscape.

This article begins by establishing the research context and outlining the methodological approach. It then explores the conceptual foundations, including key studies on legal pluralism. Subsequently, it examines the legal frameworks governing the *Gerebs*, highlighting associated legal and policy challenges, and addresses relevant policy frameworks. The analysis then investigates the institutional relationship between the *Gerebs* and state institutions. Finally, a model is presented to illustrate the interaction between state institutions and *Gereb* traditional institutions at both local and national levels.

2. Conceptual Underpinning

2.1. Traditional Institutions, Conflict Resolution and Reconciliation (*irq*)

There is a terminological debate in this field. There have been numerous suggestions about what to call normative orders existing outside of the State, including 'popular dispute resolution mechanisms'[8]'traditional institution of conflict resolution'[9], 'traditional justice systems'[10], 'customary dispute resolution mechanisms'[11], 'restorative justice'[12], 'alternative dispute

[7] The minutes of discussion (here after MoD) is a compilation of the basic discussion by the *Abo Gerebs* since 2005-2020. The *Gereb*s compiled their discussion since 2005 because the *Gereb* has been reorganized themselves and got a *de facto* recognition from the two regional states. The original handwritten Minutes of Discussion (2008–2020) are stored at the Enderta *Wereda* Security and Administration Office, while a copy is held by the researcher.

[8] Gebreyesus Bahta, 'Popular dispute resolution mechanisms in Ethiopia: Trends, opportunities, challenges and prospects, African Journal on Conflict Resolution' Vol. 14, No. 1, 2014.

[9] Meron Zeleke, 'Ye Shakoch Chilot (the Court of the Sheikhs): A Traditional Institution of Conflict Resolution in Oromiya Zone of Amhara Regional State, Ethiopia, African Journal on Conflict Resolution', Vol. 10, No. 1, 2010, pp. 63–82.

[10] Emmanuel Olawale, Ying Hooi & Balakrishnan, K., 'The Dynamics of African Traditional Justice Systems: Perspectives and Prospective, African Security Review' Vol.33, Issue 3, 2024.

[11] Alula and Getachew, *supra note* 1. See also Gebrie Yntiso, Assefa Fiseha and Fekade Azeze, *Customary Dispute Resolution Mechanisms,* (The Ethiopian Arbitration and Conciliation Center, Addis Ababa, 2011).

[12] Julie Macfarlane, 'Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with The Formal Legal System, Cardozo Journal of Conflict Resolution', Vol., 8, 2007.

resolution'[13], and 'traditional methods of conflict resolution.'[14]. The term 'traditional' is employed in this research for two primary reasons. First, while "customary" refers to norms and practices rooted in custom, often tied to conflict resolution,[15] it implies that these institutions are strictly grounded in customary rules. By contrast, "traditional" underscores the enduring nature or 'traditionality' of these institutions, without delving into the origins of their authority or decision-making processes. This mirrors the usage of terms like 'common law tradition' or 'civil law tradition, which point to well-established legal systems that have stood the test of time, as recognised in legal jurisprudence.[16] Second, this research seeks to take a broader view of these institutions, factoring in not only conflict resolution but also conflict prevention, where their underlying principles may not always hinge on custom alone. As a result, for the scope of this study, "traditional institution" is the term of choice.

Since 2011, the Ethiopian Arbitration and Reconciliation Centre has sponsored three book series on traditional institutions. In the whole series, these books are titled 'Customary Conflict Resolution Mechanisms in Ethiopia' and translated as *ባህላዊ የግጭት መፍቻ ስርዓት በኢትዮጵያ*. As the contributors have tried to reflect and translate what the traditional leaders have said or ritually performed, in nowhere the book has described that the traditional leaders/elders used the word resolution in the process. Besides, dominant number of Amharic or Tigrinya literatures on conflict resolutions use the term *'ጎንፂ ምእላይ'* (*gonts'i mɨlay*) and *'ግጭት መፍታት'* *(gɨc'it məftat)* respectively.[17] However, interviews and subsequent discussions with *Abo Gerebs* and community members revealed a notable absence of these terms. Instead, the *Abo Gerebs* frequently employed

[13] Shipi Gowok, 'Alternative Dispute Resolution in Ethiopia- A Legal Framework, African Research Review', Vol.2, No.2, April 2008.

[14] Mutisi, Martha and Greenidge, Kwesi (ed), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, Africa Dialogue Monograph Series No. 2/2012, (African Centre for the Constructive Resolution of Disputes (ACCORD), South Africa, Durban, 2012).

[15] Alula and Getachew, supra note 9, p, viii. They stated that "One of the clearest distinctions of the institutions under consideration [customary dispute resolution institutions] is that they operate on the basis of local customary or cultural norms and rules, as opposed to those set out from above from the state or internationally." Sussan Epple also discussed the difference between different terminologies in the literature including 'people's law', 'traditional law', 'folk law' and 'indigenous law'. See Sussan Epple, 'Introduction' in in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia Actors, Challenges and Solutions*, (Transcript, 2020), p.18.

[16] Glenn provides a foundational framework for understanding the concept of "tradition" within the context of legal traditions. His book emphasizes the importance of legal traditions as dynamic, evolving systems of thought and practice that are deeply rooted in cultural, historical, and societal contexts. See Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press,2004).

[17] Fekade Azeze, Assefa Fiseha, & Gebrie Yinteso (Eds.) *Annotated bibliography of studies on customary dispute resolution mechanisms in Ethiopia* (The Ethiopian Arbitration and Conciliation Center, 2011).

the term ዕርቂ (*ɨrqi*), which is commonly translated as 'reconciliation' in Amharic and Tigrinya literature.[18] The etymology of *ɨrqi* as described by the *Abo Gerebs* involves a process where the perpetrator is made naked (metaphorically exposed) before the community, prompting the wrong doer to disclose the action fully and expressing remorse for the wrong deed.[19] This concept of reconciliation through disclosure differs significantly from the notions of *gonts'i mɨlay* and *gɨc'ɨt məftat* which were not observed in the entire process.

2.2. The Relationship Between Traditional and State Institutions: Critique of the Existing Legal Pluralism Literature

The coexistence and the potential tension between state institutions and customary conflict resolution mechanisms are an ancient phenomenon. Some studies held that in some circumstances they can effectively complement, while others claim that there is an inherent contradiction that can't be resolved.[20] At the continental level, the African Centre for the Constructive Resolution of Disputes (ACCORD) monograph demonstrated that the relationship between traditional institutions and the state is a delicate one, and in some cases, politicised. This collation of case studies thus opens debate on the possibility of integrating both traditional and modern approaches to conflict resolution. However, the monograph ended by proposing the need for a clear-cut formula regarding the interactions between the state and traditional institutions.[21] With the same trend, specific case studies have been conducted in Rwanda[22], Ghana,[23] and South Africa[24] to explore the experiences and to forward possible solutions to specific countries.

The literature in Ethiopia provides different case studies with variant relationships between the State and Traditional institutions. Such studies consistently narrate the cooperation and competition between them, focusing predominantly on the justice aspect of traditional institutions.

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[18] FGD with Abo *Gereb*s, on 10 April 2020, Quiha, Mekelle.
[19] Ibid.
[20] Luc Huyse and Mark Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experience,* (International Institute for Democracy and Electoral Assistance, 2008).
[21] Mutisi and Greenidge, *supra note 14,* p.149.
[22] Sullo Pietro, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda the Search for Truth, Justice and Reconciliation* (Asser Press, The Hague, 2018).
[23]William Myers, Kevin Fridy, 'Formal Versus Traditional Institutions: Evidence from Ghana, *Democratization'*, Vol.*24, issue* 2, 2016, pp 367–382.
[24] Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, New York, 2001).

While legislative confusion looms, the day-to-day activities of traditional institutions reveal varied approaches among and within regions.

Turning to specific regional examples, among the Gamo, Temechegn highlighted that cooperation exists between state and traditional institutions in the handover of the slayer, identification of the criminal, and prevention of revenge and further escalation of conflict. This cooperation underscores the necessity for peace, which, according to Temesgen, can only be achieved through traditional institutions. He stated, "state agents have duly recognised the local preference for customary law and have also noted that it is difficult to restore peace and ensure stability in the area if customary institutions are excluded. …the state institutions collaborate with customary institutions in the resolution of conflict in general and homicide in particular."[25]

Furthermore, the tension between the two is more pronounced in areas where local elders have more influence than the state. Epple reported that among the Beshada and Hamer, "anyone who addresses the police or court directly risks being locally sanctioned and fined by the elders."[26] The police cannot easily apprehend a criminal if the local community does not cooperate. Therefore, the police usually choose to follow up on a case only occasionally. Preference is given to the local leaders, and there "seems to be a kind of silent agreement between the government and the locals" as it is impossible to apprehend and prosecute anyone in the bush against the will of the community. In the worst scenarios, this escalates to "verbal threats and intimidations" against state officials.[27]

Among the Borona Oromo, while both state law and customary law coexist, "disagreement arises when the victim, the offender, and the concerned community want their dispute to be settled through customary law, but the police insist that it be resolved in the regular courts."[28] Similarly, among the Tulama Oromo, Melaku noted that "there is informal cooperation between the two, extending to the transfer of cases to the traditional *Jaarsumma*." [29] In terms of competition, the

[25] Temechegn Gutu, 'The handling of homicide in the context of legal pluralism Cooperation between government and customary institutions in the Gamo highlands', in Susanne Epple and Getachew Assefa (eds.), *Legal Pluralism in Ethiopia Actors, Challenges and Solutions* (Transcript, 2020), P.106.
[26] Susanne Epple, 'Local Strategies to Maintain Cultural Integrity: The Vernacularisation of State Law among the Bashada and Hamar of Southern Ethiopia' in Susanne and Getachew, *supra note 13,* p.200.
[27] Ibid.
[28] Aberra Degefa, 'When Parallel Justice Systems Lack Mutual Recognition Negative Impacts on The Resolution of Criminal Cases among the Borana Oromo', in Susanne and Getachew, *supra note* 1, p.323.
[29] Melaku Abera, 'The Interplay of Customary and Formal Legal Systems Among the Tulama Oromo Cooperation and Competition' in Susanne and Getachew, *supra note 13,* P.106

author mentioned issues such as mutual undermining, confusion, disputes over jurisdiction, double jeopardy, and a lack of mutual trust. To be more specific, "the decision of the elders had little or no value in the court's decision," whereas conversely, "elders use different techniques to intimidate disputants into withdrawing their complaints before or even after investigations or prosecutions have started."[30] The mistrust between the state and traditional institutions is expressed in various ways. "Actors in the formal legal system do not trust local elders due to the latter's involvement in disputes that fall outside their jurisdiction. Similarly, the elders expressed disappointment that actors in the formal legal system violated the promises they made regarding disputes that had already been settled customarily."[31]

What makes the Oromia region different in this regard is that the regional state introduced a breakthrough proclamation empowering traditional institutions (customary courts) to have jurisdiction over civil, family, and criminal matters.[32] While no limitations are provided on civil and family matters, the jurisdiction of customary courts is restricted to petty offences and crimes punishable upon complaint.[33] However, the proclamation empowers these courts to reconcile and determine '*Gumaa*' regarding criminal matters instituted by the public prosecutor.[34] Despite such restrictions, research indicates that traditional institutions handle cases without differentiating between civil and criminal issues.[35]

In addition to these examples, there are situations where state institutions may assist in enforcing decisions made by traditional institutions. For instance, in the Somali context, it is noted that the '*odayaal'* [the elders] may fail to enforce the decision it has reached. In such a case, they ask the police and other executive officials to lend a hand in enforcing the decision, claiming that peace and security might be out of control unless the decision is enforced."[36] Such requests are typically met with positive responses, and executive officials assist in enforcing the *odayaal's* decisions. Although not formalised, the regional state acknowledges this practice and has permitted some

[30] Id, p.136
[31] Ibid.
[32] Oromia Region Customary Courts Proclamation No. 240/2021, *Magalata Oromiyaa*, No1/2021.
[33] Id, Art.8 (1)(b).
[34] Id. Art 8(4)(b).
[35] Teferi Bekele Ayana, 'Administration of Justice in Customary Courts in Oromia, Haramaya Law Review', Vol. 12, 2023, p.15.
[36] Mohammed Mealin Seid and Zewdie Jotte**, '**Customary Dispute Resolution in the Somali State of Ethiopia: An Overview' in Alula and Getachew, *supra note 1*, p.193.

criminal cases to be resolved by the *odayaal*, particularly in instances of inter-clan conflict, citing peace and security as reasons for cooperation.[37]

Contrastingly, the situation in Afar is somewhat different. In Afar, "the Regional Government allocates budgets to facilitate the work of the elders."[38] Notably, there are instances where elders have written to the state council requesting the withdrawal of ongoing cases for peace purposes. Getachew and Shimelis documented a case where, after the police transferred a case to the public prosecutor's office, elders resolved this case amicably by using customary institutions and wrote a letter to the State Council.

> *In the letter, the elders requested the release of the suspect. The State's Council accepted the peaceful resolution of the case by elders and wrote a letter to the State's Justice Bureau not to institute the charge against the suspect. The Justice Bureau of the State decided not to institute a charge on the suspect, accepting the request of the State's Council. The Justice Bureau cited Article 42 (1) of the Criminal Procedure Code as the basis of its decision. The Justice Bureau justified its action by stating that the amicable resolution of such a case by the elders was preferable to avoid conflict between the clans of the deceased and the clans of the suspect.*[39]

Furthermore, the state not only withdraws from ongoing cases or at the initial stage of criminal proceedings, but also releases perpetrators after criminal adjudication. Kebede mentioned a case where the Afar Supreme Court ordered the release of an offender upon the request of the elders from the region, "by citing the letter written to the court that indicated the disposition of the case by reconciliation made by elders in accordance with the tradition of the Afar people."[40]

In the Bashada and Hamar people, Southern Ethiopia, it is reported that there is a conflict, not cooperation, between these institutions expressed in terms of hiding crimes, pretending cooperation, trying to influence court decisions and to the extent openly resisting the state

[37] This is informal and political decisions as there is no legislation authorized such exceptions. Interview with Afar Regional State Supreme Court Judge, on 24 August 2023.
[38] Alula Pankhurst and Getachew Assefa 'Understanding Customary Dispute Settlement in Ethiopia' in Alula and Getachew, *supra note 1*, p.75.
[39] Getachew Talachew and Shimelis Habtewold, 'Customary Dispute Resolution in Afar Society' in in Alula and Getachew, *supra note 1*, p.104
[40] ibid.

institutions.[41] In the Borana, Oromia regional state, it was reported that there are inclinations to be given some degree of formal recognition to traditional institutions and be supported by the Oromia National Regional State structure. Regarding this, Aberra states:

> *the leadership of both systems could specify how cases can be referred from one system to the other and determine the nature of the relationship with the police and courts. They could also determine and agree upon the circumstances under which cases in the courts of law might be diverted to the customary justice system.*[42]

In the northern part of the country, it is revealed that there is complementarity: the police support for the appearance of the Arrestee before the elders, the final reconciliation agreements will be considered as a mitigating circumstance in the final Judgment of the court. On the border between Afar and Tigray[43] the then Ministry of Justice had terminated a criminal case constructed against the suspects for the sake of the community's peaceful co-existence. The facts of the case were that considerable numbers of cattle were taken by each side during the fight because the cattle were found grazing on the land over which the communities used to dispute. Several individuals died on each side, and the regional police caught ten individuals accordingly. Upon the initiation of the elders of the area, it was recommended that the *Abo-Gerebs* of both communities should handle the conflict. Upon the request of the *Abo Gerebs*, the police released the suspects, and the process of resolution had ended up per the procedures of the traditional institution with the document of the reconciliation written and signed in the presence of representatives of the administration of the regions (Tigray and Afar), the police representatives of the two regions and the elders of the communities.[44]

The worst type of relationship is reported in Burji.[45] Accordingly, in the locality, the formal judicial system is considered as "*yetelat bet*" or an alien institution, which shows the trust and level of acceptance that these traditional institutions have in the locality. The same is true in the Borona

[41] Susanne Epple, supra *note 1*, p.31.
[42] Abera Degefa, 'When Parallel Justice Systems Lack Mutual Recognition Negative Impacts on the Resolution of Criminal Cases Among the Borana Oromo' in Susanne and Getachew, *supra note 13*, p.*333.*
[43] Shimelis Gizaw and Taddese Gessese, 'Customary Dispute Resolution in Tigray Region: Case Studies from Three Districts' in Alula and Getachew, supra *note 1*, p.193.
[44] Ibid
[45] Girma and Fekade, 'Chemuma: Conflict Resolution System in Burji' in Gebrie et al, *supra note 11*.

Oromo and the Mehan Somali conflict resolution, which goes up to "accusing [the accused] his ethnic member for taking him to *gaddisa nyaapha* (alien court) instead of *gaddisaa gossa* (ethnic/clan court), which simply suggests the formal court is less preferable to the customary court" from the Borona case. While these studies highlight variations across the country and the cooperative, competitive, and occasionally conflicting nature of these relationships, they predominantly frame the interaction through the lens of conflict resolution and justice. This narrow focus overlooks the broader societal roles and institutional frameworks that underpin these traditional institutions.

With all these variations, the literature on traditional institutions is also replete with various typologies and models aimed at solving the delicate relationship between state and traditional institutions. Connolly, in her 2005 research, examines many cases from various countries, focusing on the state regulation of non-state systems.[46] Connolly distinguishes and evaluates four different types of recognition regimes that incorporate the non-state justice institutions into the state legal system in different ways. These are abolitionist approach, complete incorporation, limited incorporation, and no incorporation models.

Instead of distinguishing fixed types of incorporation, other writers opted to examine ways of incorporation through the 'flexibility' criterion. Kotter *et al* identified a three-step scale that resides between Connolly's hypothetical borderline cases of complete autonomy and complete integration, with criteria of increasing or decreasing autonomy of the non-state justice system in its relation to the state legal system and the state judiciary.[47] The foremost and most renowned typology is Miranda Forsyth's seven models of the relationship between state institutions and traditional institutions.[48] The problem with these typologies is that they define the complex relationship of the state and traditional institutions into listed categories. If we take the Ethiopian

[46] Connolly Brynna, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology, Connecticut Law Review' Vol.38, 2005, p. 239.

[47] Matthias Kötter, Tilmann Röder, Gunnar Schuppert and Rüdiger Wolfrum (eds), *Non-State Justice Institutions and the Law: Decision-Making at the Interface of Tradition, Religion and the State* (Palgrave Macmillan, 2015). Accordingly, *high autonomy* refers to where "the non-state institution has exclusive jurisdiction of certain subject matters and its decisions cannot be overruled by a state court of last resort", *medium autonomy* where "the final revision of certain subject matters is exercised by a superior state court" and Low *autonomy* where the non-state institution is granted jurisdiction on certain subject matters, but the final revision is exercised by a superior state court law(p.174).

[48] Miranda Forsyth, *A Bird that Flies with Two Wings Kastom and State Justice Systems in Vanuatu* (ANU Press, 2009).

reality, case studies reported show that in some localities these institutions are granted *de facto* exclusive jurisdiction, while in other case studies it is reported that there is no exclusive jurisdiction, but the person will be subjected to the state as well as the non-justice systems. This model doesn't consider the diversities within a federal structure of countries as it assumes a uniform application of these models within a single nation, overlooking the complexities inherent in federal states.

In such contexts, diverse ethnic groups may operate under vastly different local realities shaped by their distinct customary institutions. Put differently, the framework fails to consider the nuances of a multi-ethnic federal system, where a one-size-fits-all approach cannot capture the varying dynamics of local traditions and legal structures. As it is indicated above, the Ethiopian literature on traditional institutions offers a wealth of specific examples across various ethnic groups, highlighting the limitations of a model that attaches a single framework to a single state. These models, therefore, neglect the coexistence of multiple legal and customary structures that may be present within a country. Additionally, it focuses on a nation's legal framework at a macro level, often ignoring the intricate details of institutional and policy arrangements. For instance, in Ethiopia, the civil code pursues an abolitionist approach by disregarding customary rules and institutions unless they are incorporated into the code. In contrast, the criminal justice policy acknowledges and recognises the role of traditional justice systems. The draft criminal procedure code even grants exclusive jurisdiction to customary institutions on certain issues, making their decisions final and unappealable. The Ethiopian Constitution allows for the establishment of courts on personal and family matters. All these issues call for a broader analysis of the relationship between the state and traditional institutions.

In general, these studies suffer from five major limitations. First, by focusing exclusively on the justice sector, these studies presume that traditional institutions are primarily connected to the state's justice system, a presumption that arises from the dominant narrative of their conflict resolution role. Second, these analyses often rely solely on normative approaches, without employing a more holistic framework that considers legal, institutional, and policy dimensions at both the national and local levels. Third, the models and typologies offered thus far focus on national-level solutions, overlooking the nuanced dynamics of cooperation and competition that

occur at the local (sub-national) level. Moreover, these approaches have not adequately accounted for the complexities introduced by federal systems, where regional states possess distinct legislative, executive, and judicial structures. Fourth, as will be argued below, this issue originates from a misinterpretation of the FDRE Constitution's legal recognition provisions, which have been understood to grant recognition to cultural (traditional) systems solely on family and personal matters, while excluding criminal matters. Fifth, the literature appears to overlook that, while legal frameworks enforcing the decisions of traditional institutions may be absent, institutional recognition and integration of state and traditional institutions can occur without formal legal provisions.

3. Legal Frameworks and Contestations for the *Gerebs*

3.1. Legitimacy of Traditional Institutions

Contrary to the widespread misconceptions,[49] the law does not outright bar the resolution of criminal cases or civil cases through customary institutions. The involvement of traditional mechanisms in settling disputes is not inherently problematic. The core legal principle here is that while traditional institutions may adjudicate cases, their rulings do not carry binding legal authority within the state system. In other words, state institutions are not obligated to enforce decisions rendered by these traditional bodies, and the police are not mandated to execute their outcomes. This is simply about the legal legitimacy of traditional institutions. This distinction is significant, as it shifts the focus from jurisdictional exclusion to an issue of state enforcement mechanisms. In practice, most traditional institutions operate independently of state enforcement, relying on customary enforcement mechanisms that do not require state intervention.[50]

However, the practice as well as the evidence from the case study of this research shows that the *Gereb* traditional institutions have more popular legitimacy than the state institutions. As evidenced in the *Ab'ala* and *Enderta* case, courts have no role in adjudicating criminal cases, but traditional institutions do. To the question why the community chose *Gerebs* over the state institutions, a respondent mentioned that:

[49] Alula and Getachew, supra *note 1*, p.8. 'CDR systems are not allowed any formal space of operation in the criminal law areas in spite of the fact that they are heavily involved in criminal matters'; See also Susanne Epple, *supra note 13,* p.11.

[50] Case studies mentioned in Alula and Getachew, *supra* note 1, and Susanne and Getachew, *supra* note 1, reveal that traditional institutions enforce their decisions through their own mechanisms. State involvement in enforcing these decisions occurs only in rare cases, due to the absence of legal provisions supporting such cooperation.

> *The community has inherited it from its parents since ancient times, Abo Gerebs are not paid for their work, Abo Gerebs treat both communities equally, Abo Gerebs are not like a court that needs plenty of time to solve a problem. The conflict between two regions is judged by the federal government but Abo Gerebs are solving the problems swiftly without further appointment, without any obstacles and for free. Abo Gerebs helps the peoples to reconcile their conflict; Tigray, Afar, Ab'ala and Enderta believe in Abo Gerebs above all and above all, if anything happens, it comes directly to the Abo Gerebs.*[51]

Despite the formal judicial structures in place, traditional institutions continue to play a significant role in addressing intra-communal and inter-communal conflicts. This suggests a complex interplay between state and traditional systems, where the latter continues to thrive due to its resonance with local customs, norms, and practices. The persistence of traditional institutions like the *Gerebs* highlights the limitations and challenges faced by state institutions in fully integrating and serving diverse communities across the regions. The question is, then, what is the source of legitimacy of the *Gerebs* or other similar institutions in Africa? One of the arguments cited for supporting the legitimacy of traditional institutions is the one mentioned by Goran Hyden, which is associated with the problem of the post-colonial state:

> *the African continent since colonial days is a shift from one crisis of legitimacy to another. During colonialism, the crisis that eventually emerged in these societies was the discrepancy between the values underlying the operations of the state and the norms guiding African communities. The success of nationalism brought about a change so that after independence the crisis that has come to dominate the political scene on the continent is the inability of the state to operate as a distinct institution free from the constraints of communitarian and religious ties.*[52]

However, the limitation of this argument lies in its inapplicability to Ethiopia, 'unlike in former colonies, Ethiopia's customary legal systems have continued to function unimpeded by outside influence in many places'.[53] In fact, Goran's arguments work for the African states, as these states

[51] Interview with Ato Atsbha Hailu, a disputant who submitted his case to the *Abo Gerebs*, Quiha, Mekelle, on 29 March 2020.
[52]Goran Hyden, *African Politics in Comparative Perspective* (Cambridge University Press, September 2012), p.64
[53] Epple, supra *note 26*, p.24.

lacked legitimacy among nationalist politicians for whom control of people was more important than control of territory. To most Africans, local community institutions carried much greater legitimacy than the civic institutions established by the colonial powers, and 'once the colonial powers left Africa some fifty years ago, Africans – leaders and followers alike – preferred a return to what they were most familiar with from home.'

The other historical reason mentioned in the literature for the legitimacy for traditional institutions in Africa is the argument forwarded by Peter Ekeh[54] who argued that 'in the absence of a nation-state, where the boundaries between community and state would tend to coincide, African countries were characterised by much more tension between community and state' and as result 'Africans have no loyalty to the civil institutions of the state – what he calls the "civic" public realm – but instead nurture their membership in a local community based social organisation.'[55] However, this reasoning seems not to apply to this case study and Ethiopia in general. Traditional institutions were there before the era of colonisation; these institutions continued after the colonisation, and for that matter, Ethiopia has never been colonised.

If the prevailing arguments in the literature do not adequately explain the legitimacy of *Gereb* institutions, particularly due to the unique context of Ethiopia and the *Gerebs* in the northern part of the country, alternative justifications must be considered. The researcher aligns with Goran's perspective that the source of legitimacy of these institutions emanates from 'the abstract nature of the system[state] underlying the ideal of a rational-legal type of bureaucracy is ignored in favour of the locale-specific pressures and interests associated with individual communities'[56] which suggests that the legitimacy of these institutions arises from the locale-specific pressures and interests of individual communities, rather than the abstract nature of a rational-legal type of bureaucracy.

The discourse on justice, legal systems, laws, and the institutions that the modern state depends on often fails to align with the needs and local demands of these communities. In contrast, the rules, systems of operation, procedures, and decision-making processes of traditional institutions like the *Gerebs* are closely aligned with the practical needs of the community. This practical alignment

[54]Peter Ekeh 'Colonialism and the Two Publics in Africa: A Theoretical Statement, Comparative Studies in Society and History', Vol. 17, No. 1, 1975, p.6.
[55] Ibid.
[56] Goran, *supra note 51*, p.58.

provides a strong basis for their legitimacy. Accordingly, legally speaking, the *Gerebs* lack legal legitimacy as their operations are not backed by formal legal frameworks. Additionally, they do not possess popular legitimacy in the conventional sense of state elections. However, they hold significant local legitimacy because they effectively address the community's needs for peace and justice, needs that are often unmet by state institutions.

The legitimacy of the *Gerebs* and other traditional institutions, therefore, can be understood through their ability to provide tangible and culturally resonant solutions to conflicts and other community issues. While they may not conform to the formal legal standards or democratic processes, their effectiveness and acceptance within the community provide a robust form of legitimacy. This local-level legitimacy is crucial in a context where state institutions may be seen as disconnected or ineffective. By delivering justice and maintaining peace in a manner that resonates with local customs and expectations, the *Gerebs* sustain their relevance and authority within their communities.

3.2. Legal Frameworks and the *Gerebs*

There is a conspicuous gap in the legal, institutional, and policy frameworks concerning the formal recognition of traditional institutions, particularly with regard to the lack of state enforcement in decisions of criminal matters.[57] The FDRE Constitution, as well as its subsequent legislative enactments, reflects a similar pattern as they provide no substantive provisions for the formal acknowledgement of state-backed enforcement for traditional institutions' decisions in the area of criminal matters. While certain policy frameworks have tentatively addressed this lacuna,[58] they fall short of offering a comprehensive resolution. This oversight is further replicated in the regional constitutions of Tigray and Afar, which largely echo the federal constitutional arrangements on the status and authority of traditional institutions.[59] Interviews with key officials, including the heads of both Tigray and Afar security and administration bureaus,[60] representatives from the Tigray

[57] Awet Halefom, 'Integrating Traditional and State Institutions for Conflict Prevention: Institutional, Legal and Policy Frameworks in Ethiopia, Mizan Law Review', Vol. 16, No. 2, 2022.
[58] Criminal Justice Policy of the Federal Democratic Republic of Ethiopia (Ministry of Justice, Addis Ababa, 2011).
[59] Afar Regional State Revised Constitution, 2002, Art.65 and Tigray Regional State Constitution, 1994, Art.60 which both articles a direct replica of Article 78(5) of the Federal Constitution.
[60] Interview with Tigray Security and Administration head, on 19 April 2020.

Justice Office,[61] and the president of the Tigray Supreme Court,[62] confirm that no existing laws authorise the *Gerebs* to handle cases along the Tigray-Afar boundary.

From the legal point of view, two distinct systems of relationship are evident in the case studies examined. In inter-communal issues of the Afar and Tigray communities, the *de facto* recognition of the *Gerebs* grants them the authority to resolve inter-ethnic conflicts. They have *de facto* exclusive power over inter-ethnic conflicts. Conversely, in the case of intra-communal conflicts within Raya *Alamata Wereda*, the rules of the *Gerebs* indicate a parallel operation with state institutions. No reconciliation will proceed unless the perpetrator surrenders himself to the state institutions or is in custody. The *Gerebs*' final decision is then submitted to the court to be considered as 'mitigating circumstances' in the criminal proceedings, usually in cases of homicide. While the Federal and regional constitutions do not prohibit traditional institutions from functioning in non-criminal matters, such as environmental issues or the elimination of harmful traditional practices, they do not explicitly authorise the *Gerebs* to handle these issues either. Officials at the bordering *Weredas* provided similar responses, recognising the peacekeeping role of the *Gereb* traditional institutions despite the lack of formal legal backing.

On the need for the state's legal recognition of *Gerebs* and their rules, the researcher encountered diverse opinions. While most of the research participants support legal arrangements either for exclusive jurisdiction or limited jurisdiction, at least the relationship between the state and traditional institutions should be clarified. However, there remains considerable uncertainty regarding how this can be effectively achieved. Within the state system, there is clear hesitancy towards the notion of enacting legislation specifically for the *Gerebs*. For instance, the head of the Tigray Security and Administration office questions the necessity of special recognition and highlights potential drawbacks.[63] He argues that formalising the role of the *Gerebs* could inadvertently restrict their authority, confining them to a narrow framework and rendering them overly reliant on legal powers. Instead of advocating for legislative measures, proponents suggest that the current *de facto* recognition suffices to mitigate potential controversies.

[61] Interview with Tigray Justice office head, on April 27, 2020.
[62] Interview with Tigray supreme court president, on 17 April 2020.
[63] Interview with Ato Tekie Mitiku, head of Tigray Security and Administration office, Mekelle, on 19April, 2022

A judge from the Tigray Supreme Court argued that leaving jurisdiction to be determined by the parties will put a great deal of pressure on victims and cultural pressure to favour the traditional institution; the judge also asked why individual victims prefer the state institutions.[64] A judge in Raya Alamata *Wereda* highlighted the absence of specific laws delineating the authority of *Gereb* institutions.[65] Consequently, he explained that the *Gereb* institutions are utilised as mitigating factors in criminal cases. Individuals involved in *Gereb's* proceedings are subsequently required to undergo court proceedings. This underscores the necessity for greater recognition of the *Gereb* system by the state, as it currently operates within a legal grey area. The judge claims that the justice structure should consider the *Gereb* institutions not because they have to, but because it allows the community to have access to justice and ensure that peace and harmony prevail.

State officials at the bordering *Weredas* or higher acknowledged the practical necessity of the *Gerebs*, particularly in their role as peacemakers. Both regions, however, provide *de facto* institutional recognition to the *Gerebs* based on practical necessity and a desire for peace. This informal recognition is rooted in the state's failure to bring peace before 2005.[66] The *Gerebs* were there, but not as formal as the years after 2005 in terms of their relationship with the state. The approach after 2005 has undergone a pragmatic approach to governance, where traditional mechanisms are utilised to fill gaps left by formal institutions.

3.3. The Issue of Double Jeopardy and the *Gereb* Institutions

A common issue in the literature of legal pluralism relates to whether final punishment by state courts and punishment under traditional institutions' rules constitute double jeopardy.[67]According to Article 23 of the FDRE Constitution, "no person shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the criminal law and procedure." Similarly, the criminal code stipulates, with some procedural variations, that "nobody shall be tried or punished again for the same crime for which he has

[64] Interview with Assefa Woldu, Tigray supreme court Judge, Mekelle, on 20 March 2020.
[65] Interview with Ato Assefa Nigus, Judge at Raya Alamata *Wereda* court, Alamata, on 13 April 2020.
[66] The community between the two *Weredas'* had been experiencing killings, lootings and other criminal activities before 2005. However, following the *de facto* recognition of the *Gereb*s by the two states enables them address issues between the two. Accordingly, since 2005, no inter-ethnic death has been recorded. FGD conducted with community representatives on 22 April 2020, and interview with the two *Wereda* Justice, Administration and security offices confirms the same.
[67] Melaku, *supra note 30*, p.129. He contended that double jeopardy could arise in serious crimes like homicide, bodily injury, rape, and abduction, he does not clarify how double punishment fits within the existing legal framework.

already been convicted, punished, or subjected to other measures or acquitted by a final decision in accordance with the law." The same constitutional provisions provided in the revised constitutions of Tigray and Afar Regional States state that no one will be subjected to double jeopardy for the same offence if found guilty. [68]In the research area where the state courts have exclusive jurisdiction, the *Gerebs* also imposed punishment based on the customary laws.[69] This is not a simple legal controversy but has practical implications since an offender might be punished twice for the same conduct, first by traditional institutions and then by the courts.

For instance, the researcher contacted a former inmate from Maichew prison who shared his experience of undergoing the *irq* process but subsequently being incarcerated.[70] The individual contended that being compelled to pay compensation in addition to serving a prison sentence constituted an unjust double punishment. He further noted that, according to *Gereb's* customs, the perpetrator's relatives are expected to contribute financially toward the imposed penalty, which he perceived as a form of collective punishment affecting his family.[71]

Regarding double jeopardy, two perspectives emerged during discussions with government representatives.[72] The majority of the respondents viewed it as double jeopardy for the state to punish someone after they had undergone *irq* and fulfilled all the requirements under *Gereb sirit*. In contrast, prison officials argued that the *irq* process is part of a broader peace initiative aimed at fostering sustainable relationships between the parties involved. They maintained that this process operates independently and does not interfere with the state justice system.

Gereb institutions address cases through customary law, while state courts apply criminal law, potentially treating different aspects of the same case. Moreover, traditional institutions lack formal legal recognition, except in personal and family matters. As a result, state courts do not recognise their decisions, further complicating the issue of double jeopardy. Thus, categorising

[68] Tigray Regional State Constitutions, 1995, Article 24 and Afar Regional State Revised Constitution, 2003, Art.23

[69] The *Gereb*s customary rules have lists of rules with punishable and non-punishable acts. These acts are enumerated in the criminal code with corresponding punishments. The rules of the *Gereb* Raya Alamata *Wereda* list punishable acts, inter alia, rape, homicide, bodily injury, theft and other lists of harmful traditional practices. The punishments range from 1000-250,000 birr.

[70] Interview with Messay Alemu, former prisoner, on April 29, 2020.

[71] Under the *Gereb* rules in Raya Alamata, a perpetrator's kin must contribute financially. In intentional homicide cases, immediate family members pay 500 Birr, half-siblings pay 400 Birr, full siblings pay 600 Birr, and independent cousins pay 200 Birr.

[72] Interview with Tigra Regional State Supreme Court judges, April 2020 and Interview with Tigray Prison Administration leadership, April 2020.

Gereb traditional institutions' processes as double punishment is challenging in the strict sense of double jeopardy. The criteria for double jeopardy are not met, as the state neither mandates participation in traditional institutions nor enforces their decisions. However, while legal double jeopardy does not apply, a de facto form may still exist in practice.

4. Policy Frameworks and the *Gerebs*

In both regional states, Afar and Tigray, there is no specific policy that empowers the *Gerebs* to function in conflict prevention and conflict resolution. The new Transitional Justice Policy seems to open a new space for traditional institutions like the *Gerebs* by signifying a pivotal advancement by explicitly delineating the role of customary justice systems within its framework. By aiming "to clearly define the role of customary justice systems in and during the implementation of the transitional justice process," the policy sets a precedent for integrating indigenous mechanisms into national reconciliation and justice efforts.[73] This inclusion not only validates the importance of traditional institutions in conflict resolution but also empowers regional authorities to identify and recognise these systems, thereby enhancing their legitimacy and operational capacity. Moreover, the policy's emphasis on a victim-centred approach, which considers the role of traditional conflict resolution mechanisms in conditional amnesty processes, underscores a commitment to holistic healing. This strategy aims to prevent feelings of revenge and resentment as beneficiaries of amnesty reintegrate into society, facilitating sustainable peace and social cohesion.

However, while the policy's intentions are commendable, certain limitations warrant critical examination. Primarily, the policy appears to position traditional institutions as supplementary or gap-filling entities rather than recognising them as autonomous systems capable of independently administering justice. This is evident in the stipulation that "the customary justice systems shall have a supportive role in the transitional justice process," which may inadvertently undermine the authority and efficacy of customary justice mechanisms, relegating them to a secondary status within the broader justice framework.[74] Additionally, while decentralisation aligns with this article's argument, the delegation of responsibility to regional states for identifying and informing

[73] National Transitional Justice Policy of the Federal Democratic Republic of Ethiopia Adopted by the Council of Ministers, April 2024, p.5
[74] Id, p.16

customary justice systems introduces potential challenges. This top-down approach may overlook the intrinsic community-based nature of these institutions, where legitimacy and effectiveness are deeply rooted in local acceptance and participation. By not directly involving communities in the selection and empowerment of their traditional justice systems, there is a risk of misalignment between regional policies and local realities, which could impede the successful implementation of transitional justice initiatives.

Furthermore, the policy outlines that 'particulars regarding the participation of victims and customary conflict resolution institutions in the amnesty-granting process and the procedures for granting amnesty shall be specified by law.'[75] While this provision offers a structured pathway for integrating traditional mechanisms into formal legal processes, it also raises concerns about potential bureaucratic constraints that could limit the flexibility and responsiveness of customary systems. The imposition of legal specifications may not fully accommodate the diverse and dynamic nature of traditional practices, potentially stifling their adaptability and cultural relevance. Moreover, the policy mandates that "a system shall be put in place to ensure that the traditional justice systems work for truth and justice, free from politics and ethnic, religious, gender, and other biases;" while this aims to uphold impartiality, it may also impose state-driven checks and balances that could interfere with the organic functioning of these community-based institutions.

Moreover, the policy's approach to empowering regional authorities to identify and recognise traditional justice institutions may inadvertently overlook the existing capacities and structures of these entities. For instance, the *Gereb* inter-communal traditional institutions examined in this research have demonstrated a level of empowerment and functionality that surpasses the roles envisaged by the Transitional Justice Policy. By not fully acknowledging the established authority and practices of such institutions, the policy risks underutilising valuable indigenous resources that are already contributing to social cohesion and justice. Therefore, while the policy represents a progressive step towards inclusive transitional justice, careful consideration must be given to ensure that the formalisation of customary justice systems does not compromise their foundational principles and community trust.

[75] Id. p.13.

5. Mutual Institutional Recognition and Relationship Between the State and *Gereb* Institutions

5.1. Justice Institutions

In both intra- and inter-ethnic situations, the *Gerebs* maintain strong relationships with state institutions, demonstrating a collaborative approach to governance and conflict resolution. The relationship with the justice institutions consists of the courts, the justice office, the police, and the prison administration. The relationship of *Gerebs* with these institutions is presented below.

5.1.1. The Courts and the *Gerebs*

Based on the two regional States' constitutions, there are at least three levels of courts: Woreda, Zonal, and Supreme courts. In inter-ethnic issues, there is no direct relationship between the *Gerebs* and the Courts in both regions. Inter-ethnic conflicts are settled through the *Gereb* institutions, and local courts have no practical jurisdiction over these issues. Whereas in the case for Raya Alamata case, as it mentioned above, unless the issue are petty offences, the *Abo Gerebs* have no exclusive jurisdiction over criminal matters.

Responding to why they prefer *Gereb* institutions over State courts, the participants mentioned inclusivity, financial inaccessibility and accessibility.[76] However, the primary reason for the preference of *Gereb* institutions over state courts in the case of inter-ethnic conflict is the restoration of peace. The process enables the prevention of the escalation of conflicts as well as their re-emergence after their settlements. This multifaceted engagement sets the *Gerebs,* particularly their capacity to bridge community divides and promote sustainable peace, remain unparallel from the formal court system. Additionally, while state courts are vested with the authority to administer cases within the bounds of statutory law, the *Gerebs'* role extends far beyond judicial adjudication.

5.1.2. The Police and the *Gerebs*

A reciprocal relationship exists between the police force and the *Gerebs* at the local level. The police actively engage with the *Gerebs*, taking part in various pre-conflict processes. For instance, police representatives regularly attend the *Abo Gerebs*' monthly meetings, contributing to

[76] FGD with Aba'la and Enderta Representatives and interviews with Ato Dereje, on 12 March 12, 2020.

discussions and taking on assigned tasks.[77] This collaboration extends to enforcement actions, with the police assisting in apprehending individuals who violate *Gereb* rules.[78] Each month, the *Gerebs* assess the local situation, identifying any issues and individuals responsible for them. If these individuals fail to comply with *Gereb* directives, the *Gerebs* request police intervention to address the situation and initiate appropriate proceedings. This also works during the conflict stage. As customary practice, the police consistently provide support to the *Abo Gerebs* in maintaining security within the community.[79] This support extends to attending and safeguarding the *irq* process. The *Abo Gerebs* in return support the police sector in establishing peace among the communities.

In Raya Alamata *Wereda*, when a conflict arises, offenders are initially taken into police custody. This ensures the safety and security of the individuals involved and maintains order until traditional leaders can initiate *irq* process. Culturally, if someone commits a crime, typically homicide, they are usually required to take custody far from the locality. This is an honour and respect for the victim's family.[80] As state institutions are exclusively empowered to handle criminal matters, the irq process operates concurrently. The police cooperate with the *Gerebs* by taking the offender to the *Abo Gerebs*. Reciprocally, the *Gerebs* will not initiate the *irq* process until the suspect surrenders to the police. This is a precondition for any action by the *Abo Gerebs*. However, in inter-community situations, the community adheres to the *Gerebs*' rules, but reconciliation may proceed without the perpetrator being placed in custody, as communal peace takes precedence over individual peace in the two communities. Additionally, in the cases of Enderta and Ab'ala, the police may detain perpetrators before any reconciliation process begins. If a conflict escalates beyond the control of the *Gerebs*, the police typically intervene, performing their usual functions in maintaining peace and order

[77] The MoD recorded the name of police participants during a monthly meeting of the Abo *Gereb*s. MoD, *supra note* 7, p.40.
[78]Id, p. 15. The MoD mentioned a situation where the police apprehend a person to the Abo *Gereb*s monthly meeting.
[79] Interview with Ato Dereje, chairperson of the *Gereb*, on 12 March,2020. The researcher has also attended a reconciliation ceremony in January 2024 in Meseret Kebelle, Enderta observing the police provide securities to the participants.
[80] The Raya Alamata *Gereb* rules obliges the perpetrator to leave the district in case of black blood homicide (intentional homicide). See Traditional rules of *Gereb* of Raya Alamata, Raya Development Association, Meskerem 2005 EC, Art. 7.7

In the context of inter-ethnic conflict, Ato Kahsu, the secretary of the *Gereb* in Aba'la and Enderta, mentioned that, in the pre-conflict stage, the police rely heavily on traditional institutions to maintain law and order.[81] A senior police officer summarised the situation by stating that the police and traditional institutions work together.[82] The *Abo Gerebs* also engage with and lobby the police force to withdraw from initiating prosecutions and transfer cases to the *Gerebs*. Ato Kahsu provided the following insight:

> *There are situations where the police claim to proceed with formal state institutions. In such situation we speakout to the police using the proverb 'ካብ ብጣዕሚ ሮጉድ ብዳይነት ልተግነዮ ቀጣን ብሽምግልና ልተግንያ እያ ሰላም እተምፅእ' [comparing to sweepy winning from state instituions, tiney justice from shimgilina will bring peace] ዳኛ ልተሓደ የስሕቆ ልተሓደ የብኽዮ [A judge makes one person laugh while making another cry]. As a result, we didn't experience an objection from the two regional police in this regard. However, the police usually support us in the process.*

This underscores the inherent adversarial nature of formal legal proceedings, where judicial decisions often favour one party at the expense of the other, leading to satisfaction for some and disappointment or suffering for others.

5.1.3 Justice Bureau, Prison Administration, and the *Gerebs*

There is a limited situation where the prison administration, justice bureau/office and the *Gerebs* will work together. In inter-communal situations, the *Gerebs* are empowered to proceed with *irq* and settle conflicts based on the rules of the *Gerebs*. The state courts practically do not entertain such issues in the two *Weredas*. In intra-communal situations, the *Gerebs* decision and reconciliation are usually sent to the courts as a mitigating situation, as the criminal code provides so. There are two situations where the two institutions might converge and have a cooperative environment. One is the situation where the good behaviour of the offender and the reconciliation process is taken as a means of remand per the article of the criminal code. This could be done through referring back the issue of the offender to the *Gerebs* reconciliation thereby creating better linkages between them and bringing issues in their relationship to the fore.

[81] Interview with Ato Kahsu Secretary of the *Gerebs*, Meseret Kebele, Enderta, on 12 April, 2020
[82] Interview with Inspector Mamo, Enderta *Wereda* Police Quiha, Mekelle, on 12April, 2020.

According to the criminal code, 'imprisonment and death are enforced in respect of certain crimes and the main objective is temporarily or permanently to prevent wrongdoers from committing further crimes against society.'[83] Accordingly, the criminal code provides situations where criminals can be released on parole before serving the whole term or convicts can be released on probation without the pronouncement of sentence or without the enforcement of the sentence pronounced. According to the criminal code, probation as well as parole can be enforced if the criminal or convicts 'has repaired, as far as he could reasonably be expected to do, the damage found by the Court or agreed with the aggrieved party.''[84] The role of the *irq* extends beyond the court of law. In cases of pardon, the law regulating pardon procedures stipulates that any person seeking a pardon must fulfil certain mandatory criteria. Failure to meet these criteria renders the pardon null and void:

> *The Petitioner's confession and repentance, his effort to reconcile with the victim or his family and compensate them, or his ability and willingness to settle the compensation decide against him.*[85]

In such situations, the decision made by the *Gerebs* becomes relevant. This is particularly evident in Raya Alamata *Wereda*, where both the *Gerebs* and the courts have parallel functions in addressing conflict and crime. The decision made by the *Gereb* is required to be submitted to the courts for mitigation, as well as for pardon and probation procedures. Such practice is not applicable in Enderta and Ab'ala *Wereda*, where the *Gerebs* are authorised to manage conflicts, but the courts do not play a role in the process.

5.2. Non-justice Institutions

As mentioned above, the *Gerebs'* roles are not limited to justice issues. The minutes of discussion of the *Gerebs* mentioned that the *Gerebs* are engaged in a comprehensive list of the underlying causes of conflicts, meticulously categorising them based on factors such as water resources, land utilisation, reservoir management, and agricultural yields, among others. Accordingly, they provide a structured series of instructional interventions designed to address and mitigate these identified conflict triggers at various intervals. During these processes, the *Gerebs* engage with

[83] Criminal Code, 2004, Art. 8(1) & (2)., Proclamation No.414/2004,
[84] Id, Article 202(1)(b) Labour Proclamation, 2003, Art. 8(1) & (2), Proc. No.377/2003, Fed. Neg. Gaz., Year 10, No. 12.
[85] Procedure of Granting and Executing Pardon Proclamation, Art 20(5), Proc. No. 840/2014, Fed. Neg. Gaz., Year 2010, No. 68.

different state institutions which according to the *Abo Gerebs* and state institutions is cooperative. As part of this, the *Gerebs* cooperate with the Women's Affairs Office of Raya Alamata in combating harmful traditional institutions, including early marriage, revenge, FGM and similar traditional practices.

Both the Security and Administration offices of Ab'ala and Enderta are organs that have a cooperative relationship with the *Gerebs.* These offices collaborate closely with the *Abo Gerebs*, compiling best practices and providing logistical support. They are responsible for covering accommodation expenses for the *Gerebs* during their monthly meetings and addressing the transportation needs of Enderta and Aba'la *Abo Gerebs*.[86] The MoD is archived in the *Wereda* Security and Administration Offices. This archival process is viewed as a success by both the *Abo Gerebs* and the two regional administrations.

The relationship is not limited to the executive branches of the regional governments; it also extends to the regional councils. The researcher has accessed two documents from the Tigray Regional State Council. One document is an assessment of the relationship between Afar and Tigray at the zonal, *Wereda*, and Kebele levels.[87] The second document pertains to the structural foundation of this relationship. It acknowledges that the two communities adhere to the traditional law, known as the *Gereb* rule, which, according to the document, has been in effect for 95 years.[88] Committees from both regions have been formed at multiple administrative levels. At the regional level, a grand committee consisting of top security, police, militia, and conflict prevention officials oversees early warning assessments, annual planning, and lower-level committees. At the Kebele level, these committees include local administrators, security officials, police, militia, and Abo *Gerebs*, ensuring a coordinated approach to conflict prevention and response. The document emphasises that the committee will implement decisions made based on the *Gereb* rules.[89] Accordingly, though the *Gereb* rules are not legally recognised, the two regional councils legitimised the settlement of their conflict through the *Gereb* rules. The relationship between the

[86] As it is discussed above, the Abo *Gereb*s of the two *Weredas* have fixed monthly meeting regardless of the status of conflict in the two *Weredas*. When the meetings are in Ab'ala, the Aba'la *Wereda* covers food and beverage expenses and vice versa.

[87] Tigray State Council, *የፌደራሊዝም ስርዓት እና የግጭት አሰተዳደር በኢትዮጵያ በአፋርና በትግራይ ብ/ክ/መንግስታት ምክር ቤቶች የጋራ መድረክ የቀረበ ፅሑፍ*, 2006.

[88] Tigray State Council, *በትግራይ እና አፈር ክልልና አጎራባች ወረዳዎች የተደረገ የዳሰሳ ጥናት*, 2011.

[89] Ibid

regional council and the *Gerebs* is significant and warrants consideration. However, it is important to note that the *Abo Gerebs* do not have representation in the regional or local council. Despite this, there are situations where *Abo Gerebs* submit reports to the *Wereda* council annually.[90]

The second document recognised that 'strong social relationships, such as those formed through funerals and associations, have been maintained. There has been no conflict in the past seven years, and previous disputes over the ownership of grazing land, whether for oxen or camels, have now been resolved."[91] All the cases signify that the *Abo Gerebs* has a cooperative relationship with the regional as well as *Wereda* councils of both regions.

6. The Dual Approach to the *Gerebs* and its Broader Implications

The multi-layered and context-specific interactions within Ethiopia's federal structure defy simple classification under any existing typology. As it is mentioned in the first topic of this article, Forsyth's seven models of state-traditional institutions relationship, while insightful, fail to capture the nuances of Ethiopia's muti-ethnic setups. Similarly, Connolly's frameworks, ranging from abolitionist to limited incorporation, overlook the variability and flexibility required in Ethiopia's diverse regions. Besides, the existing literature on state and traditional institutions tends to focus narrowly on the judicial dimensions of state-traditional institutions interactions, neglecting the broader governance roles and the horizontal and vertical interplay between these institutions and state branches. This judicial-centric view oversimplifies the complexities on the ground, where traditional institutions like *Gerebs* operate not only in the justice sector but also in governance, conflict prevention, and reconciliation. Furthermore, the reality in Ethiopia illustrates that the relationship between traditional and state institutions cannot be neatly measured or categorised through the lens of a country's legal or policy framework alone.

Accordingly, first, the relationship between state and traditional institutions, as exemplified by the *Gereb* system, is far from linear. Traditional institutions are often analysed narrowly within the context of the justice sector, focusing on their roles in resolving disputes or adjudicating cases. However, the *Gereb* institutions illustrate that this relationship transcends justice functions, extending into governance, conflict prevention, and community reconciliation. *Gerebs* not only provide culturally resonant mechanisms for dispute resolution but also contribute to broader

[90] Interview with Ato Dereje, Chairperson of the *Gereb*s, on 12 March 2020.
[91] Tigray State Council, *supra note* 78, p.15.

societal harmony by addressing underlying grievances and fostering community consensus. These roles challenge the simplistic view that traditional institutions merely supplement or compete with state justice systems. These multifaceted roles emphasise the need for more nuanced frameworks that capture the complexity of state-traditional interactions.

Second, in a federal structure like Ethiopia, assigning a specific typology to the relationship between state and traditional institutions is inherently challenging. The *Gereb* system exemplifies this complexity, operating without formal legal recognition yet wielding significant authority in specific contexts. In cases of inter-ethnic conflicts, *Gerebs* exercise exclusive power over criminal matters, often functioning independently of the state. By contrast, in intra-communal conflicts, *Gerebs* work in parallel with state institutions, with their decisions often complementing formal legal processes. This duality reflects the limitations of existing typologies, which often fail to account for the fluid and context-dependent nature of state-traditional relationships in federal systems. This variability underscores the inadequacy of rigid classifications, which do not capture the nuances of how traditional institutions operate within diverse federal frameworks like Ethiopia's. Instead, Ethiopia's experience with *Gerebs* suggests the need for more flexible and adaptive frameworks that accommodate the diversity and contextual specificity of federal systems.

Third, in a federal structure like Ethiopia, where ethnic diversity is accompanied by a variety of traditional institutions, it is imperative to leave the design of legal, policy, and institutional frameworks to regional states. The case of *Gereb* institutions demonstrates how de facto recognition by Tigray and Afar regional states has proven effective in preventing inter-ethnic conflicts. By allowing *Gerebs* to operate independently in specific contexts, these regional states have leveraged traditional mechanisms to fill gaps in state governance and maintain peace. However, similar arrangements might not work in regions with different cultural, social, or political dynamics. The examples mentioned above clearly prove the diverse contexts that shape the relationship between traditional and state institutions. Given the realities on the ground, along with the different dynamics of cooperation and competition, the optimal solution is not to impose a uniform legal and policy framework across all regions. Rather, the authority to address these local practicalities should be left to the regional states themselves. The *de facto* recognition of the *Gerebs* can be traced to the Federal Constitution's lack of provision for enforcement authority in

criminal matters, even as regional states find a pressing need for such recognition. For instance, within the current legal framework, the Oromia Regional State has introduced its own customary courts proclamation, still adhering to the constitutional parameters that limit the enforcement of traditional institutions' decisions over criminal matters. Granting regional states to craft legal frameworks allows them to address specific circumstances in their respective regions. For example, in this research, the *de facto* recognition of the *Gerebs* in inter-ethnic conflicts has proven effective in preventing and resolving disputes, even though the *Gerebs* in Alamata district lack exclusive jurisdiction. While this model has shown efficacy in this particular context, it may not necessarily apply to other regional states, underscoring the importance of localised approaches.

7. Conclusion

This article demonstrates that traditional institutions, such as the *Gerebs*, persist not simply because they are ingrained in societal norms, predate the modern state, or serve as alternatives in areas where state institutions are inaccessible. Rather, their enduring presence is a necessity for the peaceful coexistence and governance of communities. *Gerebs* play indispensable roles in contexts where state institutions are functional and effective, complementing and extending the reach of formal systems. Moreover, these institutions are not confined to addressing justice matters; they contribute significantly to the everyday governance and social cohesion of their communities. This calls for a comprehensive examination of the interplay between state and traditional institutions and their respective rules. Existing legal pluralism literature largely focuses on the customary laws of traditional institutions and their state counterparts, often limiting its scope to justice-related issues and assuming that traditional institutions operate solely in conflict resolution. However, this study reveals that the relationship between *Gereb* institutions and the state extends beyond justice and peace matters, encompassing broader governance and societal activities, while legal and policy recognition may be lacking, institutional recognition is evident. Both regional peace and administration offices actively coordinate the activities of *Gereb* traditional institutions. Additionally, various state institutions identified in this research maintain an institutional relationship with the *Gerebs*, fostering practical collaboration despite the absence of formal legal acknowledgment. Accordingly, this study reveals that *Gereb* institutions maintain strong collaborative relationships with state systems in both intra-communal and inter-communal contexts. Data from the *Gerebs* in Enderta, Aba'la, and Raya Alamata illustrates a cooperative dynamic, where traditional and state institutions work together to address governance, conflict

resolution, and social development. The *Gerebs* partner with various state offices, including Women's Affairs, Agriculture, Administration and Security, Justice, and Police, in their respective *Weredas.* For example, the *Gerebs* collaborate with the Women's Affairs Office to combat harmful traditional practices, assist the Agriculture Office in environmental protection, and coordinate with the Justice Office on sustainable peacebuilding through *irq*, remand, and pardon processes. Additionally, the state provides logistical support, such as transportation and accommodation, for the monthly meetings of the *Abo Gerebs*. This regular interaction fosters a comprehensive approach to maintaining social order and strengthens the alignment between traditional and state efforts.

Despite this effective collaboration, the *Gerebs* operate without formal legal or policy recognition. Both Tigray and Afar regional states provide only *de facto* recognition of the *Gerebs*, reflecting a complex interplay of constitutional constraints, legal ambiguity, and differing views among state officials. While some state authorities acknowledge the value of *Gerebs* and advocate for formal recognition, others express concerns that such recognition could blur the boundaries between traditional and state systems, particularly in criminal matters. Nevertheless, the *Gerebs* continue to play a critical role in preventing inter-ethnic violence and promoting communal peace, as evidenced by their success in addressing conflicts in their respective regions.

In light of Ethiopia's federal structure and the diversity of traditional institutions across the country, this article recommends against a nationwide legal, policy or institutional framework for state-traditional institution relationships. Instead, it advocates leaving the design of such frameworks to regional states. This decentralised approach allows for greater flexibility and adaptability, enabling regions to craft policies and institutional arrangements that reflect their unique cultural, social, and legal contexts. By recognising the pluralistic realities of Ethiopia's governance, this approach ensures that traditional institutions like the *Gerebs* can continue to contribute effectively to peacebuilding, conflict resolution, and community governance. Rather than imposing a rigid, one-size-fits-all model, empowering regional states to address these issues locally ensures a more context-sensitive and inclusive governance framework, enhancing the overall stability and harmony of the nation. While legal frameworks enforcing the decisions of *Gerebs* may be absent, institutional recognition and integration of state and traditional institutions can occur without formal legal provisions, as evidenced by the *Gereb* institutions. This article

provides a fresh perspective on legal pluralism by shifting away from the conventional emphasis on the linear relationship between state and traditional institutions, focusing instead on their broader institutional interactions. The case study shows that the current state-traditional relationship cannot be resolved through generalised models or typologies, instead highlighting the need for tailored approaches that consider local contexts and the complexities of multi-ethnic states, which demand unique, context-sensitive solutions.

Conflict of Interest

The author declares no conflict of interest.

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The Role of Judicial Independence in the Protection of Human Rights in Ethiopia: Analysis of the Legal and Institutional Frameworks and Federal Court Practices

Nega Ewunetie Mekonnen♣

Abstract

This article examines the role of the Ethiopian federal judiciary in protecting and enforcing human rights from the perspective of judicial independence. Specifically, it examines the interplay between judicial independence and the protection of human rights and the implications of the manifestations of the institutional and personal independence of the judiciary on the role of courts in the enforcement and protection of human rights. The article mainly uses the relevant literature, the relevant law (domestic legislation, treaties, and international jurisprudence), concluding observations and recommendations of different human rights monitoring bodies, the recommendations of the Ethiopian Human Rights Commission (EHRC), internationally and regionally accepted legal principles, standards, and guidelines, different documents, and empirical data collected through interviews and focus group discussions as sources of data. The interviews and focus group discussions involved federal court judges, public prosecutors, and attorneys. A thorough examination of the law and the collected and analysed data reveals that the institutional and personal independence of the federal judiciary is not protected in law and practice in such a way that federal courts can play a significant role in the adjudication and enforcement of human rights in Ethiopia.

Keywords: Ethiopia, Federal Courts, Judicial Independence, Protection of Human Rights

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1. Introduction

Having an independent and impartial judiciary is a prerequisite for protecting human rights.[1] In particular, the right to a fair trial cannot be conceived without an independent and impartial judiciary. A fair trial is essential for human rights and upholding the rule of law.[2]

Commonly, judicial independence is conceptualised as freedom from interference from the two contending branches of the government, the legislative and executive branches, both institutionally and personally.[3] The independence of the judiciary and the protection of human rights reinforce each other, where an independent judiciary is essential and a prerequisite for the protection of human rights. The UN Human Rights Council (UN HRC) has underscored the role of an independent judiciary in the enforcement and protection of human rights. In its Resolution, the Council underlined that an independent and impartial judiciary, among other things, is a prerequisite for the protection of human rights and the application of the rule of law.[4] Writers, such as Javier Couso, capitalise on the role of an independent judiciary in the enforcement of human rights and argue that judicial independence is essential and a *sine qua non* element for the effective enforcement and protection of human rights.[5]

This article doctrinally and empirically examines the independence of the judiciary and its conduciveness to the protection of human rights in the federal courts of

[1] Letsebe Piet Lesirela, 'Providing for the Independence of the Judciary in Africa: A Quest for the Protection of Human Rihgts', (LLM Thesis, The Catholic University of Central Africa, 2003), P. 19.
[2] HRC, General Comment No. 32, Art. 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32
[3] *See* Ishmael Gwunireama, 'The Executive and Independence of the Judiciary in Nigeria', Pinsi Journal of Art, Humanity and Socoal Studies, Vol. 2, No. 1, 2022.
[4] UN Human Rights Council Resolution 44/9 (2020), at file:///C:/Users/DELL/Downloads/A_HRC_RES_44_9-EN.pdf (accessed on 25 July 2023)
[5] Javier Couso, '*Sine Qua Non*: On the Role of Judicial Independence for the Protection of Human Rights in Latin America', Neth. Q. Hum. Rts., Vol. 33, 2015, P. 252.

Ethiopia.[6] In addition to the relevant laws, the article employs empirical data as a source of information. The data were mainly collected from selected judges, public prosecutors, and attorneys through interviews and focus group discussions from federal courts in Addis Ababa and Dire Dawa. A total of seventeen interviewees, composed of judges, public prosecutors, attorneys, and a director from the Federal Judicial Administration, were interviewed. In addition, empirical data were collected from three FGDs, each composed of attorneys, public prosecutors, and judges. The interviewees and participants of the FGDs were selected by using purposive sampling techniques. Interviewees who held positions such as representative judge, the Deputy Director General at the Ministry of Justice, the Public Prosecutor and Coordinator of Economic Crimes, and the Judgement Inspection Director at the Federal Judicial Administration Council were purposefully selected because of the positions they assumed. Other research participants in the interviews and the FGDs were selected because of their availability at the time of data collection and their willingness.

The article discusses how judicial independence is legally protected and realised in such a way that it contributes to the judicial protection and enforcement of human rights in Ethiopia. That is, it examines the interplay between judicial independence and the protection of human rights. It scrutinises the independence of the judiciary in the selection and appointment procedure of judges, budgetary issues and the infrastructure of courts, and the implications of these manifestations of the institutional and personal independence of the judiciary on the role of courts in the enforcement and protection of human rights. The study concludes with final remarks and corresponding recommendations.

[6] According to Art. 78 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Ethiopia, as a federal state, has parallel federal and state court structures. This study specifically focuses on federal courts for empirical purposes while acknowledging that the legal analysis applies to all courts.

2. The Meaning of Judicial Independence

Judicial independence refers to the principle that courts should not be subject to an improper influence from the executive and legislative branches of government.[7] The goal of judicial independence is to enable judges to make decisions based solely on the law and the facts of the case, free from the interference or influence of the two branches of government.[8] In effect, this enables the judiciary to act as a check on the other branches of government, promoting the rule of law and safeguarding human rights and freedoms.[9]

Pragmatically, judicial independence can be defined as a response and solution to concrete problems that the judiciary may naturally face. In this regard, John Bell identifies particular problems from the perspective of judicial independence.[10] These are the following: courts themselves are seen as politicised institutions; political influence on judicial decisions; political influence over the allocation of resources for justice; political involvement in the selection and career progression of judges; and the involvement of judges in extrajudicial activities.[11] It is possible to argue that, although the magnitude and severity differ, the stated practical problems that are potentially posed by the executive and legislative branches of government and, to some extent, by the judiciary itself are the problems of every judicial system. In effect, by separating the adjudicatory function from the political branches, we can ensure impartiality, fairness, and consistency in the interpretation and application of law, ultimately benefiting the public good.[12]

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[7] *See* Gwunireama, *supra* note 3.

[8] Basic Principles on the Independence of the Judiciary, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 Aug. to 6 Sept. 1985, and endorsed by GA resolutions 40/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985, Principle 2.

[9] Gretchen Helmke & Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective', *Annual Review of Political Science,* No. 12, 2009, PP. 345–366.

[10] John Bell, 'Judicial Cultures and Judicial Independence', Cambridge Y.B. Eur. Legal Stud., Vol. 4, 2001-02.

[11] *Id*., PP. 50-51.

[12] John A. Ferejohn and Lary D. Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint,' New York University Law Review, Vol. 77, 2002, P. 967.

Judicial independence, as a generic term, entails both personal and institutional independence. In the following sections, after discussing the nexus between judicial independence and the protection of human rights, we will examine judicial independence from the perspective of these two components in general and in the context of the Ethiopian legal and judicial systems in particular.

3. The Nexus Between Judicial Independence and the Protection of Human Rights

As the judicial system in a country plays a central role in protecting human rights and freedoms,[13] the independence of the judiciary forms the bedrock of a fair and just legal system in which human rights are protected and duly enforced. As Alemayehu G. Mariam argues, where there is strong judicial independence in place, there tends to be greater respect for human rights, civil liberties, political stability, and effective democratic institutions.[14] In particular, judicial independence guarantees fair trial rights and is a prerequisite to the rule of law.[15] Without judicial independence, human rights can be easily undermined, leading to arbitrary and unjust decisions that erode the rule of law.[16] As Keith S. Rosenn describes, in societies with limited justice, instability prevails, and an unreliable judiciary hampers economic growth by discouraging productive activities.[17] This researcher shares Rosenn's opinion, but would like to examine the impact of an independent judiciary further. The researcher believes that a non-independent judiciary not only hinders socioeconomic development but also leads to a highly unstable society.

[13] International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, a Practitioners' Guide Series No. 1, International Commission of Jurists, Geneva, 2004, P. 1.
[14] Alemayehu G. Mariam, 'Human Rights Matters in the New Millennium: The Critical Need for an Independent Judiciary in Ethiopia', IJES, Vol. 3, No. 2, 2008, P. 123.
[15] UNODC, The Bangalore Principles of Judicial Conduct, 2018, Value 1.
[16] *See* Ines Vargas, 'The Independence of the Judiciary and the Protection of Human Rights', Mennesker og Rettigheter, Vol. 7, 1989, P. 3.
[17] Keith S. Rosenn, 'The Protection of Judicial Independence in Latin America', U. Miami Inter-Am. L., Rev. Vol. 19, No. 1, 1987, P. 8.

Furthermore, for a more compelling reason, it fails to create a conducive environment for the protection and enforcement of human rights.

An independent judiciary plays a key role in "safeguarding the right to fair trial".[18] It is generally agreed that independent judges ensure accountability, prevent corruption, and safeguard fundamental human rights, including freedom of speech and assembly, due process, and the rights of marginalised communities.[19] Through impartial adjudication, judges ensure the protection of civil liberties, such as freedom of speech, assembly, religion, and the right to privacy. Judges act as guardians of fundamental rights, preventing the arbitrary restriction or violation of these rights, and thus reinforce democratic values in society.

Under international human rights law, judicial remedy is not the only means of ensuring an effective remedy. In addition to judicial remedies, administrative and other remedies can redress human rights infringements.[20] However, international human rights law imposes a duty on states to investigate, prosecute, and use judicial mechanisms to remedy violations in cases of gross human rights violations.[21] The obligation of states to investigate, prosecute, and punish gross violations is important

[18] Nika Pirvelashvili and Nino Doluashvili, 'Judicial Independence As A Safeguard off The Right to A Fair Trial: Legal Framework And Practice of The Constitutional Court of Georgia' in Yücel Arslan, Fatih Çağrı Ocakli , Enise Yüzüak, Özge Elikalfa, Tuğçe Kiliç Gökçen Sena Kumcu, And Gizem Tezyürek (eds.), *Constitutional Justice in Asia "Judicial Independence as a Safeguard of the Right to a Fair Trial",* (11th Summer School ofthe Association of the Asian Constitutional Courts and Equivalent Institutions (AACC), Ankara, 2023), P.162.

[19] Margaret Satterthwaite, UN Special Rapporteur on the Independence of Judges and Lawyers, Speech During the Opening Session of the Asia Pacific Justice Forum, December 8-9, 2022, available at https://worldjusticeproject.org/news/role-independent-judiciary-protecting-rule-law (accessed on 27 July 2023)

[20] For instance, the right to administrative remedy, in addition to judicial and other remedies, is recognised under Art. 2(3) (b) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171(ICCPR).

[21] Gross violations of human rights include torture and similar cruel, inhuman, or degrading treatment; extra-judicial, summary, or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity. *See* United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, 2010, P. 4.

for prevention.[22] The obligation of states to investigate and prosecute serious human rights violations can be understood through the lens of victims' rights to justice. This duty is clearly outlined in various international human rights instruments and principles. Art. 4 and 5 of the Genocide Convention; Art. 4 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; Art. 3, 7, 9, and 11 of the International Convention for the Protection of All Persons from Enforced Disappearance; Art. 6 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and Principle 19 of the Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity impose the duty on states to investigate and prosecute serious human rights violations. The ability of states to fulfil this obligation is heavily reliant on having an independent judicial mechanism, as the investigation and prosecution of serious human rights violations would be impossible without an independent and impartial judiciary.

The importance of having an independent judicial mechanism for the investigation and prosecution of serious human rights violations is encompassed within the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. According to these principles, international and internationalised criminal tribunals may exercise concurrent jurisdiction when national courts cannot provide satisfactory guarantees of independence and impartiality or when they are materially unable or unwilling to conduct effective investigations or prosecutions.[23] To ensure accountability and combat impunity, an independent judiciary is essential.[24] By doing so, an independent judiciary acts as a

[22] United Nations, Guidance Note of the Secretary General on Transitional Justice: A Strategic Tool for People, Prevention and Peace, 2023, P. 16.

[23] Commission of Human Rights, Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, E/CN.4/2005/102/Add.1, 2005, Principle 20.

[24] Silvia Casale, 'Treatment in Detention' in Ana Salinas de Frías, Katja Samuel, and Nigel D. White (eds.) *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford, 2012), P. 511.

check on the executive and legislative bodies, ensuring that their actions adhere to constitutional provisions and international human rights obligations.[25] An independent judiciary ensures justice is served impartially and fairly, discouraging impunity. When the judiciary is free from external pressures or political interests, perpetrators of human rights abuses can be brought to justice, ultimately enhancing the protection of human rights.[26] Therefore, as Javier Couso convincingly argues, even with an advanced understanding of rights, human rights can still be violated in democracies without a truly independent judiciary.[27]

The interplay between judicial independence and the protection of human rights is addressed in the resolutions of the General Assembly of the United Nations (UNGA), human rights instruments, and the general comments of human rights monitoring bodies. In its resolutions, the UNGA underlined the nexus between judicial independence and the protection and enforcement of human rights. In this regard, it acknowledges that an independent judiciary is essential to the full and non-discriminatory realisation of human rights and indispensable to democratisation processes and sustainable development.[28] In addition to the resolutions of the UNGA, international and regional human rights instruments recognise the right to a fair trial by "an independent and impartial tribunal."[29] The Universal Declaration of Human Rights (UDHR), the ICCPR, the Convention on the Rights of the Child

[25] *See* Linda Camp Keith, 'Judicial Independence and Human Rights Protection around the World', Judicature, Vol. 85, 2001.
[26] For a comprehensive review of academic works on the nexus between judicial independence and the protection of human rights, *see* Randall Peerenboom, 'Human Rights and Rule of Law: What's the Relationship?', Georgetown Journal of International Law, Vol. 36, 2005.
[27] Couso, *supra* note 5, P. 257.
[28] General Assembly Resolution 50/181 (1995), at http://hrlibrary.umn.edu/resolutions/50/181GA1995.html (accessed on 29 November 2024), Para. 2; General Assembly Resolution 48/17 (1994), at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/ROL%20A%20RES48%20137.pdf (accessed on 29 November 2024).
[29] International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, *supra* note 13, P. 15.

(CRC), and human rights monitoring bodies in their general comments and communications emphasise the nexus between judicial independence and the judicial protection and enforcement of human rights. According to Art. 10 of the UDHR, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of their rights and obligations and of any criminal charge against them. Similarly, according to Art. 14 of the ICCPR, in the determination of any criminal charge and obligations in a lawsuit, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Rights and obligations in a suit at law should be determined by a judiciary that is independent of the executive and legislative branches of government.[30]

The Human Rights Committee (HRC) asserts that the right to be tried by an independent and impartial tribunal is an absolute right that cannot be limited.[31] In addition, the Committee against Torture emphasises the crucial role of an independent judiciary in upholding the principle of legality.[32] Moreover, in its general comment, the Committee underlined the obligation of state parties to take actions that will reinforce the prohibition against torture through judicial actions that must, in the end, be effective in preventing it and make available to detainees and persons at risk of torture and ill-treatment judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.[33] The CRC provides for the right of a child to have access to an independent judiciary to

[30] HRC, General Comment No. 32, *supra* note 2. Para. 18.
[31] HRC, Communication No.263/1987, Case of *Miguel González del Río vs. Peru*, *op. cit*., Para. 5.2. cited *in* International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, *supra* note 13, P. 15.
[32] Committee against Torture, Concluding Observations: Nicaragua, CAT/C/NIC/CO/1, 2009, Para.12.
[33] Committee against Torture, General Comment No. 2, Implementation of Art. 2 by States parties, CAT/C/GC/2, 2008, Para. 2 and 13.

challenge the legality of the deprivation of his or her liberty.[34] From this, one can understand that the right to be tried by an independent and impartial tribunal, as a human right obligation of a state, is a human right in itself, and it is also a means to enforce human rights. Hence, the independence of the judiciary can be considered "an essential requirement of the guarantee of human rights and freedoms."[35]

4. Judicial Independence in Ethiopia: The Legal and Institutional Framework

In many jurisdictions, the legitimacy of the judiciary in general and the recognition of judicial independence in particular "stem from the constitution".[36] However, it is in the domain of common knowledge that the constitutions of Ethiopia are notoriously short-lived and often violated. In the constitutional history of Ethiopia, four constitutions were adopted in less than seven decades. In this regard, Rosenn's description of the constitutions of Latin American countries also applies to the constitutional history and culture of Ethiopia: "Each *golpe* ruptures the preexisting constitutional order, leaving the judiciary in the unenviable position of trying to maintain a *de jure* institutional authority in a *de facto* regime."[37] This constitutional instability, coupled with a long history of monarchy and authoritarian rule, limited the independence of the judiciary. In the following subsection, an overview of judicial independence under the 1995 FDRE Constitution is provided.

4.1. The Ethiopian Legal Framework on Judicial Independence

The FDRE Constitution explicitly acknowledges and establishes an independent judiciary. Art. 78 and 79 outline the constitutional mandate of the judiciary. Art.

[34] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), Art. 37(d). It should also be noted that the nexus between judicial independence and the judicial protection and enforcement of human rights is addressed under Art. 7 and 26 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986).
[35] The Universal Charter of the Judge, approved by the International Association of Judges (IAJ), 1999.
[36] Rosenn, *supra* note 17, P. 33.
[37] *Ibid*.

78(1) of the Constitution establishes an independent judiciary. The Constitution specifically prohibits the establishment of special or *ad hoc* courts that usurp judicial powers from regular courts or institutions authorised to exercise judicial functions.[38] In addition to the explicit constitutional recognition of the establishment of an independent judiciary under Art. 78 and 79 of the FDRE Constitution, other provisions reinforce the constitutional recognition of an independent judiciary. One such constitutional recognition is the separation of powers. The Constitution provides for the separation of powers, a fundamental principle that reinforces judicial independence.[39] In this regard, the most important avenue that helps secure judicial independence is the power of judicial review. John A. Ferejohn and Larry D. Kramer argue that judicial review and judicial independence are often perceived as synonymous by many people.[40] Conferring constitutional decision-making power to the House of Federation instead of the judiciary in the FDRE Constitution has been identified as one of the "practical and structural impediments to judicial independence that remain to be addressed and overcome."[41] Even if the power of judicial review is not vested in courts, by dividing powers among the executive, legislative, and judicial branches, the Constitution promotes checks and balances, preventing any branch from overpowering the others. In principle, this separation of powers allows the judiciary to act impartially, free from the influence of other branches of government.

Concerning the personal independence of the judiciary, the Constitution provides that judges shall be independent and directed only by the law.[42] These constitutional provisions legally protect the judiciary from undue interference, ensuring its

[38] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 78 (4), Proc. No. 1/1995, *Fed. Neg. Gaz*., Year 1, No.1.
[39] *Id*. Art. 50 (2), 55, and 72-79.
[40] Ferejohn and Kramer, *supra* note 12, P. 1033.
[41] Ethiopia, Legal and Judicial Sector Assessment, The International Bank for Reconstruction and Development/the World Bank, (Washington Dc, First Publication), 2004, P. 24.
[42] Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 1/1995, Art. 79 (3), (4), and (5).

independence in decision-making processes. In addition to the constitutional guarantee, Ethiopia has enacted different laws to strengthen judicial independence. The Federal Judicial Administration Proclamation is one such law.[43] This Proclamation established the Judicial Administration Council, a separate body responsible for the administration and appointment of judges. The Council is composed of members from various branches of the government, the judiciary, the Ethiopian Bar Association, a legal academician, and others.[44] This ensures a multi-stakeholder approach to judicial administration and reduces the possibility of executive control over the judiciary. According to the Federal Judicial Administration Proclamation, in the administration of justice, it is important to ensure that courts exercise their judicial functions free of all internal and external influences and in the spirit of complete independence. This includes establishing a legal framework and procedures that ensure transparency, impartiality, and public confidence in the process by which judges are appointed. It also involves ensuring that members of the judiciary conduct their judicial functions with complete independence and enabling the judiciary to exercise its judicial function free from any internal and external influences.[45]

The other relevant law in which the concept of judicial independence is enshrined is the Federal Courts Proclamation.[46] The Federal Courts Proclamation provides a legal framework to safeguard the independence of the judiciary in Ethiopia. This Proclamation can be taken as a tool that helps establish an independent and autonomous federal court system that is separate from the executive and legislative branches of government. Similar to the Federal Judicial Administration Proclamation, the Preamble, Art. 23, 39, 43, 52, and 53 of the Federal Courts

[43] Federal Judicial Administration Proclamation, 2021, Proc. No. 1233/2021, *Fed. Neg. Gaz*., Year 27, No. 18.
[44] *Id*., Art. 6.
[45] *Id*., Preamble, and Art. 3.
[46] Federal Courts Proclamation, 2021, Proc. No. 1234/2021, *Fed. Neg. Gaz*., Year 27, No. 26.

Proclamation are provisions that have been provided to give effect to constitutionally recognised judicial independence. In addition to the Constitution and these subsidiary laws, it is important to note that Ethiopia has also adopted international and regional human rights instruments, such as the ICCPR and the African Charter on Human and Peoples' Rights (ACHPR), which emphasise the significance of an independent judiciary.

Despite these constitutional and legal provisions in place, arguments claiming challenges to judicial independence and the existence of a subservient judiciary in Ethiopia persist.[47] A thorough examination of institutional and individual judicial independence is conducted in the following sections in light of the previously described legal and constitutional frameworks, accepted norms, guidelines, and standards, and the collected empirical evidence.

4.2. Institutional and Personal Independence of the Judiciary and Protection and Enforcement of Human Rights in Ethiopia

As previously examined, courts in general and an independent judiciary in particular are important avenues and prerequisites to protect and enforce human rights, respectively. This section examines the two components of judicial independence—institutional and personal independence—in the Ethiopian legal framework and examines the practice in federal courts.

4.2.1. Institutional Independence of the Judiciary and Protection and Enforcement of Human Rights in Ethiopia

The institutional or collective independence of the judiciary refers to the importance of the judiciary functioning without interference or pressure from the two branches of the government, particularly the executive branch. This setup ensures that the judiciary can function independently from the executive and legislative branches of government. This duty is provided under the United Nations Basic Principles on the

[47] *See* Simeneh Kiros Assefa, 'Conspicuous Absence of Independent Judiciary and 'Apolitical' Courts in Modern Ethiopia', Mizan Law Review, Vol. 15, No. 2, 2021.

Independence of the Judiciary (the UN Basic Principles). According to the Basic Principles, all governmental and other institutions have to respect and observe the independence of the judiciary.[48]

In the FDRE Constitution, the core principles of judicial independence in general and institutional independence in particular are enshrined under Art. 79(2). According to this constitutional provision, courts at any level should be free from any interference or influence by any governmental body, government official, or any other source. In addition, the financial autonomy of federal courts is recognised under Art. 79(6) of the Constitution. According to this constitutional provision, the Federal Supreme Court has the authority to prepare and submit the budget of federal courts to the House of Peoples Representatives for approval, and once approved, to administer it. As will be discussed in detail in the following section, the institutional independence of federal courts is also secured by giving the judiciary a significant role in the appointment of judges.[49]

The aforementioned constitutional principles of the independence of the judiciary are further elaborated in the Federal Judicial Administration Proclamation. The Preamble, Art. 3, 8, 9, 20–23, and 42 of the Proclamation are the most important provisions on judicial independence. Courts are expected to exercise their judicial functions free from any internal or external influences and in the spirit of complete independence. The key aspects of institutional judicial independence include decision-making independence, judicial jurisdiction over all issues of a judicial nature, financial autonomy, and the availability of sufficient resources.[50] In the following subsection, this article examines the significance of institutional judicial

[48] Basic Principles on the Independence of the Judiciary, *supra* note 8, Principle1.
[49] Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 1/1995, Art. 80.
[50] *See* International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, *supra* note 13.

independence and its implications for the protection and enforcement of human rights, using relevant laws and empirical data.

4.2.1.1.Decision-making Independence

The institutional independence of courts, to be free from the interference of the executive, includes non-interference in judicial proceedings. The duty of non-interference in judicial proceedings, among other things, protects and ensures the decision-making power of the judiciary.[51] In its concluding observations on Slovakia, the HRC pointed out that states should take specific measures to guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making.[52] The UN Basic Principles safeguard the independence of the judiciary in decision-making, as outlined in Principle 4. This principle prohibits unjustified interference with the judicial process, thus protecting its integrity. In general, the primary goal of maintaining decision-making independence for the judiciary is to ensure that judges can perform their duties without interruptions from other state actors.[53]

As mentioned in the preceding section, the Ethiopian constitutional and legal frameworks recognise the institutional independence of the judiciary in decision-making. However, the data collected in assessing the practice in federal courts reveal that there are problems with respecting the decision-making independence of the judiciary and non-interference in judicial proceedings. In this regard, an attorney mentioned that judges may face pressure in possessory action cases involving the government.[54] A discussant in a focus group discussion composed of judges and an interviewed public prosecutor shared the same opinion as this attorney. In connection with this, a judge in an FGD mentioned that Court administrators are covertly

[51] *Ibid*.
[52] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), Para. 18.
[53] Keith, *supra* note 25, P. 196.
[54] Interview with an Attorney (Anonymous), Federal First Instance Court, Bole Bench, Addis Ababa, June 2022.

directed to act in favour of the government, even to the extent of replacing them if necessary.[55]

In an interview, a public prosecutor described the interventions of various interest groups, including the executive, in criminal judicial proceedings as follows: Widespread bias in judgment from political, lobbyist, and mob influences affects criminal cases and investigations. Decisions are sometimes influenced by mobs, revealing a gap in impartiality and autonomy.[56] These opinions demonstrate direct interventions in the decision-making independence of federal courts.

4.2.1.2.Non-Enforcement of Court Decisions

In addition, as decision-making is naturally extended to the power to enforce a given decision and order, the decision-making independence of the judiciary can be explained in terms of the reciprocal duty of the other branches of the government, mainly the executive, to enforce and execute. As Rosenn argues, the executive's refusal to enforce judicial decisions undermines judicial independence.[57] In effect, the refusal of the executive or lack of cooperation from it to execute and enforce decisions and orders of the court can be taken as the usurpation of the principle of separation of powers. The implementation and enforcement of judicial decisions, viewed as an extension of judicial independence and intrinsically linked to human rights protection, is summarised by Lovemore Chiduza, who states that respecting judicial independence involves implementing court decisions that may challenge state policy, thereby enhancing accountability, the rule of law, separation of powers, and the safeguarding of human rights.[58]

[55] FGD with Judges, Federal First Instance Court, Dire Dawa Bench, DireDawa, May 2022.
[56] Interview with a Public Prosecutor (Anonymous), Dire Dawa Branch Office, Ministry of Justice, Dire Dawa, June 2022.
[57] Rosenn, *supra* note 17, P. 30.
[58] Lovemore Chiduza, 'The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe', (PhD Dissertation, the University of the Western Cape, 2013), P. 328.

Research participants reported instances where the police refused to uphold court orders, neglecting their responsibility and rendering judicial decisions ineffective.[59] An attorney and criminal suspect observed that the police have significant influence in court proceedings, as they are able to affect decisions, detain individuals, bring new charges, or keep those who have been bailed by courts incommunicado. Courts can also enforce their orders by instructing the police to bring individuals before them.[60] Courts are hesitant to take appropriate action against police officers and others who do not comply with court decisions and orders because they are subservient to the executive branch.[61] For example, a criminal suspect who had been granted bail had to give birth to a baby at the police station because the police refused to release the woman as ordered by the court.[62] Even if some judges are courageous enough to question police officers who have detained criminal suspects granted bail, it is common to see them removed from benches following the actions they have taken.[63]

A Federal High Court judge also holds these opinions.[64] The refusal of the police to execute a court decision is common not only in criminal cases but also in high-profile political cases.[65] In practice, in the Ethiopian criminal justice system, it is common to categorise criminal cases into two categories: "high-profile political criminal cases," in which the interest of the government is the top priority,[66] and other criminal cases, in which the government is not very interested. The refusal of the

[59] FGD with Attorneys, Federal First Instance Court, Guelele Bench, Addis Ababa, May 2022.
[60] Interview with an Attorney(Anonymous), Addis Ababa, June 2022; Interview with Mr.Alelegn Mihretu, a criminal suspect and an attorney, Addis Ababa, October 2023.
[61] *Id.,* Interview with Mr.Alelegn Mihretu.
[62] Interview with a Judge (Anonymous), Federal High Court, Ledeta Bench, Addis Ababa, October 2023.
[63] Interview with Mr.Alelegn Mihretu, *supra* note 60.
[64] Interview with a Judge (Anonymous), *supra* note 62.
[65] *Ibid*.
[66] Terrorism and related crimes under the Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, and crimes against the constitutional order and internal security of the state under Art. 238 ff. of the Criminal Code fall in this category. *See* the Criminal Code off the Federal Demcratic Republic of Ethiopia, Proc. No. 414/2005, 2005, Art. 238 ff.

police to execute the decision and order of the courts is common in high-profile political cases.

In addition to the empirical data collected from the research participants and discussed above, there are various documented cases where the police have refused to enforce court orders. Specifically, there have been instances where the police have failed to release criminal suspects who have been granted bail. Several criminal suspects whose release was ordered by the court but was denied by the police have reported their grievances to the EHRC. For example, between January and February 2024, multiple complaints were filed with the Commission against the following police departments:[67] Kirkos, Addis Ketema, Akaki Kality, Bole, Lemi Kura, and Nefassilk Lafto sub-cities, and the Federal Police Criminal Investigation Department.[68] These departments collectively detained over 80 criminal suspects in violation of court orders.[69] In the case of *Chief Sergeant Metiku Teshome v. the Federal Public Prosecutor*,[70] the court had ordered the release of a criminal suspect. However, despite the court's ruling, the police detained the individual in a location that was not a police custody facility or prison. Similarly, in *Colonel Gemechu Ayana et al. v. the Federal Public Prosecutor*,[71] the primary petitioner stated that after being released from detention by the Federal High Court, they were subsequently detained by both the Oromiya Region Special Forces and the Federal Police in different locations.

[67] In order to protect the wellbeing of criminal suspects and due to the fact that most cases are still pending before the Commission, the researcher will only mention the police department that refused to release criminal suspects, regardless of a court order.
[68] Statistical Data from the EHRC, February 2024.
[69] *Ibid*.
[70] *Chief Sergeant Metiku Teshome v. Federal Public Prosecutor*, Federal High Court, File No. 253309.
[71] *Colonel Gemechu Ayana et al. v. Federal Public Prosecutor*, Federal Supreme Court Cassation Division, File No. 222914.

The executive's interference in judicial proceedings and the refusal of the police to enforce judicial decisions violate the constitutionally guaranteed institutional independence of the judiciary. These acts of interference and refusal by the executive directly violate the rights of arrested persons to be released on bail and their right to liberty as guaranteed in international human rights treaties and the FDRE Constitution. They also compromise the judiciary's institutional independence and impair its ability to protect and enforce human rights.[72] In effect, as I. Mahomed cautions, this could "implode the power of the judiciary into nothingness, and much, much worse, human rights could irreversibly be impaired."[73]

4.2.1.3.Jurisdictional Monopoly: Exclusive Jurisdiction over Judicial Issues

One of the most important aspects of judicial independence is the exclusive jurisdiction of courts over all judicial issues.[74] The independence of the judiciary also requires courts to have the power to determine if a submitted issue falls within their legal jurisdiction.[75] In this sense, exclusive judicial power extends beyond the adjudication of cases brought before the courts by contending individual parties. In addition to resolving "ordinary cases according to the law," enabling judicial review is at the core of judicial independence.[76] Judicial independence is crucial for courts to prevent arbitrary or unjust use of power by political and social actors.[77]

As the guardian of human rights and fundamental freedoms, the judiciary protects individuals from unjust and partial laws adopted by the legislature and enforced by the executive. However, the judiciary can only fulfil this important function if it has the power of judicial review. In Ethiopia, judicial power is vested in the courts.[78] The

[72] Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 1/1995, Art. 19 (1)(6) & 17.
[73] I. Mahomed, 'The Independence of the Judiciary', S. African L.J., Vol. 115, 1998, PP. 658&661.
[74] Basic Principles on the Independence of the Judiciary, *supra* note 8, Principle 3.
[75] *Ibid*.
[76] Stephen B. Burbank, 'The Architecture of Judicial Independence', S. Cal. L. Rev., Vol. 72, 1999, P. 336.
[77] Christopher M. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis', American Journal of Comparative Law, Vol. 44, No. 4, 1996, P. 611.
[78] Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 1/1995, Art. 79(1).

Constitution gives exclusive judicial power to courts and prohibits the establishment of special or *ad hoc* courts that take away judicial powers from the regular courts or institutions legally empowered to exercise judicial functions.[79]

However, the constitutionally bestowed judicial power excludes the right to challenge unconstitutional laws and acts of the government before a court of law. As has been repeatedly pointed out, the judiciary in Ethiopia does not have the power to strike down legislation and acts of the government that are deemed to be in violation of human rights and fundamental freedoms. This power is given to the HoF according to Article 83 of the FDRE Constitution. This diminishes the role of the judiciary in the protection and enforcement of human rights. It is a misconception to expect a judiciary with no power to oversee other branches in upholding the rule of law and human rights.[80]

There is also legislation, such as the Defence Forces Proclamation, that ousts the jurisdictional monopoly of courts and brings civilians under military courts.[81] According to Article 38 of this Proclamation, the jurisdiction of military courts extends beyond members of the defence force and includes offences committed by civilians. This article cross-references to the offences listed under Articles 284-332 of the Criminal Code, which highlight the predominant offences committed by civilians. For instance, offences such as refusal to perform military service, failure to comply with a calling-up order, and intentionally contracted unfitness are listed under Articles 284-286 of the Criminal Code as offences committed by civilians, not members of the armed forces. Therefore, Article 38 of the Defence Forces Proclamation, similar to Article 9(5) of the State of Emergency Proclamation,[82]

[79] *Id*., Art. 78(4) and 71(1).
[80] Diagnostic Study of the Ethiopian Criminal Justice System, The Legal and Justice Affairs Advisory Council of Federal Democratic Republic of Ethiopia Attorney General, 2021, P. 201.
[81] Defense Forces Proclamation, 2019, Proc. No. 1100/2019, *Fed. Neg. Gaz*., Year 25, No.19.
[82] A State of Emergency Proclamation Enacted to Protect Public Peace and Security No. 6/2023, Ratification Proclamation, 2023, Proc. No. 1299/2023, *Fed. Neg. Gaz*., Year 30, No. 2.

violates the right of civilians to be tried by an independent and impartial tribunal enshrined in Articles 14 and 15 of the ICCPR, the stated international principles and standards.

4.2.1.4.Financial Autonomy and the Availability of Adequate Budgetary Resources

Another important aspect of institutional independence is the financial autonomy of the judiciary and the availability of sufficient budgetary resources. As commonly stated, the government's financial power or purse is controlled by the legislative branch, not the judiciary. Therefore, it is evident that the judiciary primarily receives its financial budget and other resources from the legislative branch. It is essential for the judiciary, as one of the three branches of government, to be allocated adequate resources and be granted the authority to administer those resources.

The importance of allocating adequate financial resources and ensuring the financial autonomy of the judiciary is recognised in various international legal instruments. One such instrument is the United Nations Basic Principles on the Independence of the Judiciary. According to Principle 7, UN member states are required to provide adequate resources for the judiciary to operate effectively. The Guidelines on a Right to a Fair Trial in Africa also contain a provision with similar content. States must provide adequate resources to judicial bodies for their functions.[83] In addition, states must consult the judiciary on budget preparation and implementation.[84] The HRC emphasises the importance of allocating additional budgetary resources for the administration of justice in cases where delays in judicial proceedings are caused by a lack of resources and chronic underfunding.[85] Many constitutions allocate a fixed

[83] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples, (2003), Principle A, Para. 4 (h); *See* also the European Charter on the Statute for Judges, DAJ/DOC (98), Para. A, 4 (v).
[84] *Ibid*.
[85] HRC, Concluding observations: *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006), Para. 21, *Central African Republic*, CCPR//C/CAF/CO/2 (2006), Para. 16, cited by HRC in its General Comment No. 32, Para. 27.

percentage of the total budget to enhance the financial autonomy of the judiciary.[86] In these jurisdictions, it is common to allocate up to 3% of the total national budget to the judiciary.[87] M. Dakolias and K. Thachuk suggest that this constitutional measure helps to limit the budgetary influence of the other branches of government on the judiciary.[88]

According to the Ethiopian constitutional and legal frameworks, the budget of federal courts is submitted to the House of People's Representatives for approval. Upon approval, the judiciary administers the budget. In addition, the House of Peoples' Representatives allocates funds to the Federal Judicial Administration Council, an important body that supports institutional judicial independence.[89] The budget administration and autonomy of federal courts are further reinforced by the Federal Courts Proclamation.[90] Despite this clear constitutional stipulation, the budget of the judiciary had not been approved by the House of Peoples' Representatives for the last 25 years. Prior to the 2019/2020 fiscal year, the budget of the judiciary was submitted to the Ministry of Finance, which then presented it to the House of Peoples' Representatives as part of the overall federal government budget. The budget for the fiscal year 2019/2020 was approved by the House for the first time. Since then, the budget of federal courts has been consistently approved by the House of People's Representatives. Breaking the *status quo* and obtaining approval for the judiciary's budget from the House for the first time after 25 years was not easy. The former vice president of the Federal Supreme Court, Mr. Solomon

[86] Rosenn, *supra* note 17, P. 16.
[87] *Addis Zemen*, Amharic Daily, Interview with Mr. Solomon Areda, Vice president, the Federal Supreme Court of Ethiopia (hereinafter *Addis Zemen*, Interview with Mr. Solomon Areda), January 2020, available at https://www.press.et/Ama/?p=25768.
[88] *See* M. Dakolias and K. Thachuk, 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform', Wisconsin International Law Journal, Vol.18, No. 2, 2000.
[89] Federal Judicial Administration Proc. No. 1233/2021, Art. 40.
[90] *See* the Preamble, Art. 17(2) (c) (e) (i), 19 (2) (4), 36, 37, and 40, Federal Judicial Administration Proc. No. 1233/2021.

Areda, described this challenge by stating, "We insisted and exerted pressure to go to the Parliament to have our budget approved by it."[91]

The approval of the judiciary's budget by the Parliament can be seen as a significant breakthrough and an important step towards securing the financial autonomy of the judiciary. However, financial autonomy alone is not sufficient to guarantee institutional judicial independence. It is equally crucial to ensure that adequate funding and resources are provided to the judiciary. Currently, the government only allocates about 0.3% of the total national budget to the judiciary,[92] which falls far below the fixed budget of countries in Latin America, typically around 3%.[93] The FDRE Constitution and relevant laws do not address the issue of adequate funding for the judiciary. The government may allege that economic constraints limit its ability to allocate more funds. While not legally binding, we can learn from the Beijing Principles on this matter.[94] According to the Beijing Principles, when economic constraints make it difficult to allocate the necessary facilities and resources to the court system, which judges consider essential for performing their functions, the maintenance of the rule of law and the protection of human rights still require that the needs of the judiciary and the court system be given a high level of priority in resource allocation.[95]

If we were to import and inject this logically sound principle into the Ethiopian legal framework, the government should prioritise the judiciary in the allocation of funding and resources for the nation. When examining the current allocation of budget and resources to the judiciary, it becomes apparent that it is not only inadequate and insufficient but also unfair. Mr. Solomon emphasised the need for a

[91] *Addis Zemen*, *supra* note 87.
[92] *Ibid*.
[93] John McEldowney, *Developing the Judicial Budget: An Analysis,* A World Bank Conference, *(Saint Petersburg,* 2011),P. 12
[94] Beijing Statement of Principles of the Independence of the Judiciary, the LAWASIA Region, adopted by the LAWASIA Council, (2001).
[95] *Id*., Para. 42.

fair distribution of resources from the nation's economy rather than requiring a budget equal to that of the US judiciary.[96]

Without adequate funds and resources, the judiciary cannot perform its functions properly and effectively, and its independence, both institutional and personal, would be jeopardised. The main problem that the judiciary is facing is a lack of adequate budget, courtrooms, buildings, a conducive work environment, and infrastructure.[97] As Ferejohn and Kramer correctly put it, "an underfunded court is a distinctly unpleasant place to work."[98] Specifically, a lack of adequate funding and resources affects the administration of justice in general and the judicial protection of human rights in particular, such as the right to a fair trial. In this regard, as Mr. Solomon argues, "without allocating adequate resources and budget [to the judiciary], it is not possible to think about the rule of law, constitutionalism, and justice."[99]

In other jurisdictions, in addition to allocating a consolidated judicial fund, courts also retain their internal revenue.[100] This revenue, which comes from court fees and other services, is a portion of their budget that is collected and kept by the courts instead of being transferred to the national treasury.[101] Federal courts collect a significant amount of money from the judicial services they provide.[102] The Federal

[96] *Addis Zemen*, *supra* note 87.
[97] *Ibid*.
[98] Ferejohn and Kramer, *supra* note 12, P. 985.
[99] *Addis Zemen*, *supra* note 87.
[100] For example, approximately 60% of the courts services budget in Ireland is funded by court fee income. For more information *see* PowerPoint presentation by Noel Rubotham, *The Budget of the Courts and Judicial System in Ireland* available at **https://rm.coe.int/the-budget-of-the-courts-and-judicial-system-in-ireland-by-noel-ruboth/168076d496**(accessed on 29 November 2024). For more information on the allocation of a consolidated judicial fund *see* John McEldowney, *Developing the Judicial Budget: An Analysis*, https://biblioteca.cejamericas.org/bitstream/handle/2015/1771/wb-judicial-budget.pdf?sequence=1&isAllowed=y (accessed on 29 November 2024); Adam Ilyas and Paulus Rudy Calvin Sinaga, 'The Urgency of Budget Independence For The Constitutional Court In Strengthening The Independence Of The Judiciary', Nagara Law Journal, Vol. 1, No. 2, 2024.
[101] *Addis Zemen*, *supra* note 87.
[102] አሮን ደጎል፣'የዳኝነት ተቋማዊ ነጻነት በኢትዮጵያ ፌደራል ፍርድ ቤቶች፣ አጭር ምልከታ'፣ ሚዛን ሎው ሪቪው፣ ቮልዩም 14፣ ቁጥር 2፣ 2013፣ገጽ 334።

Supreme Court also suggested that the internal revenue of courts should be included in the judiciary's budget, to be regulated in the two yet-to-be adopted proclamations, the repeatedly cited Federal Courts Proclamation and the Federal Judiciary Administration Proclamation.[103] Regretfully, the Parliament rejected this recommendation and excluded it from the stated proclamations. This shows the unwillingness of the legislative branch to allocate a sufficient budget and resources to the judiciary, even by letting the latter retain its internal revenues.

4.2.2. **Personal Independence and the Protection and Enforcement of Human Rights in Ethiopia**

One mechanism for ensuring judicial independence is to secure the personal independence of individual judges. Personal judicial independence refers to the autonomy and impartiality of judges in the judicial process and administration of justice.[104] Therefore, it can be argued that "individual judicial independence exists primarily for the benefit of institutional independence" of the judiciary.[105] In other words, as Lord Phillips convincingly argues, personal independence is inseparable from institutional independence, as the latter greatly contributes to the former.[106] To guarantee the judiciary this protection, judges should be independent and shielded from interference and pressure from the two branches of the government and the public.

Personal judicial independence can be manifested in different ways. As previously discussed, one manifestation of personal independence is the freedom of judges to decide cases. To maintain personal judicial independence, judges must have the

[103] *Addis Zemen*, *supra* note 87.
[104] Mohamed Ali Mohamed Kotby, 'Judicial Independence versus Judicial Impartiality: A Comparative Approach', (PhD Dissertation, Middlesex University, 2022), P. 202.
[105] Stephen B. Burbank, 'Judicial Independence, Judicial Accountability, and Interbranch Relations', Geo. L.J., Vol. 95, 2007, P. 912.
[106] Lord Phillips, 'Judicial Independence and Accountability: A View from the Supreme Court, UCL Constitution Unit, launch of research project on 'The Politics of Judicial Independence' London, 2011, cited *in* Laura-Stella Eposi Enonchong, 'Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship', Afr. J. Legal Stud., Vol. 5, 2012, P. 331.

freedom to decide cases solely based on the law and the evidence presented before them. External influences, whether through public opinion, public protests, or pressure from interest groups, should not interfere with the judge's impartiality. Judges must evaluate cases without compromising objectivity and resist the temptation to align their decisions with external factors. Judges must be able to approach each case with an open mind and be free from any bias or predetermined outcome. Another related protection is the protection from political interference. Protecting judges from political interference is vital to ensuring personal judicial independence. Judicial immunity shields them from arbitrary removal, disciplinary actions, or intimidation arising from their judgments or opinions. All of these protections help judges ensure impartiality. In turn, impartiality assures judges that they can make decisions solely based on the law and the facts presented before them, guarding against any personal or external influence.

The appointment procedure is a crucial aspect of personal judicial independence. How judges are appointed plays a significant role in ensuring personal judicial independence.[107] Judicial recruitment processes that prioritise merit-based appointments over political or patronage-based selections also help uphold personal judicial independence. In addition, personal judicial independence also necessitates safeguards against external interference. This includes protection from political, economic, or other pressures that could compromise the independence of judges and influence their decisions.

The concept of personal judicial independence recognises the need for judges to be free from any undue influence that may cloud their judgment or impede their ability to uphold the rule of law and protect human rights.[108] The following subsection

[107] *See* Chávez, Rebecca Bill. 'The appointment and removal process for judges in Argentina: The role of judicial councils and impeachment juries in promoting judicial independence', *Latin American Politics and Society,* Vol. 49, No. 2, 2007, PP. 33-58.
[108] *Ibid.*

analytically discusses the different manifestations and components of personal judicial independence in light of the various legal frameworks and principles, including the UN Basic Principles on the Independence of the Judiciary, the Ethiopian constitutional and legal frameworks, along with the analysis of the collected empirical data, and other relevant sources of information.

4.2.2.1.Impartiality

The literature distinguishes between two interrelated aspects of judicial independence: impartiality and insularity.[109] In the context of judicial independence, insularity generally refers to the importance of shielding the judiciary from interference and pressure from the executive branch, as well as ensuring the personal independence of judges. On the other hand, impartiality pertains to a judge's mindset towards a case and its parties.[110] The HRC states that judges should be impartial under Art. 14 of the ICCPR, meaning they must not have biases or favour any party.[111] Therefore, impartiality refers to the duty of judges to be transparent, neutral, and free from bias and cannot be equated with the independence of judges. However, the impartiality of judges can be seen as a crucial element in safeguarding and ensuring judicial independence. It is reasonable to argue that the concept of judicial independence, particularly personal independence, cannot be fully understood unless it is accompanied by impartiality.

Impartiality, like an independent judiciary, is "at the heart of a judicial system that guarantees human rights in full conformity with international human rights law."[112] The second Basic Principle of the UN requires the judiciary to decide matters before them impartially, based on facts and laws without any restrictions, improper

[109] Menberetshai Tadesse, 'Judicial Reform in Ethiopia', (PhD Dissertation, University of Birmingham, 2010), P. 251.
[110] International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, *supra* note 13, P. 20.
[111] HRC, Communication 387/1989, *Arvo. O Karttunen v. Finland,* UN document CCPR/C/46/D/387/1989 (Jurisprudence), Para. 7.2.
[112] International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, *supra* note 13, P. 2.

influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason. Similarly, the Ethiopian constitutional and legal frameworks recognise the principle of impartiality of judges under Art. 79(3), establishing a principle on the function of judges with full independence and by relying solely on the law.[113]

Impartiality in the administration of justice can be compromised by various factors, such as economic, social, or political influences on judges, which can lead to bias, corruption, or a lack of integrity in decision-making.[114] The collected data on the impartiality of federal court judges show that there were instances in which federal court judges were not impartial. According to the research participants, a lack of impartiality is witnessed in putting convicts on probation, granting bail, and cases in which the interest of the government is at stake.

Concerning putting convicts on probation and releasing criminal suspects on bail, among the stated instances of lack of impartiality, several research participants mentioned that judges are inconsistent in releasing convicts on probation. An attorney has pointed out the unequal treatment in the judicial system, where the wealthy can pay for bail or probation and be released, which erodes trust in the system.[115] A public prosecutor highlighted the perceived bias in granting probation to serious economic criminals over prison sentences for minor offenders, attributing this to bribery considerations.[116] An interviewed public prosecutor at the Ministry of Justice shares the same opinion. According to the public prosecutor, although it may be challenging to accept and confirm, there is a rumour that a convicted person who

[113] The constitutional recognition of the impartiality of judges is elaborated by the Federal Judicial Administration Proclamation Arts. 3, 35-38, and 43, as well as Arts. 26, 29 (4), 32, and 33-34 of the Federal Courts Proclamation.
[114] Diagnostic Study, *supra* note 80 P. 216.
[115] Interview with an Attorney at Law at Federal Courts (Anonymous), Dire Dawa, June 2022.
[116] Interview with a Public Prosecutor and Coordinator of Economic Crimes (Anonymous), Dire Dawa Branch Office, Ministry of Justice, Dire Dawa, June 2022.

can pay a bribe will be placed on probation, while someone who cannot afford it will be sent to prison.[117]

A Public Prosecutor, who serves as the Deputy Director General for Corruption Crimes Prosecution at the Ministry of Justice, shares the same opinion. He said judges might accept bribes to favour fines instead of jail, resulting in many unable to pay being refused probation.[118]

Concerning the lack of impartiality in releasing criminal suspects on bail, the research participants mentioned the inconsistency and disparity with the law as follows: "Regarding bail, there is an issue that bothers us as public prosecutors. Sometimes a serious crime is committed and bail is granted, and sometimes bail is granted on serious conditions for a non-violent crime."[119]

An attorney interviewed expressed the opinion that courts lack impartiality when cases involving the government's interests are at stake. According to the attorney, government interest in legal cases can lead to bias in favour of the government, sometimes overriding impartiality.[120] In high-profile cases, court administrators often reassign judges, remove them from handling specific cases, and assign judges who are perceived as favourable by anticipating the outcome of the case.[121] Judges of the Federal High Court have been complaining about internal interventions from court administrators regarding the assignment of judges to benches and the stepping down of judges from cases.[122] This internal pressure from court administrators, notably from the officials assuming higher positions in the hierarchy of courts, has

[117] Interview with a Public Prosecutor (Anonymous), Ministry of Justice, Addis Ababa, June 2022.
[118] Interview with the Deputy Director General (Anonymous), Corruption Crimes Prosecution Directorate General, Ministry of Justice, Addis Ababa, May 2022.
[119] Interview with a Public Prosecutor and Coordinator of Economic Crimes (Anonymous), *supra* note 116.
[120] Interview with an Attorney (Anonymous), at the Federal First Instance Court, Bole Bench, Addis Ababa, June 2022.
[121] Interview with Mr.Alelegn Mihretu, *supra* note 60.
[122] Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, Addis Ababa, October 2023.

also been reported as a threat to judicial independence.[123] The Director of Judgment Inspection and Judge's Discipline Committee at the Federal Judicial Administration Council believes in the prevalence of a lack of impartiality that primarily stems from judges' relationships and bribes.[124]

Based on the data collected from various participants, including judges, it is evident that a lack of impartiality is prevalent in federal courts. The main causes of judges' partiality include the political implications of cases, administrative pressures, judicial corruption, and ethnic and interpersonal ties. Specifically, there is an abuse of judicial discretion and partiality in decisions regarding putting convicts on probation, granting bail, and possessory action cases. In addition, there is interference from the executive branch in possessory action cases, further contributing to the lack of impartiality in the handling of these cases by judges.

4.2.2.2.Recruitment and Appointment Procedure

One of the procedural measures that helps ensure the independence of the judiciary is the recruitment and appointment of judges. Generally, what is important in the recruitment and appointment procedure of judges is to ensure that it is conducted without interference and manipulation from the two branches of government, specifically the executive branch. This is because if judges are not appointed and promoted based on their legal skills, the judiciary may fail to deliver justice independently and impartially. [125]

The HRC has examined the impact of the appointment criteria of judges on judicial independence. As mentioned in its general comment, the requirement of independence specifically refers to the procedure and qualifications for the

[123] Diagnostic Study, *supra* note 80, P. 208.
[124]Interview with the Director (Anonymous), Judgment Inspection and Judge's Discipline, Federal Judicial Administration Council, Addis Ababa, June 2022.
[125]International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, *supra* note 13, P. 38.

appointment of judges.[126] States must ensure judicial independence by establishing clear procedures and objective criteria for appointing judicial members in their constitutions or laws.[127] In its concluding observation on Slovakia, the Committee underlined the importance of taking specific measures to ensure judicial independence. This includes shielding judges from political pressures through legislation governing their appointments.[128]

The generally agreed-upon selection criteria of judges, among other things, should be based on the candidate's merit, integrity, and qualification; it should not be based on the political loyalty or affiliation of the candidate to the government. Similarly, the UN Guiding Principles on Judicial Independence stipulate that judicial selection and appointment should be based on integrity, ability, and appropriate legal qualifications. They should be free from improper motives and conducted without discrimination based on race, colour, sex, religion, political affiliation, or any other factors.[129]

Similarly, judges should be appointed based on integrity, training, and ability, as outlined in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[130] Merely setting appointment criteria for judges does not guarantee judicial independence. A proper appointment procedure must be in place to ensure that these criteria are followed during the appointment process. In this regard, the accepted requirement is the selection of judges, and the appointment procedure should be conducted by an organ independent of the two branches of the government. For instance, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa underline the importance of establishing an

[126] HRC, General Comment No. 32, *supra* note 2.
[127] *Ibid*.
[128] Concluding Observations of the HRC on Slovakia, UN document CCPR/C/79/Add.79, Para. 18.
[129] Basic Principles on the Independence of the Judiciary, *supra* note 8, Principle 10.
[130] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, *supra* note 83, Principle A, Para. 4 (i).

independent body that will ensure transparency and accountability in the appointment of judges.[131]

In the Ethiopian legal and constitutional framework, the legislative organ, the Prime Minister, and the Judicial Administration Council participate in the selection and appointment of federal judges.[132] Here, it is important to distinguish between the appointment procedures of the president and the vice president of the Federal Supreme Court, the presidents and the vice presidents of lower courts, and federal judges. The president and the vice president of the Federal Supreme Court are appointed by the House of Peoples' Representatives, upon recommendation by the Prime Minister.[133] Therefore, as far as the appointment of the leadership of federal courts in general and the Federal Supreme Court in particular is concerned, the power of the executive is limited to recommending candidates to the stated offices, and the Judicial Administration Council does not play any role. However, it can be perceived that, in recommending the president and the vice president for appointment, the Prime Minister cannot be free of political considerations and the interests of the executive. Given the considerable power that the president and the vice president of the Federal Supreme Court have over the Supreme Court and lower federal courts, it "would induce judges to anticipate that 'wrong' decisions in particular cases could have career consequences, thus negatively impacting their independence."[134]

Unlike the appointment of the president and the vice president of the Supreme Court, the nomination and appointment processes for federal judges, presidents, and vice presidents of the Federal High Court and the Federal First Instance Court are the same. Candidates are nominated for appointment by the Judicial Administration

[131] *Id*., Principle A, Para. 4 (h). *See* also the European Charter on the Statute for Judges, *supra* note 83, Para. 1.3.
[132] Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 1/1995, Art. 81.
[133] *Id*., Art. 81(1).
[134] Diagnostic Study, *supra* note 80, P. 209.

Council and then submitted to the Prime Minister. Finally, their appointment is approved by the House of People's Representatives.[135] When it comes to the appointment of federal judges, as well as the presidents and vice presidents of the two lower courts, an important question arises about the Prime Minister's role. Specifically, it is unclear whether the Prime Minister's role is simply to submit candidates to the House, or if he also has the authority to reject nominations made by the Council before submitting them for approval. Unfortunately, both the Constitution and the Judicial Administration Proclamation do not provide clear guidance on this matter. It can be argued that the Prime Minister, as the bridge between the Council and the House in the nomination procedure, has the authority to reject the nomination by availing himself of the silence of the Constitution and the Proclamation. The Council does not have legal grounds to challenge the Prime Minister's rejection, bypass it, and submit candidates for the approval of the House. Therefore, it can be concluded that the Prime Minister or the executive plays an important role in the appointment of presidents and vice presidents of all levels of courts and federal judges. In the latter case, his role goes beyond submitting judges for appointment; he has the power and discretion to reject nominations made by the Council. The possibility of this complexity and legal uncertainty could undermine the role of the Judicial Administration Council and pave the way for the interference of the executive in the appointment procedure of federal judges.

About the criteria for the selection and appointment of judges, the Constitution is silent. However, it should be noted that a capable and legitimate judiciary relies on the professional competence of individual judges.[136] In addition, access to competent adjudication is a human right for court users.[137] In this regard, the Judicial Administration Proclamation provides for the general requirements for the

[135] *See* Art. 8 (1) (2) and 9 (3) of the Federal Judicial Administration Proc. No. 1233/2021 and Art. 81(2) of the Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 1/1995.
[136] The Comprehensive Justice System Reform Program Baseline Study Report, Ministry of Capacity Building, Justice System Reform Program Office, 2005, P. 161.
[137] *Ibid*.

appointment of federal judges, as well as additional requirements for those appointed to the Federal First Instance Court, Federal High Court, and Federal Supreme Court.[138] According to Art. 20 of the Proclamation, there are specific requirements that must be met for a person to be appointed as a federal judge. These requirements include being an Ethiopian national, having a proven reputation for probity, integrity, honesty, and being free from morally repugnant conduct. In addition, the individual must be in good health and demonstrate a sense of duty, responsibility, and diligence of the highest standard that is fitting for the position based on their competence to assume the responsibilities of a judge. They must also have a sense of justice and a commitment to respecting the rule of law, be willing to serve as a judge, have no criminal convictions except for minor contraventions, be at least 30 years old, and hold at least an LLB Degree from a recognised institution of higher learning. From the reading of these general requirements, it can be concluded that the selection criteria are objective and based on the merit, competence, integrity, and qualification of the candidate as enshrined under different instruments and recommended by the HRC. This will, in turn, help ensure a competent, independent, and impartial judiciary.

This researcher empirically assessed the practice of the recruitment and appointment of judges, considering the stated general requirements; the research participants questioned the observance of some of the legally stipulated recruitment and appointment requirements. The opinion of the research participants is that the recruitment and appointment of judges is not based on merit, competence, integrity, or qualification. During the interview, the attorney specifically mentioned that the recruitment and appointment of judges primarily consider the political leanings and ethnic backgrounds of the candidates. The attorney believes that judicial misconduct

[138] Federal Judicial Administration Proc. No. 1233/2021, Art. 20-23.

often occurs when appointments are made based on ethnicity rather than merit, with quotas taking precedence over qualifications.[139]

Other interviewed research participants and discussants in the focus group discussions shared the opinion of the quoted informant.[140] Research participants believe that judges are selected based on politics, ethnicity, and connections, rather than merit or qualifications. They also mentioned that ethnic quotas play a significant role in the selection process.[141] A public prosecutor mentioned that judges should not be selected based on ethnic quotas, as the judiciary is not a political entity like the House of Federation.[142] The practices mentioned by the research participants, even if they were used to a limited extent, do not align with the recruitment and appointment criteria accepted by international instruments and the requirements outlined in the Judicial Administration Proclamation. This will, in turn, hinder the right to a trial by independent and impartial courts in general, as well as the role that the judiciary can play in the protection and enforcement of human rights in particular.

5. Conclusion

Although commendable measures have been taken in adopting laws, the institutional independence of federal courts is compromised by interference from the executive branch and reluctance from the police to enforce court decisions and orders. This diminishes the inherent power of courts to protect human rights. The jurisdictional monopoly of the judiciary has also been eroded by Article 38 of the Defence Forces Proclamation and Article 9(5) of the recently adopted State of Emergency

[139] Interview with an Attorney at Law at Federal Courts (Anonymous), *supra* note 115.
[140] Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, Addis Ababa, May 2022; FGD with Attorneys and Public Prosecutors, Federal First Instance Court, Bole Bench, Addis Ababa, May 2022; FGD with Attorneys, Federal First Instance Court, Guelele Bench, *supra* note 59; Interview with a Representative Judge (Anonymous), Federal High Court, Dire Dawa Assigned Division, Dire Dawa, June 2022; Interview with an Attorney at Law (Anonymous), Addis Ababa, May 2022.
[141] *Id*.; Interview with a Judge(Anonymous), Federal Supreme Court Cassation Division, *Id*.; FGD with Attorneys and Public Prosecutors, Federal First Instance Court, *Id*.; FGD with Attorneys, Federal First Instance Court, Guelele Bench, *Id*.
[142] Interview with a Public Prosecutor (Anonymous), Guelele Branch Office, Ministry of Justice, Addis Ababa, May 2022.

Proclamation Enacted to Protect Public Peace and Security. Even if the judiciary's budget is approved by the Parliament, the allocated resources are insufficient for effective justice administration and safeguarding human rights. Adequate funding is crucial for upholding the rule of law and constitutionalism.

The analysed empirical data reveals a lack of impartiality in federal courts regarding the individual independence of judges. This is evident through instances of abuse of discretion, partiality in placing convicts on probation, granting bail, executive interference, and pressures in possessory action cases. The recruitment and appointment criteria of judges align with international guidelines and the jurisprudence of the HRC. However, some of the legally stipulated recruitment and appointment requirements are not practically observed; the recruitment and appointment of judges mainly consider the political inclination and ethnic origin of the candidates. This practice is not in tandem with the legally recognised importance of the "depoliticisation of the process by which judicial personnel are appointed and removed."[143] Specifically, the Prime Minister plays an important role in the appointment of presidents and vice presidents of all levels of courts and federal judges. This role extends beyond simply submitting judges for appointment; it also has the power and discretion to reject nominations made by the Council. In the case of the president and the vice president of the Federal Supreme Court, the Judicial Administration Council does not play a role in their selection and appointment; the executive and the Parliament have full control over the entire process.

In general, it can be concluded that constitutional provisions and subsidiary laws regarding judicial independence are inspired by internationally recognised guidelines, standards, and the jurisprudence of human rights monitoring bodies.

[143] Bruce M. Wilson, Juan Carlos Rodríguez Cordero, and Roger Handberg, 'The Best Laid Schemes ... 2004, Gang Aft A-Gley: Judicial Reform in Latin America: Evidence from Costa Rica', Journal of Latin American Studies, Vol. 36, No. 3, 2004 P. 514, cited *in* Elias N. Stebek, 'Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements - versus - Promise Fatigue', Mizan Law Review, Vol. 9, No. 2, 2015, P. 221.

However, these provisions and laws are not fully implemented and practised. As J. Mark Ramseyer rightly asserts, "Judicial independence is not primarily a matter of constitutional text."[144] Therefore, a "constitutional provision stating that the judiciary shall be independent merely indicates a commitment but does not suffice."[145] Most importantly, "judicial independence waxes and wanes with changes in the political composition."[146] Similarly, the legal and empirical analysis of this article also highlights that constitutional and legal recognition is the key instrument to ensure judicial independence in Ethiopia. Along with this legal framework, as this article suggests, the development and realisation of judicial independence in a legal system depends on the development of judicial institutions and practices that embrace good governance and a political culture that relies on and is committed to the rule of law and separation of governmental power. The constitutional history and constitutional practice of Ethiopia, unfortunately, have not significantly impacted changes in the judicial administration of justice, the protection and enforcement of human rights in general, and judicial independence in particular.

Therefore, the Ethiopian government should go beyond simply stating its commitment to judicial independence in the constitution by fully and effectively enforcing the constitutionally mandated principles of judicial independence. More specifically, the identified challenges to judicial independence that have affected the role of the judiciary in the protection of human rights in Ethiopia, such as political interference, lack of resources, and corruption, demand immediate intervention by the government. There should also be legal and constitutional reforms to address the identified legal and constitutional gaps, strengthen and ensure judicial accountability and integrity, and provide training for judges and attorneys on legal and judicial

[144] J. Mark Ramseyer, T'he Puzzling (In)dependence of Courts: A Comparative Approach', J. Legal Stud. Vol. 23, 1994, cited *in* Stephen B. Burbank, 'The Architecture of Judicial Independence', S. Cal. L. Rev., Vol. 72, 1999, P. 332.
[145] Laura-Stella Eposi Enonchong, 'Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship', Afr. J. Legal Stud., Vol. 5, 2012, P. 334.
[146] McNollagast, 'Positive Political Theory and the Law: Conditions of Judicial Independence', Journal of Contemporary Legal Issues, Vol. 15, 2006, P. 108.

ethics. By implementing these reforms, the judiciary will be better equipped to effectively fulfil its crucial role in protecting and upholding human rights. If not, as Mahomed rightly concludes and cautions, subverting judicial independence and attacking the independence of the judiciary is detrimental "[attacking] and [subverting] the very foundations of the freedoms articulated by the constitution to protect humankind from injustice, tyranny, and brutality."[147] The judiciary, both at large and within the Federal Judicial Administration Council, should make every effort to exercise their constitutionally granted judicial independence and power. This is crucial to effectively protect and enforce human rights, shielding them from any unwarranted interference or pressure from the executive branch.

Conflict of Interest

The author declares no conflict of interest.

[147] Mahomed, *supra* note 73, P. 666.

‘Real Rape Myth’ and Legal Process: Knowledge and Perception of Criminal Justice Actors’ in South Ethiopia Region

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Abstract

In Ethiopia, cross-sectional studies show a high prevalence of rape among women and girls. Though numerous policy improvements have been implemented, including a rape legislation reform, it is still unclear to what extent these changes have helped shift the focus of rape case processing from the victim's behaviour to that of the offender criminal behaviour in the legal system. This study therefore intended to identify how these knowledge and perception affect rape prosecutions in South Ethiopia Region. To accomplish this, the study used a socio-legal methodology. A socio-legal method of conducting empirical research that combined three methods: questionnaires, interviews, and court document analysis was used. 230 key actors, including judges, prosecutors, defence lawyers, and investigating police, responded to a self-administered questionnaire. Forty interviews were conducted with participants, and 316 prosecution and court files were analysed. Regarding the knowledge and perception of the criminal justice actors, 86.1% defined rape as a forced penile-vaginal penetration. The majority of the respondents have rated their attitude on the two-item scale above the average of 52.25%. This suggests that many of the key actors in the legal process have a propensity to believe rape myths and have been swayed by rape victims' actions during rape when addressing rape cases. Besides, data from interviews, as well as case review analysis, revealed that victims' actions during rape have a significant influence on the legal process. The findings in this study indicate the tendency of Criminal Justice Actors to hold false beliefs about the characteristics and behaviour of a "genuine" rape victim and to focus on these, rather than on the defendants' actions, as one of the major factors that produce unfair processes in rape cases.

Keywords: Real Rape’ Myths, Knowledge, Perception, Legal Process, Ethiopia

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1. Introduction

Rape is an everyday occurrence that girls and women face in all cultures and societies.[1] Rape violates several rights, including the right to life, the right to equal protection under the law, the right to equality in the family, the right to health, and the right to just and favourable working conditions.[2] The denial of fundamental human rights and freedoms to women is perhaps the most serious consequence of rape.[3] Rape is thought to be discriminatory because the threat of rape reduces women's autonomy by altering their lifestyles and restricting certain choices for women, such as freedom of movement, to reduce the risk of being raped.[4]

The term rape is used about only one gender-specific sexual offence in the Ethiopian Criminal Code (2004), namely, sexual intercourse (penile-vaginal penetration) of a man with a woman outside of marriage, by violence (physical force), by threat of force (grave intimidation), or by rendering the victim incapable of offering resistance or unconscious. Other sexual offences have been treated separately, with different headings and severity of penalties. However, in the current study, the term "rape" refers to only one gender-specific sexual offence that has been criminalised under the Ethiopian Criminal Code (2004).[5] The Ethiopian Criminal Code (2004) defines rape as follows:

> *"Whoever compels a woman to submit to sexual intercourse outside wedlock, whether through violence or grave intimidation, or after rendering her unconscious or incapable of resistance, is punishable..."*[6]

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[1]R. Barry Ruback and Neil A. Weiner, *Interpersonal violent behaviours: social and cultural aspects,* ((eds.), Springer Publishing, New York, 1995), p. 63-87.

[2]*ibid*

[3]UNICEF, *Domestic Violence against Women and Girls*, *Innocenti Digest, No. 6*, 2000, <https://www.unicef.org/malaysia/ID_2000_Domestic_Violence_Women_Girls_6e.pdf.> accessed on Oct 7, 2023.

[4]Brande Stellings, 'The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship, Harvard Civil Rights-Civil Liberties Law Review', Vol.28, No. 1,1993, P. 187.

[5] Criminal Code of Ethiopia, 2004, Art. 620, Proc. No. 414/2004, 9th May, 2005.

[6] Criminal Code Proc. No. 414/2004, Art. 620(1).

According to Tsehai Wada, the act must involve compulsion and be performed with the intent of having sexual intercourse with the victim to be punishable under Article 620 of the 2004 Criminal Code.[7] Furthermore, the provision specifies that, while the perpetrator can be either a man or a woman, the victim must be female.[8] Tsehai Wada went on to interpret the provision as referring to forced sexual intercourse committed outside of marriage, implying that marital rape is not a crime under the Criminal Code.[9] Tsehai Wada contended that compulsion methods include the use of violence, severe intimidation, and rendering the victim unconscious or incapable of resistance.[10]

In Ethiopia, according to a national study conducted by the Ministry of Women, Children, and Youth Affairs, the prevalence of sexual violence, with rape being a significant factor in the workplace, was 37% in the public sector and 33% in the private sector.[11] The prevalence rate in secondary schools was 20.7%, while it was found to be much higher in higher education institutions, which is 39%.[12] Similarly, according to the 2016 Demographic and Health Survey, 10% of women aged 15 to 49 had experienced sexual violence at some point in their lives, and 7% had experienced sexual violence in the year preceding the survey.[13] According to the survey, 5% of women had experienced sexual violence by the age of 18 and 2% by

[7]Tsehai Wada, 'Rethinking the Ethiopian Rape Law, Journal of Ethiopian Law', Vol.25, No.2, 2012, P.191-253. According to Tsehai, there are several factors that distinguish sexual assault from rape: Sexual assault is defined as "an act corresponding to the sexual act, or any other indecent act," whereas rape is defined as "sexual intercourse" (penile-vaginal penetration). Another distinction is that sexual assault has a broader scope than rape because it can be committed by a woman against a man or vice versa, whereas rape is a crime committed only by a man against a woman. In addition, marital rape is not excluded from sexual assault but from rape. In terms of gravity, sexual assault and rape can be distinguished because the former is punishable by a simple imprisonment of not less than one year or a rigorous imprisonment of not more than ten years, whereas the latter is punishable by a rigorous imprisonment of five to fifteen years. *Emphasis added.*

[8]*ibid*

[9]*ibid*

[10]*ibid*

[11]Ministry of Women, Children and Youth Affairs, *Assessment of Conditions of Violence Against Women in Ethiopia* (Final Report November 2013) Addis Ababa Ethiopia 60-64.

[12]*ibid*

[13]Central Statistical Agency, *Ethiopia Demographic and Health Survey* (2016) Addis Ababa, Ethiopia, and Rockville, Maryland, USA: CSA and ICF 292.

the age of 15. However, due to complex sociocultural and institutional factors, a large number of rape crimes go unreported to authorities. Even when reported, the likelihood of charges and conviction is lower.[14] According to a 2016 Demographic and Health Survey report, only 8% of sexual violence victims seek police assistance.[15] Only 2 - 3% of women have ever sought assistance from other service providers such as lawyers, doctors, and social workers.[16]

Rape law reform and various policy measures have been implemented in Ethiopia over the last two decades to address the problem of rape against women. Nonetheless, important questions remain about the extent to which the reforms have produced meaningful results in terms of improving the legal process for rape and rape victim treatment. It also discovered that the reforms have not resulted in a shift in the focus of rape case-processing from the victim's character, reputation, and behavior to the criminal conduct of the offender.[17]

Feminist scholars' research in several Western countries since the 1970s has revealed fundamental issues in rape prevention. First, unreported rapes continue to be common, resulting in many rapists going unpunished.[18] Second, rape case attrition rates are high in many jurisdictions.[19] Rape complaints are routinely dropped at all stages of the criminal justice system, from police to prosecution to courts, resulting in low conviction rates. Third, in many countries, rape victims have been humiliated by the criminal justice system during the legal process.[20]

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[14]Lynda Lytle Holmstrom and Ann Wolbert Burgess, *The victim of rape: Institutional reactions,* (Wiley & Sons, New York, 1978), p. 223.
[15]*Supra note 13,* p. 297.
[16]*ibid*
[17]Mesay Hagos, 'Effects and Limitations of Rape Law and Policy Reforms in Ethiopia' (PhD Thesis, Addis Ababa University, 2020).
[18] Jennifer Temkin, 'And always keep a-hold of nurse, for fear of finding something worse: Challenging rape myths in the courtroom, New Criminal Law Review', Vol.13, No.4, 2010, P. 710-734.
[19]*ibid*, P. 711.
[20]*ibid*, P. 712.

Some feminists have referred to the negative experiences of many complainants during both the investigation and trial processes as "judicial rape," owing to mistreatment of victim-witnesses during cross-examination.[21] These issues highlight a "justice gap" in the successful prosecution of sexual violence, though it should be noted that some jurisdictions have made progress.[22]

According to feminist research, the "justice gap" in rape cases is at least partly due to the influence of rape myths.[23] A myth is defined as "a widely held but false belief."[24] Rape myths are "prejudiced, stereotypical, and false beliefs about rape, rape victims, and rapists."[25] They are "generally false but widely and persistently held attitudes and beliefs that serve to deny and justify male sexual aggression against women."[26] They frequently blame the victim while excusing the perpetrator.[27] The public and criminal justice practitioners' denial of rape is at the heart of rape myths.[28] Similarly, Martha Burt defines rape myths as "prejudiced, stereotyped, or false beliefs about rape, rape victims, and rapists [...] creating a climate hostile to rape victims [...] a pervasive ideology that [...] supports or excuses sexual assault".[29] Rape myths, according to Lonsway and Fitzgerald, are "generally false but widely and persistently held attitudes and beliefs that serve to deny and

[21]Sue Lees, 'Judicial rape, Women's Studies International Forum', Vol.16, No.1, 1993, P. 11-36.
[22]Olivia Smith and Tina Skinner, 'How rape myths are used and challenged in rape and sexual assault trials, Social and Legal Studies', Vol.26, No.4, 2017; Jennifer Temkin, *Rape and the Legal Process,* (2nd ed., Oxford University Press, Oxford, 2002).
[23]Jennifer Temkin, Jacqueline M.Gray and Jastine Barrett, 'Different functions of rape myths use in court: Findings from a trial observation study, Feminist Criminology', Vol.13, No.2, 2018, P. 205-226; Friederike Eyssel and Gerd Bohner, 'Schema effects of rape myth acceptance on judgments of guilt and blame in rape cases: The role of perceived entitlement to judge, Journal of Interpersonal Violence', Vol.26, No.8, 2011; *Supra note 22*; Susan Estrich, *Real Rape,* (Harvard University Press, 1987);Sue Lees, *Carnal Knowledge: Rape on Trial,* (Hamish Hamilton, London, 1996), p. 31.
[24] Cambridge Dictionary <https://dictionary.cambridge.org> accessed on Jan 25, 2023.
[25]*Supra note* 18, P. 714.
[26] Kimberly A. Lonsway and Louise F. Fitzgerald, 'Rape myths, Psychology of Women Quarterly', Vol.18, 1994, P. 134.
[27]Friederike Eyssel and Gerd Bohner, 'Schema effects of rape myth acceptance on judgments of guilt and blame in rape cases: The role of perceived entitlement to judge, Journal of Interpersonal Violence', Vol.26, No.8, 2011, P. 1580.
[28] *ibid*
[29] Martha Burt, 'Cultural Myths and Supports for Rape, Journal of Personality and Social Psychology', Vol.38, No.2, 1980, P. 217-230.

justify male sexual aggression against women." They contended that rape myths serve a specific function in society by justifying sexual violence against women and maintaining social norms based on gender inequality.[30] Rape myths are widespread assumptions about rape that "affect subjective definitions of what constitutes a 'typical rape,' contain problematic assumptions about the likely behavior of perpetrators and victims, and paint a distorted picture of rape's antecedents and consequences."[31]

The "real rape" myth is an example of a rape myth. This refers to a limited understanding of rape, which envisions a genuine rape victim as a respectable woman who is attacked by a stranger in a remote location, resists the assault, suffers significant injuries as a result of the abuse, and promptly reports the incident to the police, expressing distress.[32] Because of this belief, other types of rapes that do not conform to this stereotype may not be considered "real" and may be attributed to victim characteristics or behaviors such as dress, speech, or other situational conduct. [33]As a result of such beliefs, the victim may be (partially) blamed for their victimisation rather than the offender. [34]Rapes that do not result in significant physical injuries and rapes committed by a person known to the victim are two examples of rapes that are frequently dismissed as not being "real".[35]The literature reveals other types of rape myths, which are interconnected with "real rape" myth, for instance, rape does not exist except in the most extreme cases, because a woman

[30]*Supra note 26*
[31]Gerd Bohner, Friederike Eyssel, Siebler Afroditi Pina, Frank Siebler and Vikj G. Tendayi, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator', in Miranda A H Horvath and Jennefir Brown, *Rape: Challenging Contemporary Thinking,* ((eds), Willan, Cullompton, 2009) pp. 17–45.
[32] Susan Estrich, *Real Rape,* (Harvard University Press, 1987).
[33] Jericho M Hockett and Donald A Saucier, 'A systematic literature review of 'rape victims' versus 'rape survivors': Implications for theory, research, and practice, Aggression and Violent Behaviour', Vol.25, 2015, P. 1-14.
[34]*ibid*
[35]*ibid*

is capable of preventing rape by fighting off her attacker if she truly does not want sexual intercourse.[36]

Hence, rape myths have the potential to undermine justice in rape cases. If such myths exist in Ethiopia's criminal justice system, they are likely to be a major impediment to the country's commitment to deliver justice for rape victims. However, the extent to which such myths exist in Ethiopia's criminal justice system is unknown. As a result, the goal of this article is to identify the presence of rape myths in the legal process for rape in the study area to provide knowledge that can help improve the criminal justice system's response to rape.

2. Approach, Materials and Methods

2.1 Study Area, Methods of Data Collection and Sampling Techniques

The South Ethiopia Region, which is in Ethiopia's southern region, is where the study was carried out. Kenya borders it on the south, the South West Ethiopia Region on the southwest, the Sidama and Oromia Region on the east, and the South Central Ethiopia Region on the north. About 31 indigenous ethnic groups comprise the region, each with a distinctive geographic setting, language, culture, and social identities. It combines the principal homelands of many nationalities. Five zones and three administrative towns were selected at random to make up the area, which consisted of twelve zones.

Answering the question of whether rape myths influence the criminal justice system necessitates an approach that goes beyond doctrinal legal research because the issue goes beyond a simple analysis of the relevant laws. It entails investigating key actors in the criminal justice system's beliefs, practices, and decisions. This necessitates the use of a socio-legal methodology, which allows the researchers to reach out to the people involved in the field and investigate their attitudes and actions.[37]

[36] *Supra note 18*

[37] Fiona Cownie and Anthony Bradney, *Socio-legal studies: A Challenge to the doctrinal approach*, (1st ed, Routledge, 2013) p. 14.

Legal researchers use research approaches from other disciplines to collect empirical data in socio-legal research, and thus, the design can be qualitative, quantitative, or mixed.[38] This research task was completed using a mixed-methods research design, which Creswell defines as a procedure for collecting, analysing, and "mixing" both quantitative and qualitative methods in a single study or series of studies to better understand a research problem. [39]As a result, the mixed method was chosen because it allows us to supplement the data gathered by the qualitative method with quantitative data, completing the study and providing comprehensive answers to the various research questions posed in this study. Furthermore, it may aid us in qualitatively explaining the findings of the supporting quantitative data.[40]

To maximise the validity of the research findings, the researchers used triangulation methods, which involve multiple methods rather than just one.[41] It is a combination of different methods for investigating the same subject to increase credibility.[42] It is "simple but powerful",[43] producing the best of each method while limiting specific deficiencies, as the weaknesses of one method are frequently the strengths of another. [44]In this study, three methods were combined. These are the following: questionnaire, interviews and document analysis.

The study adopted a quantitative approach. A cross-culturally validated scale named the Attitudes toward Rape Victims Scale was used. It is intended to evaluate attitudes toward rape victims. The 2-item questionnaire deals with areas of credibility and

[38]Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits, Educational Research Journal', Vol. 2, 2012, P. 254.
[39] John W. Creswell, *Educational research: Planning, conducting, and evaluating quantitative and qualitative research,* (4th ed., MA Pearson, Boston, 2012) p. 535.
[40] Louise Doyle, Anne-Marie Brady and Gobnait Byrne, 'An overview of mixed methods research, Journal of Research in Nursing', Vol.14, 2009, P. 178-179.
[41]Norman K. Denzin, *The Research Act,* (3rd ed., Englewood Cliffs NJ, Prentice Hall 1989).
[42]*ibid,* P. 297.
[43] Ellen S. Mitchell, 'Multiple triangulation: A methodology for nursing science, Advances in Nursing Science', Vol.8, No.3, 1986, P. 17.
[44]*Supra note 41,* p. 308.

victim blame. Items are scored using a 5-point Likert scale, and the total score ranging from 0 to 100 was employed to determine how much victim's resistance during rape affected the criminal justice system in specifically chosen research locations. Therefore, a survey was undertaken to measure knowledge and perception concerning rape victims to examine the influence of victim's resistance during rape among investigative officers, defense lawyers, prosecutors, and judges. A purposive sampling technique was employed to select key actors. As a result, judges, prosecutors, defence lawyers, and investigative police officers who have handled and made decisions on rape cases in their respective capacities were carefully identified as respondents. From a total population of 542 key actors in the study area, a sample of 230 key actors was selected for study purposes and completed a self-administered questionnaire based on Yamane Taro's[45] Simplified formula for sample size determination.

2.2. The Process of Data Collection, Integration of Ethical Concerns and Analysis

Before filling out the questionnaire, each study participant was given a clear explanation of the study's goals. The respondents of the questionnaire were also told that, if they so choose, they may skip questions or even refuse to fill it out at all. Additionally, they were informed that their answers would be kept confidential and analysed collectively. Finally, respondents gave their consent for the research findings to be published and disseminated.

To guarantee the consistency and validity of the items, the questionnaire was first piloted with a small sample of randomly chosen participants. Ten questionnaires were consequently issued. The feedback from the pilot test was used to modify the questionnaire. The questionnaire was altered to provide respondents the opportunity to omit the open-ended questions if they so choose, considering that the majority of participants dislike completing them. The necessary number of copies was then made

[45] Taro Yamane ,*Statistics: An Introductory Analysis*, (2nd Ed, Harper and Row, New York, 1967).

in duplicate and distributed to the participants, leaving room for any potential missing or insufficient responses. To assess their knowledge and perception regarding victim's resistance during rape when processing and making decisions on rape cases, the key actors filled out a 2-item questionnaire with a cross-culturally validated scale. The data collection period lasted three months, beginning in October 2021.[46]

After deciding on interviewing as one of the data collection methods, it was critical to select the right people who could provide the information needed to answer the research questions.[47] The most relevant individuals were among the Criminal Justice key actors, as they have direct experience with the legal process: judges, prosecutors, investigative police, defense lawyers, as well as defendants and rape victims. These categories, however, play different roles in the process, and some of them have competing interests. As a result, their perspectives are likely to differ. Hence, triangulating these divergent groups was the sampling strategy for obtaining the most reliable data from the interviews.[48] Judges, prosecutors, investigative police, defense lawyers, and rape victims were chosen to be triangulated. Defendants were not included in the study because their role in the legal process is largely assumed by their lawyers. In total, forty people were interviewed from the five categories listed above, including ten judges, ten prosecutors, six investigative police, six defense lawyers, and eight rape victims. The sampling of prosecutors and judges had to account for the representation of the various structures and departments that make up the prosecution service and the judiciary. Rape cases are heard in two levels of

[46] This article is based on data obtained for a PhD thesis. This fact should be considered when analyzing the study area, quantity of respondents and court cases.To protect the anonymity of the key informants, they will be referred to as follows in this study: JUDGE [number] for the ten judges, PROSEC [number] for the ten prosecutors, INVESTIGATIVE POLICE [number] for the six investigative police, DEFENSE LAWYER [number] for the six defense lawyers, and RAPE VICTIM [number] for the eight victims.
[47] Alan Bryman, *Social Research Methods,* (5th ed., OUP, Oxford, 2016), p. 407.
[48] *Supra note 41*.

courts within ordinary courts: first instance courts and the High Court. There are two levels of prosecution as well: Town/Woreda (District) and Zone. This representation was critical in the case of diverse practices across departments.

Key informant interviews were conducted using semi-structured interview guides. The prepared questions were open-ended, allowing interviewees to make detailed comments and express their opinions in a freeway manner.[49] To make things even easier, the interviews were conducted in Amharic (the working language of the region). The questions were translated into Amharic and then translated back to ensure consistency. Because most interviewees did not want to be recorded, the researchers took handwritten notes during the conversations. The preparation and conduct of the interviews differed depending on the type of participant. Interviews with legal professionals were mostly conducted in their offices, as they preferred.

Whereas the interviews with rape victims were conducted by considering its special nature and specific ethical issues involved. The researchers took necessary preparations and measures during interviews with rape victimse, identifying ad focusing on three potential ethical issues.[50] The first issue was the survivors' safety risk,[51] which was managed and reduced by holding a participatory approach with the victim in determining a secure interview location. The victims were consulted about the venue, though the majority of the participants left the decision to the researchers to determine an appropriate location. In addition, the researchers also adhere to the principle of prior notice to the local police office by informing this location as a precaution. Before interviews, the researchers ensured that the locations did not raise any obvious suspicions for both the victim and third parties. Consequently, during all of these interviews, no incidents of safety risks occurred.

[49]Martyn Denscombe, *The Good Research Guide for Small-scale Social Research Projects*, (2nd ed., Open University Press, Philadelphia, 2003), p. 165.
[50]Mary Ellsberg and Lori Heise, *Researching Violence Against Women: A Practical Guide for Researchers and Activists*, (World Health Organization PATH, Washington DC, United States, 2005).
[51]*ibid*

Secondly, distress caused by reliving the traumatic experience was the issue that the interview with rape victims had considered and mitigated by the researchers.[52] This possibility was mitigated by letting the focus of the interview and rape victims on their experiences with the criminal justice system rather than the assault itself. Besides, the researchers noted the need to be prepared in case a problem arose, and took precautionary mechanisms before the interviews, such as informing the interviewees in the beginning to stop or end the interview at any time if they were not comfortable. In the process, the interviewees were found to be emotional; fortunately, the emotional reaction of all of them was manageable to the researchers, and none of them asked to stop or withdraw from the interview process. Thirdly, the third issue was the risk of inadvertently shocking the interviewees through probing or inappropriate language.[53] To avoid this, great care was taken while crafting the interview questions and selecting the words used during the interviews. The questions were carefully crafted, as were the words used during the interviews. The interviews with eight rape victims and the thirty-two key actors in the criminal justice system were concluded without incident.

To increase the credibility of the research findings, the collection of prosecution and court documents was conducted in addition to the questionnaire and interviews. This aspect was critical to the study because it was necessary to examine prosecutors' and judges' decisions to determine whether they were influenced by rape myths. The most detailed explanations of these decisions can be found in the case files. As a result, the researchers collected a total of 316 files that went through the legal process to judgment based on Yamane Taro's[54] suggested simplified formula for sample size determination. It was deliberate to collect the files with all of their contents rather than just the final decisions. This enabled these decisions to be critically evaluated

[52] *ibid*
[53] *ibid*
[54] *Supra note 45*

in terms of whether they accurately reflected the evidence available to the decision-maker. Only cases handled between September 2016 and February 2020 were gathered, however. This was done to ensure consistency in their interpretation.[55]

The qualitative data analysis followed a thematic organisation of transcribed data manually to address the research objectives. By following the qualitative data analysis procedures, the data were systematically organised into related themes and categories based on the study's main objectives, from which analyses and interpretations were made. The quantitative data collected through document analysis and a cross-sectional survey, on the other hand, were entered into a template in Microsoft Excel and exported to SPSS #20 for cleaning and analysis. The recorded information from court documents was analysed using descriptive statistics, cross-tabulation with the chi-square statistic, and binary logistic regression. Using SPSS, simple descriptive statistics were used to analyse data collected via questionnaires, and Chi-square tests were used to determine statistical significance. Throughout the process, efforts were made to triangulate data from various sources. Finally, complete interpretations of the data from all sources, inferences, and conclusions were made.

3. 'Real Rape' Myth and its Implications for the Legal Process

3.1 Demographic Characteristics of Respondents

As Table 1 indicates, female respondents make up only 21.3%. Besides, 81.3 % of the respondents were degree certified. The vast majority of them have studied law. Among the participants, a large number them are judges and public prosecutors.

[55]*Supra note 46*

Table 1: Demographic Characteristics of Respondents

Variables		Frequency	%
Sex	Male	175	76.1
	Female	46	21.3
Education level	9-12	5	2.2
	Diploma	21	9.1
	Degree	187	81.3
	Masters	15	6.5
Field of study	Law	113	49.1
	Accounting or management	16	7.0
	Others	96	41.7
Occupation	Investigative Police	36	15.7
	Public prosecutor	71	30.9
	Judge	99	43.0
	Defense Lawyer	20	8.7

3.2 Criminal Justice Actors' Knowledge and Perception of Rape

As Table 2 indicates, it was observed that majority of the participants (86.1%) who were asked to define rape, defined the term as forced penetration of penile-vaginal. A few considered penile-anal and penile-oral penetration as rape (22.2% and 33.5% respectively). Thus, the majority of justice actors understood rape as forced penetration of female genital organ by male genital organ. This understanding will likely affect the whole process of rape litigation. Hence, the crucial question that has to be raised at this juncture is whether such understanding follows the Ethiopian Law against rape. To answer this question, we should look at the criminal code of Ethiopia which is the most prominent law that deals with rape. According to Article 620, "[w]hoever compels a woman to submit to sexual intercourse outside wedlock, whether by use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance, is punishable..."[56]

Even though "having sexual intercourse" makes up the *actus reas* requirement of the crime, the provision does not say anything about whether other forms of sexual

[56] Criminal Code Proc. No. 414/2004, Art. 620(1). *Emphasis added*.

intercourse, such as penile-anal and penile-oral forms, can be taken into account. Some argued that the latter forms of sexual intercourse are punishable under article 622 rather than article 620(1).[57] Article 622 is about "sexual outrages accompanied by violence", which reads as follows:

> *"Whoever, by the use of violence or grave intimidation, or after having in any other way rendered his victim incapable of offering resistance, compels a person of the opposite sex, to perform or to submit to an act corresponding to the sexual act, or any other indecent act."*

According to this interpretation of the law, forced penile-anal and penile-oral penetration does not fall under the crime of rape, hence, not punishable under article 620 of the criminal code. However, one should bear in mind that the trauma that follows from other forms of rape is equally or even more disastrous than rape committed though genital organs. Nevertheless, the justice actors have to be conscious of reacting to new developments within social phenomena. Thus, they should play a pivotal role in interpreting the law to accommodate changes.

The study has also indicated that majority of the respondents tend to reject the case of the complainant, if the suspect is the husband of the victim, i.e. marital rape. This appears to be in line with the Ethiopian law which does not criminalize marital rape.[58] According to the law, rape is a crime which can be committed out of wedlock, thus, a woman cannot claim that she is raped by her husband. In addition to this, the large numbers of the respondents believe that rape committed upon girl child (83.9%) and young women (69.1%) must be taken seriously than rape committed against adult women and boys. The possible explanation for this is that the law's fixation on the female victims has contributed to that kind of understanding. Originally, laws prohibiting rape were concerned primarily with the rape of virgins. Thus, rape was only considered to have occurred where there had been full penile-

[57] *Supra note 7*
[58] *Supra note 56*

vaginal penetration and emission of semen. This requirement was abolished in most jurisdictions in the nineteenth century, although that way of understanding of the law still appears to be persistent. Nonetheless, one should bear in mind that sexual crimes by and large are made gender-neutral in the revised criminal code of 2004. Hence, the researchers venture to suggest that the Criminal Justice Actors should be aware of this, so that they should treat victims of both sexes equally.

Table 2: Respondents' Knowledge and Perception of Rape

Variables	**Category**	**Yes**		**No**	
		Frequency	**%**	**Frequency**	**%**
Conditions of rape	When forced penetration of penile-vaginal is made	198	86.1	32	13.9
	When forced penetration of penile-anal is made	51	22.2	179	77.8
	When forced penetration of penile-oral is made	77	33.5	153	66.5
Categorization of rape victims	When wife or husband complains that she or he has been forced to make sex without consent	43	18.7	187	81.3
	When a girl has been forced to make sex without consent	193	83.9	37	16.1
	When a boy has been forced to make sex without consent	154	66.9	76	33.1
	When adult women have been forced to make sex without consent	159	69.1	71	21.9
	When adult men have been forced to make sex without consent	105	45.7	125	54.3
Type of rape justice actors must take it seriously	Rape committed by marriage partner	21	9.1	209	90.9
	Rape committed against child girls and young women	197	85.7	33	14.3
	Rape committed against child boys and young men	58	25.2	172	74.8
	Rape committed against adult women	127	55.2	103	44.8
	Rape committed against adult men	9	3.9	221	96.1

3.3 The Resistance Requirement in the Prosecution of Rape

This study revealed that the resistance requirement is still used in Ethiopian judicial practice. This finding is based on a review of questionnaires with key actors in the Criminal Justice System. Table 3 lists the elements that could lead decision-makers to accuse the victim or cast doubt on her veracity. The majority of the respondents have rated their attitude on the 2-item scale above the average, i.e., 52.25%. For a straightforward descriptive study, these variables have been categorized as the victim's resistance during rape. For example, the majority of respondents (37.8%) used to assign credibility and blame and stated unequivocally that victim resistance during the assault is the most important factor in determining whether or not a rape occurred. Correspondingly, the majority of respondents (42.2%) believe that a healthy woman can successfully resist a rapist if she tries hard enough.

Table 3: Respondents' Acceptance of Rape Myths on Victim's Behavior During Rape

Categorization	**Variables**	**Frequency**		**Percent**
Victim's resistance during rape	The extent of the woman's resistance should be the major factor in determining if a rape has occurred	SD	39	17.0
		D	53	23.0
		N	20	8.7
		A	87	37.8
		SA	28	12.2
	A healthy woman can successfully resist a rapist if she really tries	SD	20	8.7
		D	50	21.7
		N	33	14.3
		A	97	42.2
		SA	27	11.7

One significant drawback of the 2004 rape law reforms in Ethiopia is their failure to address the question of consent in circumstances of forced rape. The Criminal Code

of Ethiopia has not defined either forcible rape or rape without consent. Instead, the Criminal Code presumes absence of consent only when the offender uses violence or threatens to use violence against their victim.[59] Expressions like "without the woman's consent" or "against her will" or other equivalent terminologies have not been used in the provision for forcible rape cases. As a result, a man can only be charged with forcible rape if he used violence or "grave intimidation" against his victim, or if he rendered his victim unconscious or incapable of resistance.

Victims of forcible rape are presumed to have consented under the law if they do not physically resist the offender. The Ethiopian Revised Criminal Code requires evidence of resistance, as implied by the phrase "after rendering [her] incapable of resistance" in the definitions of forcible rape.[60] Furthermore, the requirement for physical resistance is subtly implied in other elements of forcible rape, such as the use of violence or force or the threat of violence, because it is assumed that the offender would not automatically resort to or threaten to use violence. Typically, the use of violence, or the threat of using violence, assumes that the victim will resist the offender's initial sexual encounter. As a result, the violence component of forcible rape necessitates women physically resisting and fighting back against the offender to produce evidence of the use of violence or force. A statutory requirement of this nature is unjust. According to Katharine K. Baker and Michelle Oberman, the law requires women to "engage in a physical battle that they were almost certain to lose" to obtain legal protection.[61]

The victim was required to demonstrate "utmost resistance" before being sexually assaulted.[62] She is required to resist until she is overpowered and unable to offer any further resistance. This requirement establishes a model of behaviour against which

[59] Criminal Code Proc. No. 414/2004, Art. 620.
[60] *ibid*
[61] Katharine Baker and Michelle Oberman, 'Women's Sexual Agency and the Law of Rape in the 21st Century, Studies in Law, Politics and Society', Vol.69, 2016, P. 69.
[62] *Supra note 32*

the court must evaluate women's actions to resolve two issues: a lack of consent and the use of violence or force.[63] As a result, the prosecutor must prove beyond a reasonable doubt that the woman resisted the offender to the best of her physical ability to establish that the sexual encounter was a forcible rape. A woman was not raped if she did not resist the offender to the best of her ability.[64]

Scholars and practitioners appeared to agree on the level of resistance. For instance, Tsehai Wada, a legal scholar, noted that "the law demands a high level of intimidation, but not the ordinary one, for it is required that the degree of intimidation has to be 'grave', and the victim should be made unconscious, or incapable of resistance. As a result, any threat other than this may lead to the conclusion that the victim could have resisted the intimidating force and thus the actor cannot be held liable."[65] This means that a forcible rape involving "ordinary" intimidation is legally considered consensual. The courts have been tasked with determining whether the intimidation was ordinary or grave, which is presumably judged against the preconceived model behaviour. Previous research discovered that it was used in decision making and to determine credibility and blame attributions.[66] For example, Amy Rose Grubb and Julie Harrower discovered in a review of numerous studies that people were more blaming of victims who had not physically resisted the offender and more believing of victims who had physically resisted the offender.[67]

[63]Michelle J. Anderson, 'Diminishing the Legal Impact of Negative Social Attitudes toward Acquaintance Rape Victims, New Criminal Law Review', Vol.13, No.4, 2010, P. 653.
[64]*ibid*
[65]*Supra note 7*
[66] Beverly A. Kopper, 'Gender, Gender Identity, Rape Myth Acceptance, and Time of Initial Resistance on the Perception of Acquaintance Rape Blame and Avoidability, Sex Roles', Vol.34, No.(1-2), 1996, P. 81–93;R. Lance Shotland and Lynne Goodstein, 'Just Because She Doesn't Want to Doesn't Mean It's Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation, Social Psychology Quarterly', Vol.46, No.3, 1983, P. 220–232; and Karen Yescavage, 'Teaching Women a Lesson: Sexually Aggressive and Sexually Non aggressive men's Perceptions of Acquaintance and Date Rape, Violence Against Women', Vol.5, No.7, 1999, P. 796–812.
[67] Amy Rose Grubb and Julie Harrower, 'Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim, Aggression and Violent Behavior', Vol.13, 2008, P. 396–405.

According to a study in Ethiopia, the victim's failure to physically resist the offender resulted in case attrition during the investigation or prosecution stages.[68]

Because it is a constituent element of forcible rape under the Criminal Code of Ethiopia, the variable of resistance may not necessarily be an extra-legal factor to be attributed to the key actors' attitudes and subjective assessment of rape cases in Ethiopia. The way the key actors treated the victim who had failed to resist the offender, on the other hand, demonstrates that the law rather reinforces their biased assumptions. JUDGE4 stated flatly that "without victim resistance, [they] do not consider rape." Many others simply claimed that the lack of resistance indicated victim consent. PROSEC7, for example, stated: "When the complainant is an adult and does not resist, we immediately assume that she consented and that the accusation of rape was made due to some other misunderstanding." Likewise, PROSEC6 stated: "in particular, where the victims are over the age of 18, the law requires offenders to render their victims incapable of resisting. If the victims were not rendered incapable of resisting, their case cannot be classified as rape." Other Criminal justice actors claimed similarly, for instance, DEFENSE LAWYER4 noted: "in cases where the complainant did not resist, she is considered to have consented, especially if she is an adult." INVESTIGATIVE POLICE5 also noted: "If a victim is physically and mentally fit to resist her rapist, she can resist if she wants to." One victim participant RAPE SURVIVOR6 also recalls the trial judge's comments about how she resisted the accused during the rape. "I told the court that I fought him with my arms, but after he strangled me, I didn't have any air left, so I couldn't fight back; I was then asked why I couldn't have fought back with my legs."

An examination of prosecutorial and court documents revealed that in the absence of victim resistance, prosecutors and judges tended to conclude that the rape did not

[68] Blain Worku, 'Criminal Justice System's Response to Acquaintance Rape Cases in Ethiopia: The Women's Right Perspective' (MA Thesis, Addis Ababa University, 2011).

occur. Table 4 below, for instance, shows a chi-square analysis of each factor, as well as the extent to which each factor was considered in rape-case decision making. For example, as shown in Table 4, reported injury, level of injury, and presence of exhibit collected, presence of eye witness, and presence of medical proof have all been found to influence decision making in the prosecution process.

Table 4: Chi-square and Logistic Regression Results on Factors Associated with Decision Making in the Prosecution Process

Variables	**Category**	**Decision (0=rejected, 1= proved guilty and sentenced)**			
		Chi-square	**P-value**	**Odds Ratio**	**95% CI**
Type of rape reported	0= Attempted 1= Completed	8.83	0.003	3.168	1.45, 6.92
Reported injury	0= No 1= Yes	9.147	0.002	0.371	0.194, 0.711
Level of injury	0= Minor 1= Very serious	3.132	0.002	0.371	0.121, 1.135
Presence of exhibit collected	0= No 1= Yes	6.762	0.009	0.152	0.03, 0.756
Presence of eye witness	0= Yes 1= No	22.145	0.000	0.000	
Presence of medical proof	0= No 1= Yes	31.744	0.000	0.128	0.06, 0.275

The law simply reflects, endorses, and reinforces this belief by making the victim's resistance an element of forcible rape. However, this study identified another related but distinct variable included in the current study's interview, namely, verbal resistance, as a factor determining case outcome. This key informant was also asked if verbal resistance is sufficient to indicate a lack of consent on the victim's part. According to PROSEC10, "if a woman says 'no' verbally but her actions show otherwise, a man should not be held criminally liable." Thus, demonstrating verbal opposition, saying “No”, is insufficient to demonstrate a lack of consent.[69] Neither offering some minor physical resistance (such as turning away from a kiss) is

[69]*Supra note 7*

sufficient to demonstrate a lack of consent. A previous study conducted in Addis Ababa revealed that if a rape victim fails to offer maximum physical resistance, the police do not consider the encounter to be rape and the case is dropped during the investigation stage.[70] The prosecutor declined to file a charge based on "the victim's failure to scream or shout for help knowing that someone was nearby to help her," according to Blain.[71] Although not a legal component of forcible rape, verbal resistance is not only associated with decision making, but it is also used to determine the victim's credibility.

The victims were expected to resist the assault indefinitely, according to this understanding. This interpretation of non-consent does not correspond to rape reality, as it has been established that not all rape victims physically resist the attack. Furthermore, there is no evidence that those who do fight to prevent rape fight relentlessly from the start to the end of the assault. On the contrary, empirical evidence indicates that victims may resist but eventually succumb due to exhaustion or discouragement.[72] These examples also demonstrate a failure to recognize that a rape victim may be in a state of powerlessness or inhibition, which may prevent her from physically resisting. Furthermore, they reveal the failure to recognise that a woman may express non-consent in ways other than physical resistance.

Various other studies have revealed that the lack of physical or verbal resistance may be due to uncontrollable factors or may be deliberate. A victim may purposefully refrain from resisting despite being unwilling to have sexual intercourse for a variety of reasons, including fear of death or injury.[73] In the legal literature, such a victim's response is commonly referred to as submission. Despite its appearance, submission is not consent, as has been widely emphasised. A victim may also "freeze" and

[70] *Supra note 68*
[71] *ibid*
[72] Ann J. Cahill, 'In defense of self-defense, Philosophical Papers', Vol.38, No.3, 2009, P. 363-380.
[73] *Supra note 23*

become unable to resist. Psychologists have attempted to explain victim "freezing-up" by referring to the concept of "tonic immobility" as experienced by some animals under intense attack. Fear and restraint cause tonic immobility, which is defined as an uncontrolled freezing or deep motor inhibition. It is characterised by a motionless position, insensitivity to pain, loss of vocal ability, unfocused gaze, and shaking and implies inescapability.[74]

It has been argued that rape laws were primarily intended to protect men's interests over their daughters and wives.[75] The requirement of 'physical resistance' in establishing the criminal nature of forcible rape cases is a typical example of how rape laws protect male interests.[76] According to the law, a victim of forcible rape must physically resist the offender as evidence that she did not consent to the sexual encounter. Such a requirement reflects the belief that a woman should protect her chastity even if it means putting her own life in danger.[77]

Furthermore, the consent standard for forcible rape is based on the 'real rape' myth, which Helen Reece defines as "a very violent attack in a dark alleyway by an armed stranger on a woman who physically resists and is physically injured."[78] This popular image of "real rape" typically includes a knife-wielding stranger offender, a public attack location, the use of violence, and a display of physical resistance.[79] If the offender fits the description of a "real rape", the public generally condemns the crime and sympathizes with the victim.[80] The Ethiopian rape law, which is framed around

[74]Michelle J Bovin, Shari Jager-Hyman, Deka Purnama Sari, Brian P Marx, 'Tonic immobility mediates the influence of peritraumatic fear and perceived inescapability on posttraumatic stress symptom severity among sexual assault survivors, Journal of Traumatic Stress', Vol. 21, No. 4, 2008, P. 402.

[75] Joan McGregor, 'The Legal Heritage of the Crime of Rape' in Brown JM and Walklate SL, *Handbook on Sexual Violence,* ((eds), Chapter 3, Abingdon, Routledge, 2011) p. 73.

[76]*ibid*

[77] *ibid*

[78] Helen Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?, Oxford Journal of Legal Studies', Vol.33, No.3, 2013, P. 445–473.

[79] Samuel H. Pillsbury, 'Crimes Against the Heart: Recognizing the Wrongs of Forced Sex, Loyola of Los Angeles Law Review', Vol.35, 2002, P. 845, 865.

[80] Susan Estrich, 'Palm Beach Stories, Law and Philosophy', Vol.11, No.1-2, 1992, P. 13-14.

the myth of "real rape," fails to prohibit less violent rape. This kind of formulation, as MacKinnon pointed out, simply "assumes the sadomasochistic definition of rape: [sexual] intercourse with force or coercion can be or become consensual."[81]

The inclusion of phrases like "to submit to a sexual intercourse" and "use of violence or grave intimidation" in the Criminal Code's definition of forcible rape demonstrates how the law views and characterizes female victims as submissive and male offenders as aggressive. As a result, according to Susan, Ethiopian rape law simply reflects, legitimizes, and enforces a view of sex and women that glorifies male aggression while punishing female passivity.[82] Furthermore, the requirement for resistance was based on a mistrust of women.[83] Previously, such fear was prevalent in rape laws across jurisdictions. Rape victims, for example, were required not only to physically resist their assailant to the best of their ability and to report the incident to the police as soon as possible, but also to substantiate their testimony through corroboration and good reputation.[84] All of these requirements were based on the myths that women lie about being raped. The resistance requirement, in particular, represents one of the institutionalized incredulities toward rape victims, with the assumption that women who fail to make physical resistance against the offender cause their victimisation, leading victims to believe they were somehow responsible for what had happened and thus preventing them from seeking legal redress.[85] It also leads to victimisation if she does nothing to discourage her attacker.[86]

[81] Catharine MacKinnon, 'Rape: On Coercion and Consent' in Lori Gruen and George E. Panichas, *Sex, Morality and the Law* ((eds), Routledge, London, 1997b).
[82] Susan Estrich, 'Rape, The Yale Law Journal', Vol.95, No.6, 1986, P. 1092.
[83] *Supra note 79*, P. 11.
[84] Jocelynne A. Scutt, 'The Incredible Woman: A Recurring Character in Criminal Law, Women's Studies International Forum', Vol.15, No.4, 1992, P. 442.
[85] Sinidu Fekadu, 'An Assessment of Causes of Rape and Its Socio-Health Effects: The Case of Female Victims in Kirkos Sub-City, Addis Ababa' (MA Thesis, Addis Ababa University, 2008).
[86] Lani Anne Remick, 'Read Her Lips: An Argument for a Verbal Consent Standard in Rape, University of Pennsylvania Law Review', Vol.141, No.3, 1993, P. 1112.

Furthermore, under the Criminal Code of Ethiopia, making a verbal resistance, such as saying "No", is insufficient to establish the victim's lack of consent. Thus, saying "No" to a sexual encounter is essentially interpreted as saying "Yes" and is taken to mean the inverse of its usual meaning in other human interactions. This approach is based on the assumptions that women say "No" but do not truly mean it, that women are ambivalent about consenting to sex, and that women have conflicting emotions and are unable to express their sexual desires directly.[87] In general, the approach to consent for forcible rape cases under the law and within the Criminal Justice System lends credence to the concept of justifiable rape. "If the notion that rape can be justifiable is ever to be dispelled and adequate protection from rape is ever to be provided," Lani Anne Remick suggested, "the law must declare that proof of a lack of consent satisfies the non-consent element."[88] According to Christian Diesen and Eva F. Diesen, "if the law requires resistance, it implies that a woman is sexually available until she physically resists, resulting in an attitude that a woman reporting rape without injuries should be mistrusted."[89] "This mistrust of the victim and the victim's attendant feelings of self-blame," they further note, "aggravate the victim's trauma. A modern rape law based on a lack of consent, on the other hand, sends the message that a woman is not available until she has given her consent, resulting in a different starting point for the investigation."[90]

4. Conclusion

Like many other jurisdictions, Ethiopian criminal justice actors still have preconceived notions about how a rape victim should behave during a sexual assault for the accusation of rape to be considered genuine. During an assault, victims are expected to physically resist to demonstrate their refusal to consent. It was clarified that preconceived notions about "genuine" victims' behavior are mostly

[87]*Supra note 72*, p. 77.
[88]*Supra note 85*
[89]Christian Diesen and Eva F. Diesen, 'Sex Crime Legislation: Proactive and Anti-Therapeutic Effects, International Journal of Law and Psychiatry', Vol.33, 2010, P. 329.
[90]*ibid*

misconceptions based on the "real rape" myth. Thus, justice actor's failure to play pivotal roles in addressing multifarious issues that arise in the rape litigation and the tendency to base rape case evaluations on flawed assumptions about victim behavior harmed victims. It leads to the unjust dismissal of many complaints and the release of many accused. Hence, this study suggests that since the problem is one of attitudes toward women, rape victims, and rape, a long-term plan should be established to change Criminal Justice Actors' attitudes toward rape victims; and a particular training course for Justice Actors should be created to counteract the influence of rape myths.

Legislation can be employed to limit the biased prosecution and judicial procedures highlighted in the article, including the requirement for resistance. In light of this, the following changes to substantive rape law should be made: First, it is time to eliminate the definition of rape that necessitates the use of force, threat of force, or physical resistance by the victim. Instead, the definition of rape ought to be revised to reflect whether consent was provided or not. Second, the categorisation of sexual activities into "sexual intercourse" and "acts pertaining to sexual acts or indecent acts" using a binary system must be discarded. Penile-oral and penile-anal contact, as well as sexual assault on any part of the body, should all be regarded as equally serious sexual offences, just like any other form of sexual penetration or act (sexual intercourse).

Conflict of Interest

The authors declare no conflict of interest.

A Plea for Anti-Stalking Legislation in Ethiopia: A Human Rights Perspective

Asrat Adugna Jimma ♣

Abstract

Stalking is a global socio-legal issue that emerged prominently in the 20th century, which is often described as 'a steady step towards homicide or wilful injury'. From a legal viewpoint, stalking can be defined as a wilful, malicious and obsessively repeated act of following or harassing another person in juxtaposition with an intentional threat to cause harm or fear. To curb stalking, countries such as the United States, the United Kingdom, and South Africa, for instance, have introduced anti-stalking laws into their respective legal systems. Yet, Ethiopia lacks a formalised criminal justice response to the issue of stalking, despite alarming trends in gender-based violence more broadly and stalking in particular. This reflects not an absence of the act itself, but rather a lack of developed jurisprudence on the subject within the Ethiopian context. This article, therefore, presents the need for the introduction of anti-stalking legislation into the Ethiopian legal system from a human rights perspective. This approach offers a comprehensive analysis of how anti-stalking laws align with international human rights laws and norms. In undertaking this analysis, the article endeavours to extract pertinent lessons from the jurisdictions of the United States, the United Kingdom, and South Africa.

Keywords: Ethiopia, Gender-Based Violence, Women's Rights, Sexual Harassment, Stalking

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1. Introduction

In Ethiopia, the prevalence of Gender Based Violence (GBV) in general and stalking in particular remains very high.[1] It has become common to witness, on Ethiopian media, cases related to women and girls who have suffered injuries by a person who has been stalking them and wants to establish or re-establish a romantic relationship against their will. The widely recognised and publicised cases of Kamilat Mehedi,[2] Hermela Wosenyeleh,[3] Naomi Tilahun,[4] Aberash Hailay,[5] Atsede Neguse,[6] Tsega Belachew[7] and others can be mentioned, as instances in this regard.

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[1] According to the latest study report, the prevalence of all forms of gender-based violence is 20.2%, with Sidama, Afar, Amhara, and Tigray regional states taking the lead. See, The National Action Research Report on Determining the Status and Priorities of Ethiopian Women. Determining the Ethiopian Women's Status & Priorities, a study report, October 2024, Addis Ababa, Ethiopia. Available at <https://capacity4dev.europa.eu/media/270850/download/ca030ec4-173d-4047-8450-1332925a39c8_en> accessed on 21 Dec. 2024.; Moreover, according to the United Nations Country Results Report for 2022/2023, 12,834 woman and girl survivors/victims of Sexual and gender-based violence received comprehensive services across 44 of the 74 operational one-stop centers in this specific period. On average, excluding those who did not have access to operational one-stop centers, 291.68 survivors/victims per center or 24.3 survivors/victims per month were reported for receiving the service. This is by large a very alarming number. See, The United Nations Country Results Report for 2022/2023, United Nations Ethiopia Annual Results Report July 2022–June 2023, p. 17, available at <https://ethiopia.un.org/en/268513-un-ethiopia-annual-results-report-july-2022-june-2023>, accessed on Sep. 20, 2024; See also <https://www.afrobarometer.org/wp-content/uploads/2024/09/AD861-Ethiopians-condemn-GBV-but-consider-domestic-violence-a-private-matter-Afrobarometer-20sept24.pdf>, accessed on 21 Dec. 2024.

[2]Reuters, Acid victim shows many women are at risk, <https://www.reuters.com/article/us-ethiopia-acid/ethiopia-acid-victim-shows-many-women-are-at-risk-idUSL2331917720070327> accessed on Sep. 20, 2024.; Amber Henshaw, BBC News, Acid attack on woman shocks Ethiopia, <http://news.bbc.co.uk/2/hi/africa/6498641.stm> accessed on Dec. 18, 2024.

[3] UN Economic and Social Council, Report of the Special Rapporteur on violence against women, Commission on Human Rights resolution 2000/49 (2002), <https://www.awf.or.jp/pdf/h0017.pdf> (accessed on Dec. 20, 2024).

[4]Arefayne Fantahun, A 17-year-old girl stabbed to death by 'obsessed lover' in busy street,<https://ethiopianege.com/2017/03/06/a-17-year-old-girl-stabbed-to-death-by-obsessed-lover-in-busy-street/>, accessed on Dec. 20, 2024.

[5]Court begins hearing witnesses on Aberash Hailay's case, <https://waltainfo.com/13969/>, accessed on Dec. 11, 2024.

[6] Hailu Sahle, Acid attack survivor: 'There are more good people than bad', <https://www.bbc.com/news/world-africa-51312988> accessed on Sep. 20, 2024.

[7] Natnael Fite, Uproar after mayor's bodyguard abducts young woman in Hawassa, regional police in pursuit, detain six suspects, <https://addisstandard.com/news-uproar-after-mayors-bodyguard-abducted-young-woman-in-hawassa-police-in-pursuit-of-abductor-arrest-six-accomplices/>, accessed on Sep. 20, 2024.

All these cases share similar features that the perpetrators had stalked the survivors/victims for a while before committing the "actual crime", and the Ethiopian justice system had been unable to intervene before the later crime materialised. The fact of the matter, in most instances, is that the existing laws only intervene in such cases very late after the survivors/victims have suffered a serious bodily and/or emotional harm. From the testimonies of the survivors/victims, it was learnt that before the acts which resulted in serious injuries to them were committed, the perpetrators were committing a "series of acts" aimed at instilling fear in them so that they would accept the demands. It is after such repeated attempts had failed that the perpetrators decide to take serious measures with drastic consequences.[8]

This prompted the author to inquire, 'what if the law intervenes earlier?' Would it not prevent, or at least minimise, the occurrence of such incidents? The author's answer, based on a comparative analysis in this article, is in the affirmative.

Ethiopia has adopted many international and regional conventions and enacted national laws to respect, protect, promote and fulfil the rights of women and girls in general and to fight against GBV in particular.[9] However, the existing legal and institutional frameworks do not adequately address all kinds of GBV, including the unique nature of stalking. This article is poised to investigate whether there is still a need for anti-stalking legislation in the Ethiopian legal system. It also addresses whether the already existing laws are adequate to guarantee the realisation of the rights of women and girls to be free from all forms of GBV. Therefore, the overall objective of this article is to evaluate the efficiency of existing laws in addressing

[8] Interview with Ato Getu Taddesse, Director, Branch Offices Affairs Monitoring Directorate, FDRE Ministry of Justice, on 18 December 2024.

[9] Ethiopia, among others, has adopted: International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD), African Charter on Human and Peoples' Rights (AfCHPR), and also ratified the Maputo protocol the bill of women's right in Africa on 30 March 2018. It has also enacted national laws including the FDRE constitution, FDRE criminal code, FDRE family code etc...etc.

the problem of stalking and to assess the need for introducing a comprehensive anti-stalking legislation into the Ethiopian legal system.

Accordingly, this article critically examines the necessity of enacting anti-stalking legislation within the Ethiopian legal framework by using a qualitative research approach. Specifically, based on an analytical doctrinal analysis method, it distils comparative lessons from the selected jurisdictions of the USA, UK and South Africa human rights systems. For this purpose, relevant primary and secondary data were collected from available sources, including reviewing reports, various relevant legal documents and literature, and analysed. The in-depth interviews with key informants also enriched and triangulated the data and analysis.

With this, the article draws a critical evaluation of Ethiopia's legal and institutional framework on GVB in general and stalking, in particular, and comparative lessons to adopt anti-stalking legislation. In the subsequent sections, this article begins by introducing the concept of stalking and the existing legal and normative frameworks in other jurisdictions. Then, it answers the question of why there is a need for anti-stalking legislation in the Ethiopian legal system. In this regard, then, the experiences of the USA, UK and South African human rights systems were also unpacked, which allows the author to draw comparative lessons, by highlighting suggestions on the nature and contents of the would-be anti-staking legislation of Ethiopia, finally.

2. Stalking: Conceptual Underpinning

Stalking has long had the general connotation of "following" someone obsessively.[10] Yet, the terms 'stalking' and 'stalker' gained prominence in Western media during the 1990s, where they were used to describe individuals who persistently follow or intrude upon others.[11]

Initially, those so described by the mainstream media were pursuers and posteriors of the most famous people or celebrities. In most stalking cases, however, the victim is not a famous or even a well-known individual. Later, the use of the term ceased to be associated only with those who passionately follow the famous and acquired a wider usage, particularly as a label for those who continued to intrude on their former partners whom the victim had rejected.[12]

Available empirical evidence from various jurisdictions consistently demonstrates that stalking is a gendered form of violence, most frequently committed by men against women and girls.[13] The stalking activities include, but not limited to acts, such as following a person, appearing at a person's home or place of business, vandalizing a person's property, inappropriate approach, making unwanted telephone calls, unwanted social media activities or e-mails and/or letters, or, unwanted gifts, etc.[14] These acts, however, have not been recognised as a standalone criminal offence.[15] To be considered as such, these acts, rather, have to be coupled

[10] Emerson, R.M., Ferris, K.O. and Gardner, C.B., 'On Being Stalked' Social Problems, Vol. 45, No. 3, 1998, p. 289.
[11]Way, R.C.,'The criminalization of stalking: An exercise in media manipulation and political opportunism' McGill Law Journal, Vol. 39, 1993, P.384.
[12] Lowney, K.S. and Best, J., 'Stalking Strangers and Lovers: Changing Media Typifications of a New Crime Problem' in Joel Best (ed.), Images of Issues: Typifying Contemporary Social Problems, PP 33-57, (Routledge, New York, 1995).
[13] Purcell, R., Pathé, M. and Mullen, P.E., 'A Study of Women Who Stalk' American Journal of Psychiatry, Vol. 158 No. 12, 2001, <https://psychiatryonline.org/doi/10.1176/appi.ajp.158.12.2056>, accessed on Dec. 11, 2024. ; UN Women. (2011). Progress of the World's Women: In Pursuit of Justice. < https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women>, accessed on Dec. 11, 2024.
[14] Mullen, P.E., Pathé, M. and Purcell, R., 'Stalking: New constructions of human behavior. Australian & New Zealand Journal of Psychiatry', Vol 35, No. 1, 2001, pp.9-16.
[15] Mullen, P.E. and Pathé, M., 'Stalking', Crime and Justice, Vol.29, 2002, pp.273-318.

with assault, intimidation or wilful injury. These actions, however, may or may not be accompanied by a credible threat of serious harm, and they may or may not be precursors to an assault, wilful injury or homicide.

In the context of a domestic violence and abusive relationship, stalking typically occurs after the woman has attempted to leave the relationship. The ex-husband or ex-lover, unable to accept rejection and unwilling to let the woman walk away, begins to follow, threaten, harass, or assault. In other similar instances, the attempted break-up of a more casual "romantic" or "dating" relationship generates stalking.[16]

Fundamentally, stalking has a predatory nature.[17] Usually, the *stalker*[18] focuses on a single individual, and the activity can last a short time, a few days perhaps, but more commonly will extend over weeks, months or even years. Survivors or victims often find it necessary to change their entire lifestyle, adopting a safe strategy, such as where they work, reside, when they leave for work, return home, where they shop, and so on, to deal with a persistent stalker.

Rationally, the persistence of the stalker's behaviour when coupled with its predatory nature makes stalking a particularly insidious form of activity. In that context, the behavioural notion of stalking relates to a pattern of behaviour directed at a specific person that would cause a reasonable person to feel fear for the person's safety or the safety of others or suffer substantial distress.[19] In a slightly different context other

[16] Mullen, Paul E., Stalkers and their victims, (2nd ed. Cambridge University Press, UK, 2000) P.66.
[17] Id., p. 98.
[18] According to the study of stalking by Mullen, Pathé, Purcell and Stuart there are generally five motivational types of stalkers, which includes Rejected Stalker, Intimacy Seeker, Incompetent Suitor, Resentful Stalker and Predatory Stalker. See, Mullen, Paul E., Rosemary Purcell, and Geoffrey W. Stuart. 'Study of stalkers' American Journal of Psychiatry, Vol. 156, No. 8, 1999, PP. 1244-1249.
[19] Mullen, Paul E., supra note 16, P.257.

than behavioural change, the legal notion of stalking has evolved from the dictionary definition of "following" or "pursuing".[20]

In general, stalking may simply be defined as repeatedly following, pursuing, or accosting a given individual. Though most countries with anti-stalking laws define stalking as the wilful, malicious, and repeated following and harassing of another person, some other countries include in their definition such activities as lying-in-wait, surveillance, non-consensual communication, social media or telephone harassment, and vandalism.[21] In line with that, many agree on the notion that stalking is not only a particular type of harassment, but it is also a form of sex discrimination.[22]

In many countries' anti-stalking laws, the "intent to harm", "cause fear*"* or "wilful conduct" are *the prima facie* elements of stalking.[23] Commonly, in their legal system, a person is said to have committed a stalking offence if the following three conditions are fulfilled: (1) the offender engages in a course of conduct involving doing a concerning act on at least two occasions to another person or other persons; (2) the offender intends that the victim be aware that the course of conduct is directed at the

[20] Black's Law Dictionary defines stalking as: "The act or an instance of following another by stealth, the act or an instance of following another by stealth or the offense of following or loitering near another, often surreptitiously, with the purpose of annoying or harassing that person or committing a further crime such as assault or battery". See, Black's Law Dictionary (9th ed.), p. 1534.

[21] Mullen, Paul E., supra note 16, P. 6-14.

[22] See, Van der Aa, Suzan, 'Stalking as a form of (domestic) violence against women: two of a kind.' *Rassegnaitaliana di criminologia*, Vol. 3, 2012, P. 179.

[23]The pioneer anti-stalking law of California state, for instance, states that a person is guilty of stalking if any person who:

(a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family;

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family; is guilty of stalking.

victim; and (3) the course of conduct would cause a reasonable person in the victim's circumstances to have serious concern that an offensive act may happen. Accordingly, to say a person has committed an offence of stalking, at least two essential elements of *actus reus* and *mens rea* need to be fulfilled. First, the offender must have engaged in a course of conduct that includes a particular type of action (*actus reus)*. Second, the offender must have the necessary state of mind (*mens rea*) when engaged in the course of conduct.

Based on this discussion, therefore, stalking can be defined as a wilful, malicious, and repeated act of following or harassing another person with the intent of causing that person to suffer reasonable fear and substantial emotional or physical harm.

3. Legal Framework of Stalking in Selected Jurisdictions: Drawing Comparative Lessons

In the eyes of the law, the act of stalking has never been considered a stand-alone criminal conduct; to many, it amounted to nothing more than a series of acts which, though annoying and provoking, were perfectly lawful if not quite acceptable.[24] Although stalking has no doubt been present throughout history, anti-stalking laws were introduced relatively recently. Several countries across the globe have now introduced anti-stalking legislation into their legal systems to fight the act of stalking.[25]

The principal objective of anti-stalking legislation is to intervene in a suspected stalking case before the act results in physical or emotional harm or more. In that regard, the two most common immediate and typical interventions for stalking are arrest and restraining or protection orders. The adoption of such legislation has a positive impact on the American, European and some African countries' legal

[24] Lawson-Cruttenden, Tim, 'Is there a law against stalking? the relevant criminal And Civil Law To Counter This Behaviour', New Law Journal, No. 6736, 1996, pp. 418–420.
[25] Hare, Jordan, 'Stalkers Walk: A Cultural Analysis of the Need for International Stalking Reform', Geo. Wash. Int'l L. Rev. 52, 2020, p. 317.

systems, by offering a deterring effect and protecting the rights of women and girls.[26] Their positive experience justifies reasonable ground and the necessity to adopt anti-stalking legislation in Ethiopia. Particularly, in this regard, the experiences of the United States of America (USA), the United Kingdom (UK) and South Africa (SA) systems provide comparative insights and specific inputs to adopt an anti-stalking legislation in the Ethiopian context. In this section, these three countries' anti-stalking laws and experiences are analysed and discussed.

3.1 United States of America

In the USA, the first draft of an anti-stalking legislation was introduced by California State in 1989, in the aftermath of the stalking and murder of actress Rebecca Schaffer[27]which made the act of stalking a criminal act under Section 646.9 (a) of the California Penal Code.[28] The experience of California State has been seen by other states as a positive move towards the full protection of the rights of women and girls. As a result, by September of 1993, 50 states and the District of Columbia adopted anti-stalking laws.[29] This legal reform is justified with the firm belief that the anti-stalking law can provide better protection for women and girls than the previous criminal laws of each state.[30] In this regard, for example, a case entertained

[26] Although some practical challenges persist, the incidence of stalking has significantly decreased in certain countries following the introduction of such laws. See, <https://www.met.police.uk/foi-ai/metropolitan-police/d/february-2022/incidents-of-alleged-stalking-from-2017-to-2021/>, accessed on Dec. 25, 2024.

[27]Frank Wilkins, 'The Stalking Death that Changed the Law', <http://reelreviews.com/shorttakes/shaeffer/shaeffer.htm> accessed on Sep. 27, 2024.

[28] See, the California State Penal Code. Section 646.9 (a) which states: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison."; Note that, the State of California later amended this law based on the federal anti-stalking law of the US, in 1992, 1993, 1994, 1995, 1998, and also in 2000.

[29] Jeremy Travis, 'Domestic Violence, Stalking, and Anti-stalking Legislation: An Annual Report to Congress under the Violence against Women Act', U.S. Department of Justice, National Institute of Justice. Office of Justice Programs 1996.

[30] The first federal anti-stalking law was enacted later by the US congress in 1996.

in the State of Florida Supreme Court justifies the need for anti-stalking legislation by considering that the then prevailing conditions would not have prohibited stalking.[31]

However, in the USA, the legal definitions for the act of stalking vary from State to State, but commonly all states recognise stalking as a standalone crime distinct from other offences. While most states require that the alleged stalker engage in a course of conduct showing that the crime was not an isolated event, some states specify how many acts (usually two or more) must occur before the conduct can be considered stalking. State anti-stalking laws also vary in their threat and fear requirements, where some states take "a reasonable person" standard of fear while others take into consideration "a victim standard". Most anti-stalking laws require that the perpetrator, to qualify as a stalker, make a "credible threat" of violence against the victim; others include in their requirements threats against the victim's immediate family, and still others require only that the alleged stalker's course of conduct constitute an implied threat.[32]

More importantly, California's anti-stalking legislation took a more comprehensive position, incorporating the element of intent (*mens rea*), in addition to conduct (*actus reus*). It prohibits certain conduct, such as following someone or repeatedly communicating with the intent of causing fear of physical or emotional harm. Further, it also incorporates additional elements of proof to ensure that morally innocent individuals fall outside its provision.

[31] John L. Pallas, Appellant, V. The State Of Florida, Appellee, District Court of Appeal of Florida, Third District, Jun 14, 1994 <https://casetext.com/case/pallas-v-state> , accessed on Dec. 22, 2024.
[32] See, Neal Miller, 'Stalking laws and implementation practices: A national review for policymakers and practitioners', Institute for Law and Justice Domestic Violence Working Paper, 2002; Christine B. Gregson, 'California's Anti-stalking Statute: The Pivotal Role of Intent', Golden Gate University Law Review, Vol. 28 Issue 2 Women's Law Forum, 1998.

Later, to bring similarity across state jurisdictions and to shun geographical advantage for the perpetrators, the US Congress enacted the first Federal anti-stalking law in 1996.[33]Accordingly, the United States' experience illustrates a more robust legal framework for the protection of women and girls, with stalking recognised and criminalised in all jurisdictions.[34] Drawing from the existing norm from this explanation, legislation on the act of stalking is needed in Ethiopia, bearing in mind the growing stalking trend in the nation, which is also witnessed in many recent incidents.[35]

3.2 United Kingdom

Similar to the USA trend, the need for the introduction of anti-stalking legislation in the UK began slowly, with a study of the violence against women and of its effectiveness as a general deterrent factor.[36] In the UK, although laws aiming to prohibit the stalking act existed,[37] the parliament upgraded the penalty for the stalking offence due to the seriousness of the crime by adopting the Protection of Freedoms Act in 2012.[38] The plea for the introduction of such legislation was started

[33] Tjaden, Patricia G. 'Stalking policies and research in the United States: A twenty year retrospective', European Journal on Criminal Policy and Research, Vol. 15, No. 3, 2009, pp. 261-278.
[34] US Department of Justice, Stalking and Harassment Laws (Office on Violence Against Women, 2020) <https://www.justice.gov/ovw/stalking>, accessed 28 May 2025; National Center for Victims of Crime, Stalking Laws <https://victimsofcrime.org/stalking-laws/> accessed 28 May 2025.
[35] See, Emnet Assefa, Domestic abuse against women in Ethiopia: The price of not knowing her pain. March 27 2013. <http://addisstandard.com/domestic-abuse-against-women-in-ethiopia-the-price-of-not-knowing-her-pain/> accessed on Dec. 20, 2024; Rediet Yibekal, Violence Against Women in Ethiopia: The Case of #JusticeForHanna, Nov 27 2014. <http://cyberethiopia.com/2013/?p=1133> accessed on Dec. 20, 2024.
[36] Van der Aa, S. and Romkens, R., 'The State of the Art in Stalking Legislation-Reflections on European Developments', Eur. Crim. L. Rev., Vol. 3, 2013, p.232-256
[37] In fact in the UK, before the Protection of Freedoms Act of 2012, there were various laws in place to tackle the problems of stalking directly or indirectly; including the Protection from Harassment Act of the 1997, the Malicious Communications Act of 1988, The Offences Against the Person Act 1861, Criminal Justice & Public Order Act 1994, The Regulation of Investigatory, Powers Act 2000, Criminal Justice Act 2003, Communications Act 2003, Wireless Telegraphy Act 2006, and Equality Act of 2010.
[38]Since, the 25th of November 2012, stalking became a specific offence in England and Wales, where stalking related cases after this date are dealt with under section 2A and section 4A of the Protection of Freedoms Act 2012. <http://www.legislation.gov.uk/ukpga/2012/9/section/112/enacted> accessed on Sep. 27, 2024.

by the Justice Unions' Parliamentary Group, which led to an "Independent Parliamentary Inquiry". As per the report of the group, the survivors/victims of stalking had a profound lack of confidence in the criminal justice system, and recommended that the Protection from Harassment Act (PHA 1997) be amended as part of a package of reforms.[39]

According to the act, which re-established the offence of stalking involving fear of violence or serious alarm or distress, the perpetrator's course of conduct must cause the victim to fear, on at least two occasions, that violence will be used against the victim or cause the victim serious alarm or distress. In addition, the perpetrator must know or ought to know that the course of conduct will cause the victim such alarm or distress.[40] Under the act, the test applied remains an objective one, which is "a reasonable person standard" in possession of the same information who would think that such a course of conduct would cause the victim to fear on that occasion, which has a substantial adverse effect on the victim's usual day-to-day activities.[41]

Before the introduction of this legislation, stalking was not considered a specific or standalone crime, and the police had to wait until stalkers committed another crime, such as harassment or breaching a restraining order, before they acted.[42] Moreover, the Act enabled the Criminal Justice System to catch up with other jurisdictions, such as the USA, particularly in respect of recognising and prosecuting stalking as a specific crime or a standalone offence. In that regard, the amended legislation

[39]Justice Unions' Parliamentary Group: Independent Parliamentary Inquiry into Stalking Law Reform Main Findings and Recommendations, February 2012, <https://www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/Stalking-Law-Reform-Findings-Report-2012.pdf> accessed on Sep. 27, 2024.
[40]See, the Protection of Freedoms Act 2012, part 7 section 111 & 112.
[41]Ibid.
[42]The stalker and the woman who refused to give in, 4 April 2016<https://www.bbc.com/news/magazine-35941555>, accessed on Sep. 20, 2024.

received praise for imposing tougher sentences for stalkers.[43] It has also been rolled out in a drive for harsher punishments to reflect the severity of the crime. The government also introduced stalking protection orders, where police will be able to apply to the courts for an order to impose restrictions on perpetrators whenever the survivors/victims seek help.[44]

Later, the government increased the maximum sentence for people found guilty of stalking up to 10 (ten) years. What is more, in the case of racially or religiously aggravated stalking offences, the most severe sanction will double from seven (seven) to 14 (fourteen) years.[45] Further, the Act also incorporated the emerging problem of stalking using computer and internet technology, concerning cyber-stalking, such as sending unwarranted e-mails or messages. In this regard, as seen from the discussion above, the legal effect[46] of the Protection of Freedoms Act is a breakthrough that consolidated the previously existing laws and made the act of stalking a standalone punishable offence. It, therefore, provides a suitable example to be followed by the Ethiopian human rights system.

3.3. South African Experience

Compared to the above systems, in Africa, the anti-stalking legislation is a very recent phenomenon; in this regard, though late, South Africa is one of the best examples. The anti-stalking legislation came into effect after a South African Law Reform Commission (SALRC) investigation into stalking acts.[47]

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[43]Stalkers face new maximum sentence of 10 years in jail <https://www.telegraph.co.uk/news/2017/01/06/stalkers-face-new-maximum-sentence-10-years-jail/> accessed on Sep. 27, 2024.

[44] The Stalking Protection Orders (SPO) was later introduced by the Stalking Protection Act, in 2019, as a civil order. An application for an interim or full order can, therefore, be made by the police to the magistrate's court to request both prohibitions and/or positive requirements to protect the victim.

[45] Pat Strickland, Stalking: developments in the law, House of Commons library BRIEFING PAPER Number 06261, 21 November 2018.

[46]The Crown Prosecution Service (CPS) Wessex: Successful Stalking Cases April 2024<https://www.cps.gov.uk/wessex/news/cps-wessex-successful-stalking-cases-april-2024>, accessed on Sep. 27, 2024.

[47] See, the Preamble to the Protection from Harassment Act 17 of 2011. South African Law Commission Project 130: *Stalking* Discussion Paper 108, 2004.

In SA, stalking, in its current legal notion, was not recognised as a standalone criminal act before 27th April 2013.[48] The then-existing criminal law focused primarily on the punishment of specific prohibited acts. It is only where an aspect of stalking constitutes a concurrent criminal act that the criminal law may be invoked to restrain or punish a stalker. Yet, the alarming number of violations of the rights of women and girls prompted the South African Assembly (SAA) to include additional protection.

The Protection from Harassment Act (Act 17 of 2011), which came into effect on 27th April 2013, addresses stalking acts in its current notion equating it with a violation of the constitutional rights of privacy and dignity of individuals. The act itself provides three bases for the adoption of anti-stalking law in South Africa. First, it re-cited the fundamental inalienable right of individuals, including personal dignity, that shall be guaranteed by legislation. Second, the introduction of the Act would help to ensure more effective protection for the rights of women and girls. Third, the act of stalking has been criminalised, as a result of which convicting offenders has become easier now than before. The adoption of the anti-stalking legislation was followed by an endorsement by several women's rights advocacy groups, as it affirmed the state's commitment to guaranteeing the obligation of states towards human rights of women and girls.[49]

This act and its initiatives that prioritise victim support, empower law enforcement agencies, and facilitate efficient evidence gathering have yielded positive results in several cases. Despite some legal and implementation challenges,[50] South Africa's

[48] In SA the Domestic Violence Act, 116 of 1998, defines stalking, albeit it restrictively, for the civil law. It provides recourse to a person who is stalked only if he or she is in a domestic relationship with the stalker.

[49]<https://brandsouthafrica.com/103285/democracy/anti-harassment-law-comes-into-effect/>, accessed on Sep. 30, 2024.

[50] Stalking cases in South Africa often face challenges associated with evidence collection to the difficulties of proving intent and persistence. See, <https://www.linkedin.com/pulse/exploring-south-africas-legal-framework-combating-stalking-brown-etqff>, accessed on Dec. 12, 2024. See also for

measures demonstrated promising outcomes in the successful prosecution and prevention of stalking incidents. These initiatives and context are not unique to the South African legal system alone. They are also associated with the application of the law in Ethiopia and elsewhere. Hence, as previously noted, South Africa's experience offers a valuable precedent from which the Ethiopian human rights system can draw important lessons.

4. Anti-stalking Legislation in Ethiopia

The ultimate test for any legal system that purports to deal with the human rights of women and girls is the degree of protection it provides and the difference it makes to their lives. Yet, as discussed below, the existing Ethiopian legal system could not stand that test, for it lacks such a specific legal protection mechanism that addresses all instances of stalking.[51]

Despite the growing global recognition of stalking as a distinct and harmful form of GBV, Ethiopian criminal law does not currently recognise stalking as a standalone offence. The absence of specific legal provisions leaves women and girls without adequate protection or access to justice. This legislative gap is inconsistent with Ethiopia's international obligations, particularly under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), both of which require state parties to enact comprehensive measures to prevent, investigate, and punish all forms of violence against women. Addressing stalking through specific legislation would not only fill a critical gap in the domestic legal framework but also affirm Ethiopia's commitment to upholding international human rights standards.

legal challenges, South Africa: New "Stalking" Bill Criticized as Potential Danger to Freedom of Expression, <https://www.loc.gov/item/global-legal-monitor/2009-10-30/south-africa-new-stalking-bill-criticized-as-potential-danger-to-freedom-of-expression/> accessed on Dec. 12, 2024.

[51]Committee on the Elimination of Discrimination against Women, Concluding observations on the 8th periodic report of Ethiopia, CEDAW/C/ETH/CO/8, para 23 (a).

Yet, in the context of such legal *lacuna*, the rampant trend of stalking over time is likely to continue, as it is evidenced from old and new real cases of stalking against women and girls. The above premise is valid and sound taking into consideration the criminal cases decided by the Federal Courts on wilful injury, homicides and attempted homicide cases committed by men against women where the act of stalking preceded the later crime.[52]

Moreover, according to an assessment made by the one-stop service centre at Menelik-II Comprehensive Specialized Hospital, in 2023/24, 67% of the survivors/victims of rape and sexual assault cases revealed that they knew the perpetrators before the incident and that before they were raped or sexually assaulted, they were stalked.[53] Similarly, from the account of survivors/victims of sexual abuse who received technical support as survivors of sexual trauma at the Ethiopian Women with Disabilities National Association (EWDNA), it could be seen that the majority of women and girls with disabilities were stalked.[54]

The trend of stalking in Ethiopia is even more common among divorced or separated women. A divorced or separated woman who is dependent on her ex-husband for child maintenance would not be in a *status quo* to fight against stalking. Most often, the ex-husbands with child visitation rights under court permission after divorce tend to use their children as a proxy to stalk their ex-wives.[55]

More visibly, the lack of such legislation is felt in the above-mentioned cases of violence from the old case of Kamilat Mehedi to the recent case of Tsega Belachew. The inadequacy of such protection has been a concern of national and international

[52] Interview with Ato Getu Taddesse, supra note 8.
[53] Interview with Dr. Getachew Emeye, General Surgeon, Menelik II Comprehensive Specialized Hospital, One-Stop Service Centre, on 6 December 2024.
[54] Interview with w/ro Lemlem Yehualashet, Senior Project Coordinator, Ethiopian Women with Disabilities National Association (EWDNA), on 16 December 2024.
[55]Interview with Ato Yohannes Fekadu, Senior Project Coordinator, Federal Supreme Court Child Justice Project, on 25 December 2024.

institutions where the CEDAW Committee, for instance, has been repeatedly recommending Ethiopia to adopt a comprehensive and inclusive law on GBV including stalking, addressing all forms of violence against women, including acid attacks, domestic violence, rape, marital rape, gang rape and other forms of sexual violence.[56] To mitigate such scenarios and protect the rights of such women and girls, the adoption of anti-stalking legislation in Ethiopia is an urgent priority.

The following sub-section evaluates the jurisprudential dearth and specific legislation concerning stalking in Ethiopia. along with a reflective analysis of the need for legal reform that embraces anti-stalking law.

4.1 Jurisprudential Dearth of Stalking in Ethiopia

The FDRE constitution, which is the supreme law of the land,[57] provides protection to the human rights of women and girls in general and, of the right to safety, security and dignity in particular.[58] The constitution, besides allotting about one third of its provisions to the protection and promotion of human rights, incorporated both specific and general provisions on the rights of women and girls that has also received praise.[59] In this regard, it enshrines as many as important human rights, including the right to equality, the right to privacy, the right to dignity, the right to liberty and body integrity, the right to be protected from inhuman and degrading treatment, the right to freedom and security which incorporates the right to be free from all forms of GBV, including, of course, stalking.[60] More importantly, the FDRE constitution has an inherent mechanism of incorporating international human rights instruments that are ratified by Ethiopia into the national legal framework, making it part of the law of the land.[61]

[56]Concluding observations on the eighth periodic report of Ethiopia, supra note 51.
[57] The Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 9 (1), Proc. No 1, Neg. Gaz. Year 1, no. 1.
[58] Id. Art 13-44 and Art 35.
[59] Id. Art 35 & 36.
[60]Id. Art 14, 16, 17, 18, 24, 25, 26 and 32.
[61] Id. Art 9 (4).

Moreover, the constitution also provides that the fundamental rights and freedoms specified under Chapter three (Art 13-44) shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR), International Covenants on Human Rights and international instruments that Ethiopia adopted.[62] These international instruments oblige state parties, among other things, to enact legislation to enhance the protection of the rights of women and girls. These stipulations are very much paramount, if appropriately used, for they arrange significant opportunity to interpret the rights of women in light of these international treaties which have been extensively interpreted, and benefit from a large body of jurisprudence that has been built-up over many years. Hence, Ethiopia has an international obligation to adopt a legislation both at the federal and regional state levels to protect women from all forms of stalking.

However, despite the ratification of various international and regional human rights instruments concerning women and girls by Ethiopia, their implementation in reality remains inadequate. Women and girls are still victims of various kinds of stalking in their day-to-day life. This originates, among other things, from the absence of anti-stalking legislation. Therefore, the questions that would certainly cross the minds of many is why the need for legislation? Why is the existing legislation not able to protect the rights of women that are guaranteed by various international, regional and national human rights instruments?

As indicated above, it should be noted that the legal basis for the need to introduce anti-stalking legislation in Ethiopia does not only originate from the human rights that women and girls have, but also from the normative frameworks reflected in various human rights instruments the country has adopted. One of the important

[62] Id. Art 13 (2).

instruments, for instance, the CEDAW provides that women and girls shall be free from any kind of GBV.[63]

Nevertheless, to date, there is a dearth of jurisprudence in Ethiopia on the act of GBV in general and on the interpretation of the acts relating to stalking in particular. At present, the police and public prosecutors at both federal and regional state levels are the primary organs responsible for the investigation and prosecution of any criminal offences under the existing criminal laws. Yet, if the police were presented with a direct challenge to the stalking offence based on the existing legislation, like the FDRE criminal code, then they would be in a position to reject it from a different perspective.[64]

Regarding the question of an application of the existing laws strictly, it might not be feasible at the moment, considering the already failed attempts in the "trial and error" of establishing the act of stalking as a standalone offence. However, it does not mean at all that there have not been a handful of cases that ended up in police stations in the form of accusations but would not bring any exemplary result at all.[65] This could be a problematic route to addressing the question of stalking offences, as the inspired boldness has not been the hallmark of the legislator. Thus far, several prominent women's rights advocacy groups have commented generally on the relative inefficacy of the existing laws.[66]

Therefore, most women and girls remain vulnerable, despite the growing international human rights standards in general, and standards on the protection of

[63] See, The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), (adopted 18 December 1979 UNGA Res 34/180 (UNCEDAW), Part I (Articles 1–6). In line with CEDAW General Recommendation on Gender-Based Violence against Women, updating General Recommendation No. 19, No. 35 (2017), <https://www.vn-vrouwenverdrag.nl/wp-content/uploads/General-Recommendation-35-update-van-19.pdf>, accessed on Dec 18 2024.
[64] Interview with Ato Getu Taddesse, supra note 8.
[65] Ibid.
[66] See, Ethiopian Women Lawyers Association (EWLA) Annual report for the year 2023 <https://ewla-et.org/ewla-2023-annual-report/>;<https://ewla-et.org/assessment-of-the-existing-legal-procedures-and-mechanisms-on-the-treatment-of-sexual-violence-cases-in-ethiopia/>,accessed on Dec 18 2024.

the rights of women and girls in particular. Besides, there was no mention of the concern from the perspectives of introducing anti-stalking legislation.[67] Thus, the adoption of anti-stalking legislation would facilitate an interpretation of all other human rights provisions of Ethiopian bill of rights.

Furthermore, an anti-stalking legislation in Ethiopia is particularly desired considering the international human rights developments and trends towards the ending of violence against women and girls.[68] This is even more so considering that for human rights systems to be efficient, they need to be constantly adapted to match the changing conditions where cyber-stalking is now the new threat.[69] One of the means of such adaptation could be through the adoption of legislation to supplement the existing human rights instruments.

Taken very seriously by many, the current setting in Ethiopia does not indicate a trend towards the recognition of the threat of stalking. First, when the FDRE criminal code was adopted in 2004, it was not made clear whether the drafters intentionally omitted a reference to the issue.[70] The code only refers to sexual violence under Part II (Special part), Book V, Title IV, as "Crimes against Morals and the Family", which excludes stalking. However, in 2016, an incidental trend towards stalking was evidenced with the adoption of the Computer Crime Proclamation.[71] And, though the instrument incidentally places restrictions on the act of stalking on the internet-

[67] Activities are being carried out by the Ministry of Women and Social Affairs to identify legal gaps regarding prosecuting GBV. Yet, there is no indication for the concern of stalking so far. See, <https://www.mowsa.gov.et/?p=5620&lang=en> accessed on Dec 18 2024; See also, Ministry of Justice, draft National Policy and Strategy on GBV Prevention and Response in Ethiopia.

[68] United Nations Assembly, Intensification of efforts to eliminate all forms of violence against women and girls: technology-facilitated violence against women and girls, Seventy-ninth session, Agenda item 27, Advancement of women A/79/500 8 October 2024, <https://www.unwomen.org/sites/default/files/2024-10/a-79-500-sg-report-ending-violence-against-women-and-girls-2024-en.pdf>, accessed on Dec 18 2024.

[69]<https://www.ojp.gov/ncjrs/virtual-library/abstracts/cyberstalking-new-challenge-law-enforcement-and-industry-report>, accessed on Dec 20 2024.

[70] See, the *Ex post motifs* of the FDRE criminal code of the 2004, pp 273-305.

[71] See, Computer Crime Proclamation, 2016, Art.12 & 13, Proc. No. 958/2016, Fed. Neg. Gaz., Year 22, No. 83.

cyber stalking, it is a highly commendable step towards the fight against stalking. Lastly, legislation on the act of stalking is needed because, in the absence of any other instrument for the cause, the state can retreat from its international obligation.[72] This has been the case in many parts of the world, including Ethiopia. Thus, developing the Ethiopian jurisprudence to extend the protection of the rights of women against stalking is a remaining challenge.

4.2 Assessment of Existing Laws Regarding Stalking

As already indicated above, Ethiopia has adopted various international, regional and national instruments aimed at protecting women's rights in general. The Ethiopian constitution, as a governing principle, affirms the substantial equality of women with men in any sphere of life. The constitution clearly states that the state shall enforce the rights of women, and laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited. It also guarantees women the benefit of affirmative action as compensation.[73]

Additionally, the FDRE criminal code of 2004 has a number of provisions related to some acts sanctioning behaviour calculated to assault, threaten or intimidate.[74] However, the existing laws have limitations for the provisions are insufficient or inadequate to deal with what is understood to constitute stalking in the broader sense and as legislated for in comparative jurisdictions.

As it stands, the first limitation is that legislation starts from the time when the victim reports the act. When survivors/victims go to the police to report stalking behaviours by former lovers or boyfriends whose actions may qualify to stalking acts but do not amount to any of the criminal laws' provisions, the first step prosecutors and police officers take is to explain that the alleged action is not covered by the Ethiopian

[72] Concluding observations on the eighth periodic report of Ethiopia, supra note 51.
[73]FDRE Constitution, supra note 57, Art. 25 & 35 (4).
[74] The Ethiopian Criminal Code of 2004 covers detailed information on assault, intimidation and crimes against personal liberty. See, The Criminal Code of the Federal Democratic Republic of Ethiopia, 2005, Art 560, 580 & 601-606, Proc No. 414/2004, Fed. Neg.Gaz.

criminal law and thus cannot be investigated formally.[75] However, although stalking is not recognised by name as a crime, some of the stalking acts are addressed concurrently by way of a number of existing offences, such as assault, intimidation, trespassing or malicious damage to property.[76] For instance, the criminal codes provision that deals with such threats is the crime of intimidation under Article 580 of the FDRE criminal code which states:

> *"Whoever threatens another with danger or injury so serious as to induce in him a state of alarm or agitation, is punishable, upon complaint, with a fine not exceeding five hundred Birr, or with simple imprisonment not exceeding six months"*

In the context of stalking, the first limitation on this provision arises due to interpretation of the provision itself, what amounts to danger and injury as qualified in the law seems to be vague which may have adverse effects on the survivors/victims right since restrictive and narrow interpretations in favour of the accused are expected in criminal law.

The flaw in the application of the criminal code should convince the law enforcement organs that legislation on stalking in Ethiopia is much needed. For example, concerning repetitive offenders of a certain crime that is concurrent with stalking, the failure of the code to punish that in itself is problematic. If a repetitive offender of such a crime is arrested, he can still be released on bail and continue with the stalking act.[77] Moreover, the act and offence and the emotional damage he has done

[75] Interview with Ato Getu Taddesse, supra note 8.
[76] The Criminal Code of the Federal Democratic Republic of Ethiopia, supra note 74, Art.560, 580, 689.
[77] Public Prosecutor v. Mohammod Fereja, Federal High Court, Lideta Division, File Number 305080, 2024, cited in Helen Abelle, 'Intimate Partner Violence Survivors and the Criminal Justice System: A Case Study of Addis Ababa City Administration', Hawassa University Journal of Law (HUJL), Vol. 8, July 2024. P. 12.

against women and girls unlike other acts is uniquely irrevocable. For there is clearly a legal shell to be filled with regard to the efficiency of existing Ethiopian laws, the solution would only be introducing anti-stalking legislation at the federal level.[78]

The second limitation survivors/victims of stalking face with regard to getting their complaints formally investigated is the issue of evidence. The Ethiopian justice system is largely dependent on eye-witness testimonies, and the actions directed against women are usually done in the absence of anybody else in the vicinity. Continuous and repeated phone calls and abusive messages raise a particular challenge to manage, even when they contain elements of the crimes of intimidation, since the accused's identity cannot be proved.[79]

Third, although the modern manifestations of stalking, like cyber-stalking on the internet become common in Ethiopia, incidents of such acts remain unreported to the police. Some of such acts are made from unknown gadgets or sources which make it nearly impossible to identify the perpetrator, but even in the cases where it is known, investigation is rarely commenced for it requires advanced skills. This may be in part due to the lesser attention given to these kinds of incidents and such cases are most likely to result in a 'not guilty' verdict.[80]

Therefore, to effectively protect the survivors/victims of stalking, anti-stalking laws must be broad in scope and have substantial penalties. On the other hand, such laws must be sufficiently narrow that they will not punish legitimate acts of others. Drafting effective anti-stalking legislation that balances both of these interests is a complex task. In some cases, the distinction between lawful activity and stalking activity can be blurry. This is because behaviours or acts such as following someone, and telephoning someone repeatedly can be taken as stalking. Yet, a clear dividing

[78] Walsh, Keirsten L., 'Safe and Sound at Last-Federalized Anti-Stalking Legislation in the United States and Canada', Dickinson Journal of International Law. Vol. 14, 1995, pp. 373-402.
[79] Interview with Ato Getu Taddesse, supra note 8.
[80] Ibid.

line between stalking and acceptable behaviour, like courtship, has never been easier to distinguish unless the law enforcement received sufficient training.

In other setting, in most jurisdictions, which have anti-stalking laws, defendants have attempted to challenge the validity of such laws in a court of law. Defendants seeking to challenge anti-stalking laws usually argue that these laws are defective because they are void for vagueness or are so overly broad that they infringe constitutionally protected activity and speech.[81] The solution or technique that would help to avoid the potential problem of vagueness in anti-stalking laws is to narrow down the term through judicial interpretations. A good example in this regard is the interpretations of the Supreme Court of Connecticut of the term 'repeatedly follow' when the court was reviewing the constitutionality of Connecticut's stalking law.[82]

Lastly, what is more, there has not been significant progress towards ending GBV against women and girls in Ethiopia, following intense lobbying from human rights activists in the nation from the perspective of introducing legislation.

To this end, the author of this article suggests that the best remedy to address the broad range of stalking offences is by enacting new legislation to specifically address stalking as a standalone crime, which has penalties so that survivors/victims can seek protection and perpetrators are held accountable.

4.3 The Need for Introducing Anti-stalking Legislation

There is no official data available as to how many of the stalking cases are reported, and how many of them resulted in more grave consequences in Ethiopia.[83] Yet, though it is difficult to get data on how many stalkers and survivors/victims are former intimates, how many murdered women were stalked beforehand, or how

[81] Robert A. Guy, 'The Nature and Constitutionality of Stalking Laws'. Vanderbilt Law Review, Vol. 46, Issue 4, May 1993, p. 1012.
[82] Id. P.1020.
[83] Interview with Ato Getu Taddesse, supra note 8.

many stalking incidents overlap with other crimes, the prevalence of stalking in Ethiopia is very high.

Neither the Ministry of Justice nor the Ministry of Women and Social Affairs acknowledged having comprehensive data concerning the number of stalking survivors or victims that appear before them. As per the latest study report, rather, the act of stalking is very widespread.[84] The country has waited for long up until much misfortune has happened to women and girls.

The widely publicised or high-profile cases that ended in grievous bodily injury or near death, including Kamilat Mehedi, Hermela Wosenyeleh, Naomi Tilahun, Aberash Hailay, Atsede Nguse, Tsega Belachew and others, would serve as evidence to appreciate the magnitude of the national problem of stalking in Ethiopia. Among these cases, the first high-profile stalking case is that of Kamilat Mehedi, where the perpetrator by the name Demessew Zerihun had obsessively stalked her for over four years. The stalker and later convicted criminal, Demessew, used to follow Kamilat and made continuous phone calls just to cause an intentional fear. His stalking behaviour was just not limited to Kamilat but also extended to her family members. Finally, at one night while *Kamilat* was walking home after dark with her two sisters, a man stepped out of the shadows and threw acid in her face. The acid spread on her eyes, nose, mouth, forehead and chest, splashing onto the faces and backs of her sisters beside her, burning flesh wherever it touched.

Secondly, the case of Hermela Wossenyeleh was a famous stalking case, which was committed by her purported admirer named Negussie Lemeneh, for eight years. Claiming to be infatuated with her, Negussie engaged in a pattern of escalating violence, culminating in a brutal physical assault in which he shot Hermela in the face. He also inflicted severe injuries on her family members, attacking two of her sisters with a machete and fracturing the skull of her younger sister with an axe. The

[84] See, Determining the Ethiopian Women's Status & Priorities, supra note 1.

third grave case of violence against separated or divorced women and stalking in Ethiopia is the case of Aberash Hailay. An Ethiopian Airlines flight attendant whose ex-husband, Fisseha Tadesse, stabbed both her eyes with a knife in Addis Ababa, Ethiopia. Fisseha Tadesse, who is said to have been stalking the victim before committing such a heinous crime, turned himself in to police and was later tried for the crime. Moreover, the latest and highly publicised stalking cases happened against a young accountant named Tsega Belachewe, who was abducted for nine days by the personal bodyguard of the then Hawassa City Mayor. As reported by the close family members of the victim[85] and later revealed by herself,[86] Tsega had been stalked for a while by a proxy-stalker and by the same person, who is now arrested and criminalised, following a social media campaign.

These cases might have been avoided or at least mitigated had there been a well-designed anti-stalking law in Ethiopia. Given the emerging discussion on the issue in Ethiopia, the Ethiopian legal system would be more responsive to the needs of legislation on the subject. This is because the discussion in itself is already an important contribution towards the improvement of the system in affording better protection of human rights in general and the rights of women in particular.

The experiences of other human rights systems guide the drafting process and content of a well-designed anti-stalking law in Ethiopia. Accordingly, based on the lessons learned from the experiences of the USA, UK and South African human rights systems, this article analyses and draws two major lessons, focusing on the drafting process and specific content of anti-stalking legislation. Concerning the drafting process, it is suggested that the drafting process has to adopt a participatory approach, through the involvement of various interested parties that use human rights

[85]<https://youtu.be/wiLQM0EdUpc?si=dfmr3bSYtd9o1Qwp> accessed on 21 Dec. 2024.
[86]<https://www.bbc.com/amharic/articles/c2e714vekk1o> accessed on 21 Dec. 2024.

daily, such as lawyers, non-governmental organisations (NGOs), government officials, academics and civil society.

In terms of the specific content of the anti-stalking legislation, this article highlights several substantive considerations and recommendations. Primarily, the legislation should aim to protect the rights of women and girls from gender-based violence. The author recommends the American legal system approach regarding the application of the legislation, which is expected to prohibit the act of stalking, making it a stand-alone criminal act, allowing law enforcement organs to start of investigation at the time of commission. As was the case in California stalking law, the act shall be interpreted incorporating all the important elements to avoid drawing attention to the vagueness exception.[87] Besides, the priority at the moment is, first of all, to make the act an offence, which could subsequently be consolidated by the complete recognition of the act as a stand-alone criminal act in Ethiopia.

Besides, to achieve this, the legislation shall incorporate all acts of stalking as a stand-alone crime applicable to all states, as a federal matter. The law should not be too narrow or too broad. If it is too narrow, it would exclude important stalking acts. In addition, if it is too broad, it will not survive a vagueness challenge, where it places no limits on the conduct to distinguish innocent and criminal behaviour. Therefore, the law should be sufficiently broad to proscribe stalking acts effectively, yet narrow enough to survive a constitutional challenge. Moreover, the legislative framework should include a clear and effective approach to addressing offender accountability and rehabilitation.[88]

[87] Robert A. Guy, supra note 81, p. 1014

[88] A draft proclamation is already prepared to introduce first ever sexual violence registration system that aims to prevent and respond to sexual violence against women and children, <https://www.mowsa.gov.et/?p=5620&lang=en>, accessed on 21 Dec. 2024.

In addition, the legislation should set the type of the crime -stalking categorisation, which shall not be listed as an up-on compliant crime.[89] For example, the crime of intimidation is a crime punishable only upon complaint. Moreover, the punishment for the crime should be a simple imprisonment rather than rigorous, except for aggravated circumstances, or where the act of stalking surges into wilful injury of more. Fourth, generally, since some of the provisions of the legislation would be regarded as additional articles to the criminal code, some clarity should be advocated. Lastly, in drafting the provisions of the legislation, reference shall be sought from the laws of other nations' human rights systems. The experiences of other countries systems exist as references, as they have been successful in implementing anti-stalking law. More specifically, the experience of South Africa, which shares similar social, economic and political problems, is instructive to Ethiopia.

5. Concluding Remarks

In Ethiopia, the legal *lacuna* concerning the protection of women and girls from stalking remains evident, and the continued absence of appropriate safeguards against stalking continues to leave them particularly vulnerable. This underscores the urgent need for the Ethiopian legal system to adopt and implement comprehensive anti-stalking legislation.

However, drafting effective anti-stalking legislation that enables the prohibition of certain acts as a stand-alone stalking offence is a complex task. In some cases, the distinction between lawful activity and stalking activity can be blurry. This can be, in part, due to the overlap between accepted courtship acts and stalking. Defendants seeking to challenge anti-stalking laws usually argue that these statutes are constitutionally defective because they are "void for vagueness" under due process

[89] For more on offences punishable only upon private complaint, See, Graven, Philippe, 'Prosecuting criminal offences punishable only upon private complaint', Journal of Ethiopian Law Vol. 2, Noo. 1, 1965, pp.121-159.

principles or are so overly broad that they infringe upon constitutionally protected speech or activity. Yet, the priority should be striking a balance between the two interests in giving special attention to the issue and affording the maximum protection to the women and girls in danger.

The international and national bills of rights provide for a robust protection of the rights of women and girls, including the right to be free from any sexual harassment, the right to privacy and the right to dignity. In the context of protecting these rights, the FDRE constitution emphasises the special position of the enactment of laws in ensuring the protected rights and reiterates that special measures should be taken to ensure their implementation.

As discussed above, women and girls have a constitutional right to be protected from abuse and harassment. It is inherently illogical and legally indefensible to require them to wait until harm materialises before authorities take action. Such an approach is inconsistent not only with the protective guarantees enshrined in the FDRE Constitution but also with the international human rights conventions to which Ethiopia is a party. These legal frameworks obligate the state to adopt proactive and preventive measures to safeguard individuals from threats to their rights and dignity. Accordingly, in the interest of the protection of the rights of women and girls, the government shall accord urgent priority to the enactment of anti-stalking legislation, which is vital to ensure full protection.

From this, it follows that, if there is a law governing stalking, it would have two main benefits; first, as a crime prevention tool, it would deter potential offenders from being engaged in stalking in fear of punishment. It also has the advantage of placing citizens on notice; the subsidiary laws are meant to advise them in advance of how they can and cannot use their right to be free from stalking. Second, if the offender is punished in a court of law, potential victims would trust the legal system and would be encouraged to report stalking cases by affording survivors/victims of stalking an

effective remedy against such behaviour. Therefore, the solution lies in a plea for the introduction of anti-stalking legislation into the Ethiopian legal system.

Conflict of Interest

The author declares no conflict of interest.

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Examining Ethiopia's Federal Supreme Court Cassation Division's Position on Concurrence of Fraudulent Misrepresentation and Forgery Offences

Fesseha Negash Fantaye ♣

Abstract

Forgery and fraudulent misrepresentation are usually categorised as commercial or white-collar offences since they are committed to get pecuniary benefits. The act of forgery is criminalised to ensure the trustworthiness of public and business documents, while the fraudulent misrepresentation act is criminalised to protect constitutionally guaranteed ownership rights. Consonant with these objectives, Ethiopia has criminalised these acts through its criminal law. It also makes the act of deceiving through counterfeited documents a material concurrent offence. Nonetheless, the Federal Supreme Court (FSC) cassation division has been holding an inconsistent position on the issue of material concurrence offences of deceiving through counterfeited documents. Thus, this article aims to examine these positions of the division in light of the Ethiopian criminal law through the analysis of the law and specific cases. The case analysis highlights the contradictory position of the FSC cassation division. The division, in some case, held that the act of deceiving through a counterfeited document is a material concurrence offence of fraud and forgery, while, in another cases, it held that the act of deceiving through a counterfeited document could not constitute material concurrence offence of fraudulent misrepresentation and forgery rather only the offence of fraudulent misrepresentation. Therefore, this article draws the flawed position held by the FSC cassation division and highlights the correct interpretation of material concurrence offences of deception through counterfeited documents.

Keywords: Cassation Division, Concurrent Offences, Forgery, Fraudulent Misrepresentation, Unity of Offences

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1 Introduction

Even though constitutionally the term '*Cassation'* was introduced with the promulgation of the Federal Democratic Republic of Ethiopia (FDRE) constitution[1], the practice of reviewing lower courts' decisions by the higher and special division is not a new phenomenon.[2] The term cassation has not yet been firmly defined in the Ethiopian legal system. However, it denotes the act of annulling, cancelling, or quashing the lower courts' decisions by the higher one.[3] The pertinent provisions of the FDRE Constitution[4] and Federal Court Establishing Proclamations[5] expound that the cassation division (the division) is a special division of the regular Court in the FSC of FDRE with a specific mandate of the FSC to supervise the legality of the lower courts' decisions.[6]

The FSC Cassation Division articulated its legal mandate by claiming its inherent power is gauging the legality of the lower courts' decisions, but not examining the

[1] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, art. 80(3(A)), Proc. No. 1/1995, *Fed. Neg. Gaz.*, Year 1, No.1. This provision states (. . .) the FSC has a power of cassation over any final court decision containing a basic error of law. Furthermore, some scholars argue that the term ``cassation`` was used in legislation in Ethiopia for the first time in the treaty signed between Ethiopia and France in 1908. According to the record, this treaty empowered the emperor, stating that the emperor had the prerogative to review final decisions of the special courts by way of cassation, that is, for error of law. Muradu Abdo, 'Review of Decisions of State Courts Over State Matters by the FSC, Mizan Law Review', Vol. 1 No.1, 2007, p. 62

[2] Criminal Procedure Code, 1961, Art. 183, Proclamation No.185/1961, *Neg. Gaz.*, (Extraordinary Issue No I of 1961). The Civil Procedure Code Decree, 1965, art. 361 -370, Neg. Gaz., (Extraordinary Issue No I of 1961) Year 25, No. 3; Mahari Radie, 'Cassation over Cassation and Its Challenges in Ethiopia, Mizan Law Review', Vol. 9, No.1, pp. 178 – 9

[3] Merriam-Webster dictionary, < https://www.merriam-webster.com/dictionary/cassation > accessed on December 1, 2023. Similarly, Muradu states that the term 'cassation' comes from the French verb 'Casser' and its literal meaning is to quash the force and validity of a judgment. In Ethiopia, cassation may be taken as a means by which a final decision of any lower courts, concerning which appeal is exhausted, containing a basic error of law, is reversed or varied by the cassation division. Muradu, (n 2) 62

[4] Article 80(3(A)) of the FDRE constitution

[5] Federal Court Proclamation, 2021, art. 10, Proc. No. 1234/2021, *Fed., Neg. Gaz.*, Year 27, No. 26

[6] It is argued that the purpose of the cassation division is to see the exactitude of the decisions; verifying whether the final decision rendered synchronises with the letter and spirit of the laws. Hirko Alemu, 'The Binding Interpretation of the FSC Cassation Division: A Critical Analysis to its' Novelty and Rickety, Oromia Law Journal', Vol 11, No.1, 2022, p. 46;

facts of the case like an appellate court.[7] Thus, the prime mandate of its establishment is to assist the uniform application of law across the Ethiopian territory[8] by setting final and applicable precedents that make the decisions of the courts predictable and consistent.[9]

However, owing to its distinct mandate, recently the division's decisions have been attracting several scholars' and lawyers' attention, and it has also become one of the research areas. Due to the wider legal implications of the division's decisions, the division's decisions have attracted scholars' scrutiny and critique.[10] Even invited the House of Federation's attention and reversed some of them.[11] Specifically, the issue of jurisprudential consistency in interpreting the material concurrence of fraudulent misrepresentation and forgery remains a critical concern. Certain rulings, such as those in the cases of Zakarias and Endashaw, recognize material concurrence in instances involving deception through counterfeit documents; however, other

[7]Zewdu Gizaw v. Ayelech Dastaa, (FSC, 2011, Cassation Civil Case No. 55273), Cassation Division Decisions Book, Vol. 13, p. 615

[8] Getachew Dasta and Fntu Tasfye v. Rukia Kedir, (FSC, 2012, Cassation Civil Case No. 68573), Cassation Division Decisions Book, Vol. 13, p. 623

[9] ጌታሁን ወርቁ, 'ሕግ የማውጣት ና የመተርጎም መስመር ሲጡብ, (በፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰ/መ/ቁ 44800 እና የሰ/መ/ቁ 40109 ላይ የቀረበ ትችት), Hawassa University Journal of Law', Vol. 6, July 2022, p.191

[10]Biruk Haile, 'Period of Limitation Applicable to Claims over Immovable Property under the Ethiopian Law: Gateway to Hindsight Scrutiny of Legality of Nationalisation of Immovable? Case Analysis, Jimma University Journal of Law', Vol. 4 No. 1, 2012, p. 178; Zerihun Asegid, 'The Power to Transfer Employees: A Case Comment, Bahir Dar University Journal of Law', Vol. 6, No. 1, 2015, p. 156; Leake Mekonen, 'The Effect of Changes in Tax Rates Amidst Tax Years in the Determination of Corporate Income Taxes in Ethiopia: A Comment on FSC Cassation Decision on ERCA v MIDROC Gold, Bahir Dar University Journal of Law', Vol.8, No.1, 2017, p. 139; Mehari Redae, 'Dissolution of Marriage by Disuse: A Legal Myth, Journal of Ethiopian law', Vol. XXII, No.2, p. 37; Dejene Girma, 'Tell Me Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division, Jimma University Journal of Law', Vol. 2, No. 1, 2009, p. 114,

[11]Mehari, for instance, bombarded the FSC Cassation Division decision, Shewaye Tessema v. Sara Lengana et al, File No.20938, with a critique arguing that the division was not empowered to create an extra method of dissolution of marriage rather than applying those designed by the lawmaker. Mehari Redae (n 11) 37; Dejene also repeated Mehari's argument; Dejene Girma (n 11) 114. After lengthy criticism, the House of Federation reversed this decision in a way that fits Mehari's and Dejene's argument. W/ro Kelemua Tefera V. Fiseha Demise, House of Federation, (File No. 50/10, October 8, 2019, unpublished); ተክለኃይማኖት ዳኜ, 'ፍቺ ከፍርድ ቤት ውጭ፡ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት እና የፌዴሬሽን ምክር ቤት ውሳኔዎች አጭር ዳሰሳ, Journal of Ethiopian Law', Vol. XXXII, 2020, p. 223ff

rulings, such as Mu'az and Abiy, do not, resulting in contradictory precedents. This article critically investigates whether the Cassation Division consistently adheres to its mandate of legal uniformity when confronted with cases that encompass overlapping components of fraud and forgery. It examines the FSC Cassation Division's position regarding the material concurrence offences of deceiving through counterfeited documents by upholding jurisprudential consistency in its interpretation of concurrent offences involving fraudulent misrepresentation and forgery within the context of Ethiopian criminal law.

For this purpose, it employs a doctrinal legal research method by analysing the available relevant cases decided by the division in light of the Ethiopian criminal law. The case analysis highlights contradictory positions of the division regarding the material concurrence of offences related to deception through counterfeited documents. In the Zakarias and Endashaw case, the division's decision recognised the act of deception through a counterfeited document as a material concurrence offence involving both fraud and forgery. In contrast, the ruling in Mu'az and Abiy rejected this interpretation and limited the act to only a fraudulent misrepresentation offence. These analyses demonstrate that the position held by the division in Zakarias' and Endashaw's cases is a right reading of articles 61(3) and 699 of the FDRE Criminal Code (hereinafter the code), while the one held in Mu'az's and Abiy's cases is flawed. This article critiques this inconsistency and argues for a correct and consistent interpretation that acknowledges material concurrence in cases involving deception through counterfeit documents.

These findings are systematically presented in the subsequent four sections of this article. Section two analytically introduces the concept of fraudulent misrepresentation, forgery and concurrent offences in general and in the Ethiopian context, in particular. Section three provides a summary of the material facts of the selected cases and the FSC cassation division's decisions. The fourth section, the

main section of the article, analyses the incongruity between the law in the book and the law in action on the issue of material concurrent offences of forgery and fraudulent misrepresentation. Finally, the conclusion section highlights the arguments and provides recommendations for this article.

2 The Concept of Fraudulent Misrepresentation, Forgery and Concurrent Offences

Since forgery and fraudulent misrepresentation offences are committed to get pecuniary benefits, they are termed socio-economic offences,[12] and usually, categorised as commercial or white-collar offences. Though they are in one category of offences, they are distinct offences and evolved to govern distinct purposes. Accordingly, the act of forgery is criminalised to make public and business documents trustworthy documents while the fraudulent misrepresentation act is criminalised to protect constitutionally guaranteed ownership rights.

Regarding the basic definition of fraudulent misrepresentation offence, Judge Holmes stated that the law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.[13] Conceptually, nonetheless, fraudulent misrepresentation, also known as deception or fraudulent representation, is the act of making a false or misleading statement, either in a form of spoken or written form, usually to gain an advantage by deceiving.[14] Furthermore, since its

[12]Fundamental of Crime, Criminal Law & Criminal Justice, <https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S001608/P001744/M027843/ET/152110522271.BASISOFCRIMINALIZATION.pdf> accessed on April 18, 2025

[13] Podgor Ellen S., 'Criminal Fraud, American University Law Review', Vol. 48, No.4, 1999, p.739

[14] Bryan A. Garner (ed.), Black's Law Dictionary, 7th Edition, 1999, P.1016; Jonathan Herring, 'Criminal Law' (Palgrave Macmillan Law Masters, 2008), P. 294ff. Nonetheless, on the one hand, it is argued that mere deceit is insufficient to convict someone of fraud; rather, it must also be proved that the defendant intended to cause harm to a victim's 'money or property'. On the other hand, it is maintained that it encompasses all forms of deceptive behaviour, even where the defendants intended no pecuniary harm. According to the latter group, the so-called 'right to control' theory, which holds that one's 'right to control' his or her assets qualifies as property. Thus, per this theory, even if defendants did not intend harm, they may be convicted if they withheld from the putative victims potentially valuable economic information, thereby depriving them of their right to control their assets; Tai H. Park, 'The Right to Control Theory of Fraud: When Deception Without Harm Becomes a Crime, Cardozo Law Review', Vol. 43:1

core objective is to get an advantage by deception, some consider it an offence of theft through lies.[15] In the case of Ethiopia, this offence is provided in a way that fits hereinabove mentioned conceptual definition of fraud.[16]

On the other hand, the concept of forgery is the making of a false document intending that it be used to induce a person to accept and act upon the message contained in it, as if it were contained in a genuine document.[17] Forgery[18] generally consists of the false making or material alteration or using a forged document of a legal instrument with the specific intent to defraud.[19] Besides, for some, the act of forgery constitutes simulation of writing by free hand, traced forgery, and disguised writing.[20] In the case of Ethiopia, in fitting this concept of forgery, article 375 of the code,[21] provides

[15] Id 138

[16] Article 692(1) of the Criminal code, the provision which is considered as the provision that defines a fraudulent misrepresentation offence in Ethiopia, states, *Whoever, with intent to obtain for himself or to procure for a third person an unlawful enrichment, fraudulently causes a person to act in a manner prejudicial to his rights in property, or those of a third person, whether such acts are of commission or omission, either by misleading statements, or by misrepresenting his status or situation or by concealing facts which he had a duty to reveal, or by taking advantage of the person's erroneous beliefs* [. . .]. Nonetheless, one should note that the act of fraudulent misrepresentation is criminalised through different proclamations.

[17] It is noted that document usually contains messages of two distinct kinds – the first a message is about the document itself, while the second a message is the words of the document that is to be accepted and acted upon. It is argued that it is documents which convey not only the first type of message but also the second type that need to be protected by the law of forgery. < https://www.oxfordlawtrove.com/display/10.1093/he/9780198890942.001.0001/he-9780198890942-chapter-29> accessed on April 18, 2025

[18] Material forgery could take three forms; viz., a) forgery of a document – is the execution of the document in whole or in part, while maintaining the appearance as if the document came not from the perpetrator, but from another person; b) forging a document – giving an existing authentic document by an unauthorised person a different content than the one originally possessed; and c) using a counterfeit or forged document as an authentic one - this is using the function of the document's legal meaning; Ewelina Rytelewska, Material Forgery of the Document, <https://thepolicereview.akademiapolicji.eu/article/01.3001.0053.9745/en > accessed on September 17, 2024

[19] Forgery < https://en.wikipedia.org/wiki/Forgery > accessed on September 17, 2024

[20] Vinita Kacher, Forgery, <https://www.lkouniv.ac.in/site/writereaddata/siteContent/20200406193943558 9Vinita_Kacher_LAW_OF_CRIMES_FORGERY.pdf > accessed on September 21, 2024

[21] In criminalising the act of forgery, this provision states, *Whoever, with intent to injure the rights or interests of another, or to obtain for himself or to procure for another any undue right or advantage:*

the basic elements for forgery offence. Nonetheless, like fraudulent misrepresentation offences, the act of forgery is criminalised through different proclamations.

On the other side, a close reading of articles 375 and 692 of the code reveals that the constituting ingredients of these two offences are distinct. Owing to this, the commission of one of these offences does not require or entail the commission of the other. This indicates that these two offences are designed for different purposes, and one of these offences could not be subsumed under the other. Beyond this general understanding, article 699 of the code specifically addresses that these offences are separate.

Moreover, the term 'concurrent offence' is known by different names in different legal systems; namely, mainly multiple crimes or multiple offences, cumulative charge, or criminal episode.[22] As Elias notes, concurrent offences are offences together charged and tried against the same defendant.[23] Further, Graven also observed that concurrence of offence comes into beings either when several unlawful acts are done in contravention of one or more articles of law, which he named concurrence of offences or material concurrence, or when one unlawful act is done

(a) falsely executes an instrument, such as a writing, a deed or any document or material means constituting proof of, or capable of proving, a fact material, or susceptible of becoming material, to legal proceedings; or
(b) makes use of the sign manual, signature, mark or stamp of another to make a false instrument; or
(c) counterfeits, an instrument. especially by changing his handwriting, by affixing to the instrument a false signature, mark or stamp, or by signing it in a false capacity purporting to certify its authorship; or
(d) falsifies an instrument, especially by modifying, deleting, adding or altering, in whole or in part, the name or signature of its author or the terms, figure, fact or material details it contains, [. . .].

[22] Yihenew Hailu, 'Concurrent Crimes in the Ethiopian Criminal Justice System: The Law and the Practice in Northern Showa Zone, Amhara Region (LLM thesis, Bahir Dar University School of Law, 2020, unpublished), P.12

[23] Elias N. Stebek, *Principles of Ethiopian Criminal Law, A Textbook*, (Revised Edition, Addis Ababa, 2022), P. 189

in contravention of several articles of law, which he labelled concurrence of provision or notional concurrence.[24]

In addition, Vestal and Gilbert argue that multiple crimes may arise from a single event when the criminal commits several crimes against one individual, the criminal commits multiple crimes against different individuals, a single event constitutes crimes under the laws of several jurisdictions – particularly in the case of USA, or a combination of these possibilities occurs.[25]As well, according to Ashworth, concurrent crimes may follow from either a single or successive act(s) or omission(s).[26]

In the case of Ethiopia, reading the pertinent article of the code reveals that three categories of concurrent offences are recognised in the Ethiopian criminal justice system, namely, material, notional and victim concurrent offences.[27] Material concurrence of offence, according to article 60(a) of the code, is committed when perpetrator successively commits several criminal acts that results the commission of two or more similar or different offences against similar or different interests while notional concurrence offence, as prescribed through Article 60 (b) of the code, is committed when a single criminal act simultaneously contravenes several criminal provisions. The third one, according to article 60(c) of the code, concerns a situation

[24] Philippe Graven, *An Introduction to Ethiopian Penal Law* (Haile Selassie I University, 1965), p. 163

[25] Allan D. Vestal and Douglas J. Gilbert, 'Preclusion of Duplicative Prosecutions: A Developing Mosaic, Missouri Law Review', Vol. 47, No.1, 1982, p. 4

[26] Andrew Ashworth (2010) Sentencing and Criminal Justice (5th ed., Cambridge University Press), p. 260 as cited in Leake Mekonen, 'Concurrence of Crimes under Ethiopian Law: General Principles vis-à-vis Tax Laws, Mizan Law Review', Vol. 17, No.1, 2023, p. 82

[27] Article 60 of the criminal code states that a person commits concurrent crimes,
a) in cases of material concurrence, when the criminal successively commits two or more similar or different crimes, whatever their nature; or b) in cases of notional concurrence, when the same criminal act simultaneously contravenes several criminal provisions or results in crimes with various material consequences; or c) in the case of a criminal act which, though flowing from the same criminal intention or negligence and violating the same criminal provision, causes the same harm against the rights or interests of more than one person.

in which several similar offences are committed against the protected interest of two or more victims through a single guilty act.[28]

Consequently, one can construe from the foregoing observation that the term concurrent offences conceptually denotes a situation in which a single guilt act is committed against a single protected interest in contravention of several provisions of criminal law simultaneously; or several guilt acts are committed against a single or several protected interests successively; or a single guilt act is committed against a several protected interest in contravention of the same provisions of criminal law.

On the other hand, the unity of offences is a contrary concept of concurrent offences. In essence, the term unity of offences denotes a concept-form that arises when the criminal activity consists of a single action or inaction or even several such manifestations that combine naturally or according to the will of the legislator, forming the content of a single offence.[29] This definition implies two forms of unity of offences; viz., natural and legal. The unity of offences made based on the will of the lawmaker is termed legal unity of offence, while natural unity of offences occurs from the nature of the offence, in which the unity component derives from the nature of the action or inaction and the unique result caused.[30]

In Ethiopia, the principle of unity of offences is enshrined under article 61 of the Code.[31] As stated by Graven, the drafter of the Ethiopian Penal Code of 1957, article

[28] Graven (n 24) 163; Dejene Girma, A Handbook on the Criminal Code of Ethiopia, 2013, p. 33, Leake, (n 26) 81, Yihenew (n 23) p.11

[29] Ivan Mari-Claudia, Unity of Offence (Summary of Doctoral Dissertation) <https://drept.unibuc.ro/documente/dyn_doc/oferta-educationala/scoala-doctorala/2018-2019/rezumat%20%C3%AEn%20limba%20englez%C4%83.pdf > accessed on August 20, 2024

[30] Ștefănuț Radu, Differentiation between the Concurrence of Offences and the Unity of Offence with Multiple Passive Subject, European Integration - Realities and Perspectives, Proceedings, 2021, p. 505

[31] This provision states,

(1) The same criminal act or a combination of criminal acts against the same legally protected right flowing from a single criminal intention or negligence, cannot be punished under two or more concurrent provisions of the same nature if one legal provision fully covers the criminal acts.

(2) Successive or repeated acts against the same legally protected right flowing from the same initial criminal intention or negligence constitute one crime; the criminal shall be punished for the said crime and not for each of the' successive acts which constitute it. Similarly, where the repetition or succession of criminal acts or the habitual or professional nature of a crime constitutes an element of

61 (1) of the code is all about an imperfect or apparent concurrence offence.[32] Moreover, as he put it, the content of imperfect concurrences of offences denotes offences consist of behaviour of one offence which is also an ingredient of other offences or imply a combination of acts, some of which are also material elements of other offences. He also adds that, in apparent concurrence, when one of the offences is committed, the other offence is also committed.[33] Put otherwise, apparent concurrence of offences is the combination of guilty acts which seems to violate several provisions but actually one criminal law provision engrosses them.[34] On top of that, it is also contended that guilt acts to be apparent concurrent offences it must be committed once, against the same protected right, and must be from a single criminal intention or negligence.[35]

All the same, article 61(1) of FDRE Criminal Code makes some improvement to article 60(1) of the 1957 Penal Code. To reproduce these two provisions of the codes for contrast,

Article 60(1) of the 1957 Penal Code states,

> *The same criminal act or a combination of criminal acts against the same protected right flowing from single criminal intention or act of negligence cannot be charged under two or more concurrent provisions of the same nature.*

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an ordinary or aggravated crime, or where the criminal act is pursued over a period of time, the criminal shall be regarded as having committed a single crime and not concurrent material crimes. (3) In cases where the criminal is regarded to have intention to commit a specific crime, in particular where he committed a crime on property to obtain unlawful enrichment or he made counterfeit currency, used it of put it into circulation or executed a forged document and used it, the subsequent acts performed by the criminal himself after the commission of the main crime for the purpose of carrying out his initial criminal scheme shall not constitute a fresh crime liable to punishment and are merged by the unity of intention and purpose.

[32] Graven (n 24) 163.

[33] Ibid

[34] Leake (n 26)81-116.

[35] Graven (n 24)163 – 165

Article 61(1) of the 2004 Criminal Code states,

> *The same criminal act or a combination of criminal acts against the same legally protected right flowing from a single criminal intention or negligence cannot be punished under two or more concurrent provisions of the same nature if one legal provision fully covers the criminal acts (emphasis added).*

A flick through these two provisions of these codes shows that the latter code adds an ingredient to the principle of unity of guilt and penalty to the content of the previous code, being fully covered by a single provision of the code. As per the later code, therefore, cases which fulfil the ingredients of article 61(1), committed once, against the same right, and flow from a single criminal intention or negligence, may be concurrent offences, if it is not fully covered by a single provision of the code.

Similarly, referring *expose des motif* of article 61(1) of the code also shows that it added an ingredient to the prior code's unity of guilt and penalty.[36] As a result, per the latter code's provision, unity of guilt may not always demand unity of penalty; rather, it demands so if only one legal provision could fully cover the criminal acts of the defendant. In the Ababa case,[37] the FSC Cassation Division also held the same position.

Leaving it as it is, the foregoing discussion shows that the concept of apparent concurrences of offences denotes the principle of unity of offence. As well, a close

[36] Legislative History of FDRE Criminal Code of 2004, p. 38

[37] Ababa Tefera v. Federal Public Prosecutor, (FSC, 3 Oct. 2017, Cassation Criminal Case No. 134549), Cassation Division Decisions Book, Vol. 22, p. 178. The same position is also held in different cases; Mamay Abara v. Tigray Regional State Justice Bureau (FSC Cassation Division, Criminal Case No. 132492, March 1, 2017, unpublished); Dejene Mokenin v. Federal Public Prosecutor (FSC Cassation Division, Criminal Case No. 119159, 27 July 2016), Cassation Division's Decisions Book, Vol. 20, p. 353; Federal Public Prosecutor v. Mu'az Desta, FSC Cassation Division (Criminal Case No. 104637, January 2, 2017), Cassation Division's Decisions Book, Vol. 21, p. 332

look at article 61(1) of the code reveals that it talks about the natural unity of offences in the Ethiopian legal system.

Linked to the issue under discussion, the point worth discussing at this point is article 61 (3) of the code that highlights the principle of non-punishable acts of execution preceding or following an offence or ancillary (subordinate) acts. This principle is provided as an exception to the material concurrence of offences.[38] As per this principle, when a person with a single end view commits several offences closely linked one to another, a guilty mind is deemed to have concerning the main offences but not to the act done thereafter in furtherance of the initial criminal scheme.[39] As stated earlier, like article 61(1) of the code, which added some improvement to article 60(1) of the Penal Code, article 61(3) of the code also made some modifications to article 60(3) of the Penal Code. According to the Penal Code, three ancillary acts were provided exhaustively, while the Criminal Code provides them illustratively. These ancillary acts, which were provided exhaustively but now illustratively, are crimes against property, counterfeiting currency and forgery of documents.

Similarly, a close reading of this provision suggests that it is all about a legal unity of offences. As far as this sub-provision covers legal unity, it could be argued that the lawmaker could provide an exception to it by following any appropriate approach. In Ethiopia, material forgery offences are criminalised in Book IV, Title I and Chapter I of the code, while fraudulent misrepresentation is essentially criminalised in Book VI, Title I and Chapter III of the code. Needless to state, these two offences are criminalised in different books of the Criminal Code. Owing to this design of the code and also for clarity purposes, article 699 of the code comes up with an unequivocal limitation to the principle of non-punishable acts of execution

[38] Elias (n 23) 197
[39] Graven (n 24) 170

preceding or following an offence of article 61(3) of the code.[40] Consequently, article 699 of the code is designed to provide a clear exception to the principle of non-punishable acts of execution preceding or following an offence.[41]

3 Summary of the Selected Cases and Holding of the FSC Cassation Division

In this section, the summary of fraudulent misrepresentation and material forgery offences' decisions of the division is provided, along with the holding of the division. As a result, the material facts and the division's positions on the four cases of these offences, which the FSC Cassation Division have heard and decided at different times, are summarised as follows.

[40] Nonetheless, examining some decisions of the division reveals that they have not yet developed clear jurisprudence on article 61(3) of the code and reached a common consensus on the concept of this provision. To substantiate this argument, reading Abdulfata Kadir and Biniyam Abiy v. Oromia Attorney General Case is adequate. In this case, the defendants were apprehended at Bishan Guracha town while they were transporting illegal coffee from Hawassa to Addis Ababa using a forged pass permit and certificate of competency. They were charged for using forged pass permit and certificate of competency under article 23(1(A, B, C), 2 & 3) of Corruption Offenses Proclamation No. 881/2015 and for transporting illegal coffee under article 19(10) of Coffee Marketing and Quality Control Proclamation No.1051/2017. The West Arsi Zone High Court, in its first instance jurisdiction, convicted and sentenced the defendants for both offences. Being unsuccessful in appellate courts, the defendants took their complaints against the conviction and sentence to the FSC Cassation Division. In the Appellate Courts and the FSC Cassation Division, the defendants argued against their conviction and sentence using article 61(3) of the code and some decisions of the FSC Cassation Division. Nonetheless, the FSC Cassation Division, three to two, confirmed the lower courts' conviction. In confirming the lower courts' conviction, the majority opinion argued that to benefit from article 61(3) of the code, the defendants should prove that transporting illegal coffee is the extension of using a forged pass permit and certificate of competency. On the other hand, the dissenting opinion argued that the defendants used forged pass permits and certificates of competency to transport illegal coffee. Owing to this, they argued that since a forged pass permit and certificate of competency were employed to transport illegal coffee, the defendants should only be convicted and sentenced for transporting illegal coffee; Abdulfata Kadir and Biniyam Abiy v. Oromia Attorney General FSC Cassation Division (Criminal Case No. 226130, 5 November 2021, unpublished)

[41] This provision states: *Where there is misrepresentation of any kind, committed by means of a forgery, the relevant provisions shall apply concurrently*

3.1 Zakarias G/Tsadik *v.* Federal Public Prosecutor[42]

This case was commenced in the Federal High Court. The fact of the case was that the defendant was authorised to renew the title deed of the victim's building. Nonetheless, the principal (the victim) revoked the power of attorney, and the Federal First Instance Court also attached the building of the victim because the defendant was found while he was attempting to sell the victim's building using the power of attorney, which he had obtained to renew the title deed. Nonetheless, the defendant sold the victim's building using a forged court order that showed the attachment was withdrawn and also using a forged power of attorney document. As a result, the defendant was indicted with an aggravated fraudulent misrepresentation offence under article 696 (C) of the Criminal Code and concurrently for using forged instruments offence under article 378 of the same code.

The Federal High Court, after examining the case, convicted and sentenced the defendant for both offences. Being unsuccessful in his appeal to the FSC, the defendant lodged his complaint with the division. The division examined his complaint, *inter alia,* from the perspective of article 699 of the code and confirmed the lower Courts' decision. In confirming the lower Courts' decisions, the division held that the concurrency of offences under article 696 (C) and 378 of the code is vividly understood from article 699 of the same.

[42] Zakarias G/Tsadik v. Federal Public Prosecutor, (FSC Cassation Division, Criminal Case No. 85237, 5 April 2013), Cassation Decision Book, Vol. 15, p. 355

3.2 Endashaw Yilmaa *v.* Federal Public Prosecutor[43]

This case began in the Federal High Court; its material fact states that the defendant approached the victim by making himself a facilitator, who could provide the victim a certificate of divorce following all procedures. Convincing the victim, he was paid Birr 40,000 but delivered her a forged certificate of divorce. Of this reason, he was charged with two concurrent offences; viz., fraudulent misrepresentation offence for taking birr 40,000 by misrepresenting his status and providing forged certificate of divorce to the victim under article 692 (1) of the code as well as for Forged Certificates, providing counterfeiting certificate of divorce, offence against article 385(1(A)) of the same code concurrently. At the Federal High Court, he was convicted and sentenced as per the charge. Being unsuccessful in his appeal to the FSC, the defendant lodged his complaint with the division. The division, after examining his complaint, *inter alia,* from the perspective of articles 60, 61, 63 and 699 of the code, confirmed the lower courts' conviction of the defendant under article 696 (C) as well as article 378 of the code. In confirming the lower Courts' conviction, the division held that article 61(1) of the code shows that the principle of unity of guilt and penalty comes into the picture when different criminal acts are committed with a single criminal intention or negligence. It also added that, against this principle, when the lawmaker provides that the concurrency of offences committed with a single mental state, the case will be entertained as per articles 60 and 63 of the code. Lastly, in confirming lower courts' decisions, the division held that, since article 699 of this code plainly provides the concurrency of forgery and misrepresentation offences, no basic error is committed by the lower courts.

[43] Endashaw Yilmaa v. Federal Prosecutor, (FSC Cassation Division, Criminal Case No. 104715, 11 April 2013), Cassation Decisions Book, Vol. 17, p. 188. Nonetheless, some may argue that the fact of this case is not similar to the situation of Article 699 of the code since the defendant misrepresented the victim by misleading her believe that he has that power, and then he brought her a forged divorce document. Nonetheless, the fact of the case is that the defendant committed the offence of fraudulent misrepresentation accompanied by forged documents. Article 699 of the code makes fraudulent misrepresentation accompanied by forged documents a material concurrence offence. Thus, this author argues that arguing against the relevancy of article 699 of the code for this case is not substantial.

3.3 Federal Attorney General v. Mu'az Dasta[44]

The Federal High Court entertained this case in its original jurisdiction. As indicated in the decision, to succeed the properties of those whom he has no right to succeed, the defendant took a certificate of succession by providing a false plea supported with an oath to the court to change the name of his maternal grandfather, which the court changed the name per the plea. For this reason, the defendant was charged with committing an aggravated crime of fraudulent misrepresentation contrary to article 696(C) of the code by providing a false petition supported with an oath to the court to change the name of his maternal grandfather and taking a certificate of succession. He was also concurrently charged for use of forged instruments contrary to article 378 of the code for providing to the court to succeed those whom he had no right to succeed by using a certificate of succession he obtained by deceiving the court. The Federal High Court convicted and sentenced the defendant for both counts. Submitting his grievance to FSC, the lower court decision was reversed, and the defendant was acquitted. Grieved with the defendant's acquittal, the Federal Attorney General took its complaint to the division. The division, after examining the applicant's complaint, convicted the defendant only under Article 696(C) of the code. Concerning the second count, nonetheless, it held that since the defendant committed both acts with a similar mental state and one result, the second count is subsumed within the first count as per article 61(3) of the code. All the same, in this case, the division stated nothing about article 699 of the same code.

[44] Federal General Attorney v. Mu'az Dasta, (FSC Cassation Division Criminal Case No. 104637, 2 January 2017), Cassation Decisions Book, Vol. 21, p. 332

3.4 Abiy Dibaba v. Federal Ministry of Justice[45]

Abiy was charged with material forgery of public organisation documents as well as aggravated fraudulent misrepresentation concurrently at the Federal High Court. The fact of the case was that the defendant withdrew Birr 123,400 from Dashen Bank by using a forged cheque and Identity Card prepared in another person's name. For this act, he was indicted under article 696(C) of the code for withdrawing other person's money from the Bank using forged documents while under article 23(1(A, B, C), 2 & 3) of Corruption offences Proclamation No. 881/2015 for using forged Identity Card. The defendant was convicted and sentenced as per the charge at the Federal High Court. Being unsuccessful in his appeal to the FSC, the defendant took his grievance to the FSC Cassation Division. The division, after examining his complaint, altered the lower courts' decision by holding that the defendant's acts for which he was charged under article 23(1(A, B, C), 2 & 3) of Corruption Offences Proclamation No. 881/2015 was committed to facilitate the commission of the acts for which he was charged under article 696(C) of the code. Continuing its analysis, it stated that the lower courts have committed a fundamental error of law in convicting and sentencing the defendant under both counts, while he should have been convicted and sentenced only under Article 696(C) of the code. Per this argument, the division reversed the lower courts' conviction and sentence for using a material forgery offence.

[45] Abiy Dibaba v. Federal Ministry of Justice, FSC Cassation Division (Criminal Case No. 234082, 5 July 2023) unpublished. Nonetheless, since this case is unpublished, some may question whether it has a binding effect on the lower courts like the published one. This doubt may be cleared by a simple reading of Article 10(2) of Proclamation No.1234/2021. This sub-article states that '*interpretation of law rendered by the Cassation Division of the FSC with not less than five judges shall be binding from the date the decision is rendered.'* This provision makes it clear that the binding effect of cassation decisions commences, whether it is published or not, from the date it is pronounced. This to say that once it had been decided, Cassation Division's decision unconditionally become a law.

4. **Analysis of the Case in Light of Ethiopian Law**

As was indicated earlier, the Criminal Code has enshrined the principle of concurrent offence on the one hand, and the principle of unity of offence along with its exception, particularly in the case of fraudulent misrepresentation offences committed through counterfeited documents, on the other hand. Put in a nutshell, the code makes a fraudulent misrepresentation offence committed through counterfeited documents, material concurrence offences. Nonetheless, the division has been holding an inconsistent position on the (non)concurrency of these offences by misapprehension of a clear provision of the code, particularly articles 61(3) and 699 of the code. Wording it differently, the division has not yet held an unwavering position on the (non)concurrency issue of these two offences to date. Owing to this, the division has been holding contradictory positions on the issue of the material concurrence of fraudulent misrepresentation and material forgery offences.

Nonetheless, from the outset, this author opines that the position the division held in Zakarias' and Endashaw's case is a right reading of article 699 of the code, while the one held in Mu'az and Abiy cases is erroneous. As was argued, the (non)concurrency of fraudulent misrepresentation offences and material forgery offences issue has been vacillating the position of the division from one corner to the opposite. Needless to state, since its decisions are considered as a law, the division's vacillation of position on a particular issue has a far-reaching consequence on the administration of justice by disturbing the certainty and predictability of judicial decisions at all levels.

A close review of the interpretation held by the FSC Cassation Division in the above abridged cases reveals that one of the reasons that vacillates the division's position is the improper use of the rule of statutory interpretation.[46] Strauss opined that the

[46]Emphatically, there is no single and common rule of statutory interpretation across the jurisdictions. It is argued that Courts differ on whether they even admit that an issue of interpretation exists or that

problem of interpretation of law only arises when a lawyer has a problem before him and if the language of the statute is not clear or direct on the point, but if he finds that the language of the statute clear and appears to give an exact answer to his problem, then he needs go no further.[47] Elias also wrote that, where the law is clear, the issue of interpretation should not arise; the power of the court to interpret the law is only allowed in case of doubt.[48] To put it otherwise, if the lawmaker has done their job well, the inherent power of the judiciary, particularly those of the continental legal system, is to apply a law as per the letter and spirit of the lawmaker. Nonetheless, applying 'law as it is' does not require absolute clarity of law. In this line of argument, Dressler held that since the doctrine of statutory clarity is itself an indefinite concept, absolute clarity of law is not required; rather, it is to be the one that provides a person of ordinary intelligence a fair notice of what is prohibited.[49]

Coming back to the issue under discussion, even skimming article 699 of the Criminal Code makes it clear that article 61(1 & 3) is not applicable when any kind of misrepresentation offence is committed by employing forged documents. Article 699 of the code unequivocally states that 'where there is misrepresentation, of any kind, committed by means of a forgery, the relevant provisions shall apply concurrently'. This provision is pretty clear, and it needs only to be enforced but not interpreted. That is to say, in principle, where the words of the act of the parliaments are clear, there is no room for applying any principle of interpretation.[50] In fitting

there is more than one possible way to read the statute. All the same, it is thought that a general distinction can be made between common law countries and civil law countries. It is also accepted that courts in common law countries tend to pay close attention to the facts and exercise more freedom in their legal reasoning while courts in civil law countries tend to take greater interest in the exact wording of the applicable rule and are generally stricter in their legal reasoning; Frans Vanistendael, 'Legal Framework for Taxation' in Victor Thuronyi (ed.), *Tax Law Design and Drafting* (vol. 1, International Monetary Fund, 1996) < https://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch2.pdf > accessed on December 6, 2024

[47] Peter L. Strauss, 'On Interpreting the Ethiopian Penal Code, Journal of Ethiopian Law', Vol. V - No. 2, 1968, p. 376

[48] Elias (n 23)45

[49] Joshua Dressler, *Understanding Criminal Law* (7th edition, Matthew Bender Company, 20115) chapter 5

[50] George Krzuczonowicz, Statutory Interpretation in Ethiopia, Journal of Ethiopian Law, Vol. 1, No. 2, 1964, p.318

this line of argument, in Zakarias'[51] and Endashaw's cases, the division itself held that since article 699 of the Criminal Code is pretty clear, the inherent power of the court is to apply it. In Endashaw's case,[52] particularly, the division held that the conviction of the defendant concurrently for forgery and misrepresentation offences, since the lawmaker provides the concurrency of these two offences, the lower court had not committed a basic error of law.

One of the relevant maxims of interpretation is that the special prevails over the general rule. Nonetheless, the position the division held in the Mu'az's and Abiy's cases manifests that the division misapprehended this maxim. Needless to say, the code has two main parts, namely, the general and the special parts. The general part provides general principles of criminal liability, while the special part defines crimes along with their ingredients and penalties. As a result, the structure of the code itself tells us, in case of conflict, if any, the provision of the code in the special part prevails over the provision in the general part of the code. In strengthening this line of argument, Strauss argued that the maxim of codified law's interpretation, particularly the Ethiopian Criminal Code, is that provision of the special part prevails over that of the general part.[53] In the structure of the Code, article 63 is a general provision while article 699 of the code is a special provision as well as article 699 of the code is an exception to article 63(3) of the code. Nonetheless, in Abiy case the division wrongly held that article 63(3) and 699 of the code were designed for different purpose and, consequently, held that classifying these provisions into general and special is not a water holding argument.

Inconceivably, in the Abiy case, it was held that article 699 of the Criminal Code is designed to show that article 61 of the code is not applicable in cases where the committed acts could not be covered by a single provision of the criminal law.

[51] Cassation Decision Book, vol.15, (n 42), p.358
[52] Cassation Decision Book, vol.17, (n 43), p.189
[53] Strauss (n 47)385

Nonetheless, article 61(1) of the code itself provides that in case the committed acts could not be covered by a single provision of criminal law, the acts will be concurrent offences. Owing to this, if the intention behind Article 699 of the code is what the division held, this provision is superfluous. Nonetheless, interpreting a given provision in a way that defeats the very purposes of the other provision goes against the doctrine of judicial interpretation.

Furthermore, even though the division should have come up with convincing reasons why the lawmaker included article 699 in the special part of the code, in Mu'az's and Abiy's case, it has failed to address the rationale behind this provision. This is because in statutory interpretation, the primary role of the judiciary is to attempt to discover the real intention of the lawmaker. In these cases, however, the division did nothing to discover the legislative intent behind this provision; rather, it only rushed to transcribe its whim, stating that this provision is designed for a different purpose and goal.

Nonetheless, the author believes that the rationale behind Article 699 of the code is the interest attached to protecting the sanctity of documents in private business transactions as well as public affairs. Put otherwise, it is asserted that the importance placed on the reliability of written documents justifies the special offences of forgery.[54] Moreover, as was indicated, these offences have evolved to different purposes and, thus, they are two separate offences. For this reason, to settle the dusk of confusion, article 699 of the code is designed in a way that the act of deceiving by employing counterfeited documents constitutes material concurrent offences of misrepresentation and forgery. Nonetheless, in Mu'az's and Abiy's case, the division decided contrary to the letter and the spirit of article 699 of the code without considering the rationale behind this provision.

[54] Jonathan (n 14) 312

The other rationale behind this provision is Aristotle's principle of justice that requires equals should be treated equally, and the same is true with unequals.[55] Accordingly, treating individuals in the same conditions similarly while treating differently those who are different in ways that are relevant to the situation in which they are involved. Besides, this principle suggests that the criminal punishment must be proportional to the criminal disposition of the offender. In line with this principle of justice, the criminal disposition of a person who is found only using forged documents and a person who defrauds others by employing forged documents is not the same. Moreover, punishing those who defraud others by employing forged documents only for offences of fraudulent misrepresentation but not additionally for using forged documents incentivises all who get forged documents to employ them to defraud others. Nonetheless, the very purpose of criminal law is not to incentivise people to commit further offences rather to discourage them. For this reason, in Ethiopia, the act of material forgery and fraudulent misrepresentation offences are criminalised independently under different provisions of its criminal law, and it makes the act of employing forged documents to defraud a different offence.

On top of that, the reason that distances the FSC Cassation Division from the plain letter and spirit of article 699 of the code, though not clearly stated in the decision, is its purport to have lawmaking power. The reluctance of the division either to apply a plain law as it is or to interpret beyond its spirit manifests its purport to install a new law. Nonetheless, its purport to have this power is tantamount to eroding the principle of the separation of powers. Montesquieu's doctrine of the separation of

[55] Manuel Velasquez et al., Justice and Fairness, < https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/> accessed on September 17, 2024

powers[56] is designed to circumvent the tyranny of one state organ over the other state organ.[57]

Thus, according to this principle, it is argued that the roles of the judiciary, of the legislature and the executive must be carefully distinguished, be made independent of each other's and each of these organs is required to exercise its power only within its jurisdiction. Furthermore, it is maintained that, whether the matter before them is civil or criminal, courts ought to be courts not rule-makers.[58] The background design of judicial power is also hinged on the principle, particularly in criminal cases, where the courts should rely and interpret only the law, and that judicial creation of law is an abuse of power to be sternly avoided. Besides, it is also opined that the legislature determined the law while the courts merely applied it to the facts of cases which come before them.[59] This suggests that once the lawmaker enacts plain law, the job of the judicial sector is to apply it.[60]

This truism is not an exception to the Ethiopian case. In fitting the described principle, the FDRE Constitution stipulated the scope and power of the legislative, executive and judicial organs.[61] According to this constitution, the legislative power has not been entrusted to a judicial organ. Owing to this, in the Ethiopian context, some scholars argue that the division has not given the power to change or enact laws. Simeneh, for instance, argued that the power of the division does not include

[56] Max Radin, The Doctrine of the Separation of Powers in Seventeenth Century Controversies, University of Pennsylvania Law Review, < https://www.jstor.org/stable/3308798 > accessed on 02 February 2024

[57] Jeremy Waldron, Separation of Powers in Thought and Practice? Boston College Law Review, Vol. 54:433, 2013.

[58] Strauss (n 47) 421; **ጌታሁን** (n 9)177

[59] Strauss (n 47) 385

[60] **ተክለኃይማኖት** (n 11) 229

[61]This fact can easily be understood from article 50(2), 55, 77, 78 and other pertinent provisions of the FDRE Constitution.

changing the law, either in word or spirit, but rather to interpret it in an approach that sheds light on its application.[62]

As was alluded to, regarding the act of using material forgery to commit a fraudulent misrepresentation offence, article 699 of the code provides a clear limitation to the principle of non-punishable acts of execution preceding or following an offence. As far as the law is clear in word and spirit, the rule is to apply the law as it is. Reluctance to follow this rule is against the doctrine of separation of powers and an appetite to be a tyrant. The position the FSC Cassation Division held in Mu'az's and Abiy's case by disregarding article 699 of the code demonstrates not only its misapprehension of article 61(3) of the code but also the absolute desire of the division to grip binary powers and dishonestly circumvent the doctrine of separation of powers.

Besides, through its position held in Mu'az's and Abiy's case, for all practical purposes, the division repealed or at minimum amended article 699 of the code. Nonetheless, since the power of lawmaking is within the competence of the lawmaker in Ethiopia, as once Mahari[63] asserted, the division's repealing or amending a law is something beyond the interpretation of law and an action which amounts to invading the territory of the House of People's Representatives.

Similar to the other argument of the author,[64] the FSC Cassation Division's position lacks jurisprudential consistency on the same issue.[65] However, the uniform

[62] Simeneh Kros, 'Conspicuous Absence of Independent Judiciary and Apolitical Court in Modern Ethiopia, Mizan Law Review', Vol. 15, No. 2, 2021, P.408

[63] Mahari, (n 11) 45

[64]Fesseha Negash, 'Appraising the Interplay of Ethiopian Cassation Division's and House of Federation's Jurisprudence on (In)applicability Discourse of Period of Limitation to Rural Land: Case Analysis, Hawassa University Journal of Law', Vol. 5, July 2021, pp. 195 - 212

[65] It is argued that the principle that the like cases should receive like treatment is one of the most fundamental principles of any liberal theory of justice. Indeed, some philosophers are of the view that it is the most fundamental principle. It also added that without jurisprudence, it is completely impossible for that principle to be respected. Council of Canadian Administrative Tribunals, Conference - June 2006, Jurisprudence and Consistency, < https://www.ccat-

application and interpretation of legal principles should have been one of the features of the division's decisions. Since one has consistency when cases with like facts produce like results,[66] it is argued that consistency is a *sine qua non* to safeguard the citizen against arbitrariness by the government as a whole and, in particular, by its judges.[67] Conversely, against this maxim, the division held contradictory positions in Zakarisa's and Endashaw's case on one hand and in Mu'az's and Abiy's case on the other hand.

5. Conclusion and Recommendations

Through the analysis of four decisions of the FSC Cassation Division, an attempt is made to show that the position the division has held regarding the issue of (non)concurrency of fraudulent misrepresentation and material forgery offences is inconsistent and controversial. The controversy arises not from the vagueness of the Ethiopian criminal law on this issue, but rather from the indecisive position held by the division. The Ethiopian Criminal Code, at article 699, clearly states that the act of deceiving others using forged documents constitutes both fraudulent misrepresentation and material forgery offences. In other words, it constitutes offences of material concurrence. Consistent with this provision, the division adjudicated and decided as such in Zakarias' and Endashaw's cases. Consequently, in the author's view, the position upheld in Zakarias' and Endashaw's cases is the correct interpretation of article 699 of the Criminal Code.

However, later in Mu'az's and Abiy's cases, the division adopted a different stance, which effectively amounts to repealing or, at a minimum, amending article 699 of the code. In doing so, the division oversteps the jurisdiction of the lawmaker and contradicts its previous position without providing convincing justification by thoroughly examining articles 61(3) and 699 of the code. Furthermore, it disregards

ctac.org/CMFiles/Ron%20Ellis/13.JurisprudenceConsistency-CCATconferenceJune2006.pdf > accessed on December 3, 2024

[66] Ibid

[67] Strauss (n 47) 385

its earlier position in the Zakarias' and Endashaw's cases without clearly revising it or indicating that it held a different stance. Thus, the author argues that the position held by the division in Mu'az's and Abiy's cases results from a misapprehension of articles 61(3) and 699 of the code.

As a result, the author contends that granting the division unrestricted discretion to alter its previously held position and deviate from the clear letter and spirit of the law is not the right decision. Therefore, there is a need for legislative intervention regarding how to revise its past positions and the implications of the division's holdings that contradict the clear letter and spirit of the law in the lower courts. Hence, the Federal Courts' proclamation should be revised to provide clear rules on the revision of previously held positions and the impact of the division's decisions that disregard clear and appropriate law. In other words, the outcome of the division's contradictory interpretations must be resolved legislatively.

On the other hand, the division must develop a consistent jurisprudence on the procedure for revising its prior holdings. Moreover, it should also establish a clear jurisprudence that prevents the division from encroaching on the jurisdiction of the lawmaker. Lastly, it is recommended that the FSC arrange annual workshop(s) on the roles of the division and its practices.

Conflict of Interest

The author declares no conflict of interest.

Does Ethiopia Have a Workable Transitional Justice Framework? Appraisal of the Challenges of Sustainable Peacebuilding

Befekadu Dereba Debaba ♣

Abstract

Enduring peace in Ethiopia through transitional justice is critically challenged by the lingering effects of human rights violations in the past and present. This article examines how Ethiopia's transitional justice laws and policies provide a workable framework to address the unresolved and ongoing issues of conflict and injustices, characterised by systemic impunity and deep-seated grievances that undermine the peacebuilding efforts. A legal and historical analysis of Ethiopia's transitional justice approach demonstrates that the absence of effective truth-seeking and restorative justice mechanisms perpetuates a cycle of retribution and hinders genuine reconciliation. The article argues that achieving sustainable peace necessitates a strategy that balances justice and reconciliation. It emphasises the importance of establishing credible accountability measures, fostering inclusive dialogue, and implementing institutional reforms to break the cycle of human rights violations and impunity. Therefore, Ethiopia's experience highlights that the ability to navigate the complexities of seeking justice while promoting healing will determine its path to a more peaceful state through context-specific approaches tailored to achieving sustainable peace.

Keywords: Ethiopia, Transitional Justice, Peace, Impunity, Reconciliation

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1. Introduction

Transitional Justice (TJ) mechanisms, particularly establishing international and national tribunals, are designed to deliver justice for egregious human rights violations in post-conflict societies. The International Criminal Tribunal for Rwanda (ICTR) or Special Court for Sierra Leone (SCSL) of the national hybrid courts are significantly referred as lessons in the post-conflict state reconstruction through human rights accountability and reconciliation process. However, their effectiveness in promoting sustainable peace and the consolidation of democracy remains a subject of intense scholarly debate. Critics argue that pursuing retributive justice through tribunals may inadvertently undermine fragile peace processes.[1] This potential tension is often framed as a trade-off between immediate peace and long-term justice.[2] Though both peace and justice are vital for rebuilding a post-conflict society, achieving them can be an agonising balancing act, where sometimes pursuing one comes at the cost of the other. This dilemma remains even after a peace deal is signed. Pursuing accountability by punishing perpetrators and building systems to prevent future atrocities can sometimes backfire.[3] It might demotivate cooperation on building a unified future, potentially destabilising the peace process as disgruntled factions exploit this discontent to reignite conflict.[4]

Addressing this dilemma is relevant in contemporary Ethiopia, which has made efforts and has been working to deal with its human rights abuses during the Imperial, Derg, and EPRDF regimes. The Derg regime's approach to transitional justice was marked by the extrajudicial execution of 60 former imperial officials,

[1] Snyder, J., & Vinjamuri, L. (2003). "*Trials and Errors: Principle and Pragmatism in Strategies of International Justice."* International Security, 28(3), 5–44.
[2] William Zartman, 'Negotiating Forward- and Backward-Looking Outcomes' in William Zartman and Victor Kremenyuk (eds), *Peace versus Justice: Negotiating Forward- and Backward-Looking Outcomes* (Rowman & Littlefield 2005) pp. 18-26
[3] Loyle, C. E., & Davenport, C. (2016). "Transitional Injustice: Subverting Justice in Transition and Postconflict Societies." Journal of Human Rights, pp. 126
[4] Jeffrey Pugh, 'Eroding the Barrier between Peace and Justice: Transitional Justice Mechanisms and Sustainable Peace' (University of Massachusetts Boston) 4

land reform by returning land to the tiller, abolishing feudalism and confiscation of feudalist economic bases, and a complete disregard for civilian rule.[5] The EPRDF regime pursued retributive justice through the "Red Terror" trials, which were widely criticised as victor's justice, by establishing a Special Prosecutor's Office to ensure the accountability of Derg officials.[6] In response to political reforms, the post-2018 Ethiopian government has undertaken several initiatives aimed at addressing historical injustices, grievances, and severe human rights violations. These measures encompassed symbolic acts, such as the issuance of an official apology,[7] and the establishment of key institutions, including the Reconciliation Commission[8] and the Identity and Boundary Commission. Furthermore, the government enacted progressive legislation, notably Proclamation No. 1089/2018[9], which outlined procedures for granting and implementing amnesty, and the subsequent Amnesty Proclamation No. 1096/2018, which aimed to comprehensively regulate amnesty grants.

These efforts were complemented by attempts to pursue institutional reforms conducive to democratic consolidation and, to a lesser extent, to hold former leaders accountable. However, despite these initiatives, the government's approach has been criticised for its limited effectiveness in achieving genuine reconciliation and addressing past injustices.[10] Indeed, the country has subsequently experienced a devastating armed conflict, highlighting the persistent challenges in navigating Ethiopia's complex history.[11] Scholars argue that the government's transitional

[5] Tiruneh, Andargachew (1993). *"The Ethiopian Revolution 1974–1987: A Transformation from an Aristocratic to a Totalitarian Autocracy."* Cambridge University Press.
[6] Kjetil Tronvoll, Charles Schaefer and Girmachew Alemu Aneme, *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (James Currey 2009) pp. 45–47.
[7] The Government's Approach to Past Human Rights Violations Needs to Be Transparent - Addis Standard' (Addis Standard, 25 January 2019) <https://addisstandard.com/oped-the-governments-approach-to-past-human-rights-violations-needs-to-be-transparent/> accessed on January 18 2025.
[8] *Réconciliation Commission Establishment Proclamation* No. 1102/2018,
[9] *The Procedure of Granting and Implementing Amnesty*, Proclamation No. 1089/2018,
[10] S Meron T. Gebretsion (2023). *"The Politics of Memory and Justice in Ethiopia: From the Derg to the Present*." Journal of Eastern African Studies, pp. 245-264.
[11] Jon Abbink, '*Ethiopia:* The Fragile State and the 2020/21 War' (2021) 120(480) African Affairs 385.

justice efforts have been hampered by a lack of inclusivity, transparency, and a coherent strategy for addressing the root causes of conflict.[12] The focus on selective measures, without a broader framework for truth-telling and restorative justice, has contributed to ongoing tensions and undermined efforts to build lasting peace.

The post-2018 reforms of TJ in Ethiopia are squeezed between post-conflict reconstruction promises and continued civil wars and conflicts. After decades of internal conflicts and widespread human rights violations, the TJ reforms of the post-2018 government confronted these historical challenges with the promise of achieving sustainable peace.[13] However, in this reform period, the country has endured a series of deadly civil wars and armed conflicts.[14] These complexities entangle not only the post-conflict reconstruction promises of the reform but also complicated human rights grievances, competing historical issues, and conflicts. This article explores these historical issues along with the TJ legal and policy frameworks of the past and present regimes. Accordingly, it analyses Ethiopia's TJ laws and policies along with their complex contexts and historical issues; thereby, it highlights TJ limitations to provide a workable legal and policy framework that ensures human rights accountability, fosters reconciliation, and enables sustainable peace.

For this purpose, the article employs a doctrinal legal analysis of the Ethiopian TJ approach, along with a critical exploration of the past and present governments' efforts and the issues they encounter using primary and secondary sources. It also draws comparable and relevant experiences from other post-conflict nations while

[12] Sarah Vaughan, '*Ethiopia: The Limits of Elite-Driven Peacebuilding'* (2020) 119(476) African Affairs 365.
[13] Transitional Justice Policy of the Federal Democratic Republic of Ethiopia (Ministry of Justice, December 2022).
[14] UN Human Rights Council, *Oral Update on Ethiopia* (A/HRC/55/CRP.3, 5 March 2025) para 21 (noting "persistent impunity for atrocities in Tigray and Oromia"). Arah Vaughan, 'The Impossible Balance: Ethiopia's Transitional Justice in the Shadow of War' (2024) 12 African Conflict & Peacebuilding Review 89, 93-95

bringing on insightful experiences and analysing the potential tensions observed between pursuing accountability for human rights violations and achieving a sustainable peace process. Based on Ethiopia's experience, this article contributes to the significance of a transitional justice legal and policy framework to navigate the complexities of seeking justice while promoting healing, as a sustainable path to a peaceful state construction. In the subsequent sections, the article draws on a theoretical approach and comparative lessons and then critically discusses the past and present government's strategies to TJ, highlighting their challenges. Finally, it analyses the underlying complexities and possible options of Ethiopia's TJ legal and policy framework to embrace justice and reconciliation together.

2. TJ Approaches and Comparative Experiences in Balancing the Pursuit of Justice with the Imperative of Peace

TJ is a process that societies use to address widespread human rights violations and build a more just and peaceful future after conflict or repression. According to definitions provided by the United Nations[15] and the African Union[16], TJ involves a range of legal and social mechanisms to confront past injustices, promote reconciliation, and prevent future abuses. At its core, TJ focuses on four key pillars: truth-seeking, accountability, reparations for victims, and guarantees of non-repetition through institutional and societal reforms. However, TJ is not a uniform process; its mechanisms should adapt to historical, cultural, and political realities. While prosecutions are crucial, other approaches, such as truth commissions like South Africa's TRC[17] or community-based justice like Rwanda's Gacaca courts, may be necessary to achieve sustainable peace.

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[15] United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (March 2010) <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf accessed> accessed on October 13, 2024

[16] African Union, *Transitional Justice Policy* (2019) <https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_framework_eng_web.pdf> accessed on October 15, 2024.

[17] Truth and Reconciliation Commission of South Africa, Truth and Reconciliation Commission of South Africa Report (vol 1, 1998)

Ethiopia's ongoing conflicts and human rights abuses underscore the urgency of a context-specific TJ framework. However, as comparative experiences show, TJ faces two major challenges: (1) the limitations of relying solely on legal mechanisms like international tribunals, and (2) the political obstacles that undermine accountability and reconciliation. The following subsections explore these challenges, drawing lessons from Rwanda, the former Yugoslavia, and South Africa to highlight the need for a holistic TJ approach.

2.1. The Role of International Criminal Tribunals and Complementary Measures in TJ

The International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) were initially hailed as groundbreaking institutions for securing accountability and peace after brutal conflicts. These tribunals represented a significant step in international justice; they held perpetrators of genocide, war crimes, and crimes against humanity accountable.[18] However, over time, doubts have emerged regarding the effectiveness of relying solely on criminal prosecutions to address these crimes. Critics argue that legal responses alone are "too fragile and incomplete" to fully address the complex societal, political, and cultural issues that often arise in the aftermath of mass atrocities.[19] While international tribunals like ICTY and ICTR contributed to accountability, they were not the only mechanisms employed in these contexts. Both Rwanda and the former Yugoslavia adopted a range of complementary measures to address the legacies of violence and to promote reconciliation.

[18] United Nations Security Council Resolution 827 (1993) Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993) UN Doc S/RES/827;
[19]Security Council, Resolution 955 (1994), Statute of the International Criminal Tribunal for Rwanda (8 November 1994) UN Doc S/RES/955.

In Rwanda, the ICTR was established to prosecute high-level perpetrators of the 1994 genocide.[20] However, the Rwandan government also implemented domestic mechanisms to address the immense scale of the crimes. The Gacaca courts, a community-based justice system, were established to try lower-level perpetrators and facilitate truth-telling at the local level.[21] While the Gacaca courts faced criticism due to procedural shortcomings, they played a crucial role in addressing the backlog of cases and fostering community-level reconciliation.[22] Additionally, Rwanda implemented measures such as memorialisation, national unity and reconciliation programs, and socio-economic reforms to rebuild trust and promote social cohesion.[23] These efforts highlight the importance of combining legal accountability with broader societal initiatives to address the root causes of conflict and prevent recurrence.[24]

Similarly, in the former Yugoslavia, the ICTY was established to prosecute those responsible for war crimes, crimes against humanity, and genocide during the conflicts of the 1990s.[25] While the ICTY contributed to establishing a historical record and holding high-level perpetrators accountable, it was not the sole mechanism for addressing the past.[26] Domestic courts in the successor states of the former Yugoslavia also played a role in prosecuting war crimes, though their effectiveness varied.[27] Beyond legal mechanisms, the region saw efforts such as truth-seeking initiatives, reparations programs, and inter-ethnic dialogue aimed at

[20] Priscilla B Hayner, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions (2nd edn, Routledge 2011) 45-47.
[21] Supra note 18
[22] Ibid 150-152.
[23] Timothy Longman, Memory and Justice in Post-Genocide Rwanda (Cambridge University Press 2017) 89-93.
[24] Lars Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79 Temple Law Review 1, 15-18.
[25] supra note 18
[26] Diane F Orentlicher, Shrinking the Space for Denial: The Impact of the ICTY in Serbia (Open Society Justice Initiative 2008) 12-14.
[27] Jelena Subotić, Hijacked Justice: Dealing with the Past in the Balkans (Cornell University Press 2009) 67-70.

fostering reconciliation.[28] However, the persistence of ethnic tensions and political divisions in some areas underscores the limitations of legal responses alone and the need for comprehensive, long-term approaches to reconciliation.[29]

The experiences of Rwanda and the former Yugoslavia demonstrate that international criminal tribunals, while important, are insufficient on their own to address the multifaceted challenges of post-conflict societies.[30] Legal mechanisms should be complemented by broader transitional justice measures that address victim demands, rebuild the rule of law, and promote societal healing.[31] Therefore, we can conclude that while international criminal tribunals, such as the ICTR and ICTY, have made significant contributions to accountability, they are only one part of a larger transitional justice framework.[32] Effective transitional justice requires a holistic approach that combines legal accountability with truth-seeking, reparations, institutional reforms, and societal reconciliation.[33] By integrating these diverse mechanisms, societies can better address the legacies of violence and build a foundation for lasting peace.[34]

Ethiopia is expected to avoid the shortcomings of international tribunals like the ICTR and ICTY by adopting a hybrid transitional justice model that combines targeted prosecutions with robust local reconciliation mechanisms. Rather than relying solely on top-down judicial processes, which risk being perceived as distant or politically selective, Ethiopia should: (1) prioritise community-based truth-

[28] Eric Stover and Harvey M Weinstein (eds), My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity (Cambridge University Press 2004) 210-215.
[29] Laurel E Fletcher and Harvey M Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 590-592.
[30] Pablo de Greiff, 'Theorizing Transitional Justice' in Melissa Williams, Rosemary Nagy, and Jon Elster (eds), Transitional Justice (NYU Press 2012) 31-33.
[31] United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010) 5-7.
[32] Supra note 31, pp.201
[33] African Union, Transitional Justice Policy (2019) 12-14.
[34] Supra note 27, pp. 45

seeking through its Truth and Reconciliation Commission, ensuring it has independent subpoena powers and grassroots outreach; (2) establish clear complementarity between domestic prosecutions (focusing on atrocity architects) and restorative justice for mid/low-level perpetrators; and (3) integrate socioeconomic reparations with peacebuilding programs in conflict zones. Crucially, Ethiopia's TJ is expected to learn from the ICTR's failure to connect with victims by guaranteeing civil society participation in all TJ structures and allocating the greater portion of TJ budgets to victim-centred memorialisation and mental health services. Only this multifaceted approach can address both accountability and the root causes of cyclical violence.

Moreover, Ethiopia may need to consider a hybrid transitional justice model that draws critical lessons from both the Gacaca courts and the limitations of international tribunals like the ICTR and ICTY. While the ICTR and ICTY succeeded in prosecuting high-level perpetrators, they were criticised for being costly, slow, and disconnected from local communities. Conversely, Rwanda's Gacaca system, despite its flaws, demonstrated the value of community-based justice in processing mass atrocities while fostering grassroots reconciliation.

Therefore, TJ is a multifaceted process aimed at addressing past human rights violations through context-specific mechanisms such as truth commissions, community courts, institutional reforms, and, in some cases, amnesty to foster accountability and reconciliation. While these measures have supported peace in countries like South Africa and Rwanda, aggressively pursuing justice in fragile settings can reignite tensions. Ethiopia's TJ process reflects this delicate balance; ongoing conflict, political exclusions, stalled reforms, and the absence of an inclusive amnesty framework risk reducing the effort to a symbolic gesture. According to the African Union's Transitional Justice Policy Framework, the selection of TJ should be made with the demands and perceptions of society regarding concepts of justice and reconciliation in mind. This entails considering the

nature of the conflict and its violations, as well as the context and framework of the nation's legal system, cultural practices, and institutional framework. When determining the TJ measures necessary for its realities, a society in transition may choose to emphasise the various dimensions of justice, healing, and reconciliation.[35] Moreover, this comprehensive approach should not be seen as a one-size-fits-all solution. Instead, it should be tailored to the specificity of the Ethiopian national context, considering its unique historical, cultural, and social complexities. It should draw on best practices from other transitional justice processes around the world, adapting them to suit the specific needs and aspirations of the Ethiopian people.

2.2. Political Challenges to Justice from Country Experiences

As mentioned elsewhere, addressing crimes and issues of justice following conflict is inevitably contentious and riddled with dilemmas.[36] International tribunals like the ICTY and ICTR face a tough reality: their effectiveness depends heavily on political and social factors, sometimes falling short of addressing collective and individual needs for justice. These tribunals, operating in highly charged political environments, were further limited by being held outside the affected countries.

The Rwandan government, led by President Kagame, for instance, refused to cooperate with the ICTR, believing trials needed to happen within Rwanda for true reconciliation. Human rights organisations also accused the ICTR of being one-sided, focusing exclusively on prosecuting Hutu perpetrators of the 1994 genocide while ignoring alleged crimes committed by Kagame's Rwandan Patriotic Front (RPF) against Hutus during and after the genocide.[37] This criticism was echoed by human rights organisations, such as Human Rights Watch and Amnesty

[35] Ibid. Para 36

[36] Humphrey, M, 'International Intervention, Justice and National Reconciliation: The Role of the ICTY and the ICTR in Bosnia and Rwanda', Journal of Human Rights, Vol.2, No.4, 2003, pp 495-505

[37] Phil Clark, The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers (Cambridge University Press 2010) 60-62.

International, which documented reports of RPF atrocities, including massacres of Hutu civilians and suspected genocidaires.[38] Additionally, critics claim Kagame used the genocide narrative to silence dissent and consolidate power, further complicating the situation. This mistrust and political complexity made returning cases to Rwanda risky and overburdened the court.[39] This situation reflects the delicate balance that tribunals face between addressing mass atrocities and promoting reconciliation and peace.[40]

Similarly, the ICTY has encountered many of the same issues, as the indictment of Radovan Karadzic and Ratko Mladic for crimes against humanity was hampered by NATO forces' refusal to arrest the two, believing that it could destabilise peace talks at Dayton. This refusal to arrest Karadzic and Mladic has been perceived by many as a failure of the international community and has significantly undermined the credibility and impact of the ICTY in the former Yugoslavia. The fact that it has taken fourteen years to arrest Karadzic and Mladic, who avoided capture for over a decade, reflects the belief that the ICTY has been ineffective in holding those responsible and accountable for their actions. Whilst both the ICTR and the ICTY have been hampered by political constraints, both tribunals have contributed significantly to justice and peace, including ensuring that crimes do not go unpunished, establishing the truth within historical records, and ensuring that victims' rights are upheld. The tribunals' contributions to international humanitarian law and acknowledgment that crimes committed in Srebrenica and Rwanda, where

[38] Human Rights Watch, Rwanda: Justice After Genocide—20 Years On (2014) <https://www.hrw.org>, Amnesty International, Rwanda: The Troubled Course of Justice (2000) <https://www.amnesty.org> accessed on October 15, 2024.

[39] Jasini, R, 'Challenges in the Quest for Justice in Cambodia.', Oxford Transitional Justice Working Paper Series, 8th of June 2010http://www.csls.ox.ac.uk/otjr.php?show=currentDebate2 > accessed on May 22, 2024

[40] Mydan, S, 'Anger in Cambodia Over Khmer Rouge Sentence', The New York Times, July 26th, 2023 accessed at <http://www.nytimes.com/2010/27/world/asia/27cambodia.html on 2/11/2024> accessed on May 22, 2024

genocide is significant for understanding peace and justice, both locally and internationally.

In Ethiopia, killings, summary executions, enforced disappearances, rape, torture, forced relocation, and arbitrary detention are only a few of the heinous human rights violations committed in history and still ongoing. There have generally been serious human rights breaches as well as historical unjust relationships and grievances among various communities, even though the extent and authenticity of the charges have not yet been thoroughly and sufficiently uncovered. If there is any debate today, it is about the nature of the violations, their scope or magnitude, the victims' identities and whereabouts, the perpetrators' identities, and how to deal with such atrocities and oppressive pasts.[41] The institutions established by the Ethiopian government face many challenges due to the deep divisions that have not yet been properly addressed.[42] For instance, while the Failed Reconciliation Commission is tasked with documenting past conflicts and human rights violations to determine their causes, the law does not specify their relation to investigations and prosecutions. There was therefore a real risk that victims and survivors would not have access to justice and reparations, including the right to truth, accountability, compensation, rehabilitation, or recognition. Similarly, the current National Dialogue Commission has no legal mandate to prosecute and investigate violations; rather, its legal mandate is limited to giving recommendations based on the agenda gathered from the public.[43] Ethiopia's TJ process also exemplifies the delicate balance between accountability and peace in the context of ongoing conflict. While the Transitional Justice Policy formally embraces the four pillars: truth-seeking, accountability, reparations, and

[41]Marshet Tessema and Markos Debebe Belay, "Confronting Past Gross Human Rights Violations in Ethiopia: Taking Stock of the Reconciliation Commission" (2020) 33 South African Journal of Criminal Justice 563 <http://dx.doi.org/10.47348/sacj/v33/i3a3>, accessed on May 22, 2024

[42] The Battle of Mekelle and Its Implications for Ethiopia, csis, <https://bit.ly/3b3cj9P> accessed May 26, 2024

[43] National Dialogue Commission Proclamation No. 1265/2021, Federal Negarit Gazeta, art 6(3)

institutional reform, its implementation has been undermined by active wars in Amhara and Oromia, as well as political compromises.[44]

The Truth and Reconciliation Commission, for instance, struggles with legitimacy due to its exclusion of key armed actors like the Fano militia and Oromo Liberation Army (OLA), limiting its truth-seeking mandate.[45] Reparations remain stalled as resources are diverted to military campaigns, and proposed security sector reforms are frozen due to the government's reliance on regional militias.[46] Unlike South Africa's TRC or Rwanda's Gacaca courts, Ethiopia lacks a coherent amnesty framework, leaving ex-combatants in legal limbo and discouraging disarmament.[47] As noted in the African Union's 2024 assessment, this approach risks rendering TJ "a symbolic exercise" unless paired with inclusive ceasefires and local justice mechanisms.[48]Hence, it is more urgent than ever for the incumbent government to outline a roadmap for justice during the country's transitional period. Ethiopians need to clarify when and how current and former high-level government officials suspected of human rights violations will be investigated and prosecuted, how survivors will receive compensation, as well as plans for legal and structural reforms to break past repression. Until Ethiopia addresses past atrocities and injustices through justice for every era and region, the country may remain vulnerable to incidents that provoke far more violence.[49] Therefore, the TJ process demands a high level of commitment from the government.

[44] Transitional Justice Policy (Ministry of Justice, 2022).
[45] Moges Zewdu Teshome: Ethiopia Must Give Transitional Justice a Chance. The Challenges of Reconciliation in a Deeply Divided Nation, VIDC online magazine Spotlight 53/September 2020. <https://www.vidc.org/detail/ethiopia-must-give-transitional-justice-a-chance-the-challenges-of-reconciliation-in-a-deeply-divided-nation>
[46] African Union, Joint Assessment of Ethiopia's TJ Process (February 2024) para 12.
[47] Daniel Bekele, 'Justice Deferred' in Routledge Handbook of African TJ (2025, forthcoming), chap 6.
[48] ICG, Ethiopia's Fragile Peace (Briefing No 178, January 2025) 4.
[49] OPED: Justice, not repression, will break Ethiopia's waves of violence, 2020,< https://bit.ly/3jm82mb>accessed on June 20, 2024

3. Previous Attempts and Ongoing Transitional Justice in Ethiopia

To comprehensively address the past and create a better future, Ethiopia has neither created nor executed comprehensive and integrated transitional justice mechanisms. No extensive methods have been implemented to evaluate and provide an independent, accurate, and authoritative account of the various types, natures, causes, patterns, and repercussions of past violence in the context of recent transitions. [50] Moreover, in the Ethiopian context, there has been negative interaction between peace and justice, in which peace is compromised for the sake of justice and vice versa. Some of the primary causes for the continuation of the vicious cycle in Ethiopia have been identified as injustice, human rights violations, erroneous historical interpretations, insufficient responses to challenges encountered, and the lack of a thorough and productive reconciliation process.[51] The following discussion will show previous attempts of TJ in Ethiopia.

3.1. The Derg Regime

Emperor Haile Selassie I and the feudal elite of the ancient regime were overthrown by the popular revolution in Ethiopia in 1974, and the military junta known as Derg took over, which resulted in the state-sanctioned use of violence from 1975 to 1978.[52] Derg began its ruling by killing 60 former imperial regime officials without a trial, rejecting all pleas for civilian governance. After this execution, the Derg was ruled by "the law of the jungle" and was known for its heinous abuses of human rights.[53] The Derg's largest and most well-known campaign of official human rights

[50] Ibid
[51] Tsegaye R. Ararssa, 'Land Injustice as Structural Violence' (2023) 17 Ethiopian J Soc Sci 45.
[52] Legide, Kinkino Kia, 'The Facets of Transitional Justice and 'Red Terror' Mass Trials of Derg Officials in Post-1991 Ethiopia: Reassessing its Achievements and Pitfalls' (2021) 4 *Journal of African Conflicts and Peace Studies* (2) 1.
[53] Jima Dilbo Denbel, "Transitional Justice in the Context of Ethiopia" (2013) 10 International Letters of Social and Humanistic Sciences 73< http://dx.doi.org/10.18052/www.scipress.com/ilshs.10.73>, p. 75, accessed on 22 May 2024

violations was the Red Terror in Ethiopia. The Red Terror Massacre was officially launched in November 1977 and lasted until 1980. It was a well-coordinated massacre directed against those opposed to military rule, most of whom were members of the Ethiopian Peoples' Revolutionary Party (EPRP).[54] It led to torture, arbitrary detentions, disappearances, and summary killings. Between 30,000 and 50,000 persons were reportedly put to death in 1977 without ever facing criminal proceedings. According to Amnesty International, the total number of deaths at the end of the Red Terror campaign alone ranged from 150,000 to 200,000.[55] In the words of Human Rights Watch/Africa Watch (1991), the Red Terror campaign has been characterised as "one of the most systematic uses of mass murder by the state witnessed in Africa".[56]

3.2. The Red Terror Trials under the Transitional Government

After 17 years of ruling, the Derg was finally overthrown in 1991 by the Ethiopian People's Revolutionary Democratic Front (EPRDF) by complete military defeat. Ethiopia chiefly adopted post-conflict trials from among alternative measures for dealing with Derg-era perpetrators of gross human rights violations. According to the then PM. Meles Zenawi, the government's decision was criminal prosecution, it did not intend to establish a truth and reconciliation commission, and amnesty was ruled out since it "would send a wrong signal for the people and future politicians".[57] Other transitional justice instruments were applied, including the lustration of Derg regime members and collaborators as well as property restitution. Additionally, a method most often associated with restorative justice was incorporated into the mandate of the Special Prosecutor's Office as a corollary objective of the trials,

[54] Y Haile-Mariam 'The quest for justice and reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 Hastings International and Comparative Law Review, p. 667-674.
[55] Ibid, p. 678
[56] Human Rights Watch/Africa Watch, *Evil Days: 30 Years of War and Famine in Ethiopia* (November 1991)
[57] Kjetil Trovoll (2013), Ethiopia, In Encyclopedia of Transitional Justice, Vol. 2, (pp.167- 173), Cambridge: Cambridge University Press, pp.169.

focusing on recording the brutal offences perpetrated against the Ethiopian people.[58] Key members of the former regime and the Workers' Party of Ethiopia were arrested in large numbers by the new government in Ethiopia. The establishment of Peace and Stability Committees allowed for the investigation, capture, and detention of alleged Derg regime human rights offenders. More than 2,000 military and civilian officials were imprisoned in the first few months of the EPRDF government, and thousands more soon after. Several hundred people were released following brief detentions and preliminary investigations.[59]

The transitional government established the Special Prosecutor's Office (SPO) as per Proclamation No.22/92 in 1992 to investigate and prosecute "any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organisations under the Derg - WPE regime" and to prosecute those responsible for human rights violations and/or corruption. The SPO mandate had two objectives: (1) to bring those criminally responsible for human rights violations and/or corruption to justice, and (2) to establish a historical record of the abuses of the Derg regime.[60] Regarding the first objective, the SPO has prosecuted approximately 5000 former leaders and other officials for crimes allegedly committed between 1974 and 1991 while they were in office. Three major categories were used to classify the defendants: Senior government officials and military commanders who deliberated and designed the genocide plan to obliterate their political rivals (146 defendants); field commanders (2133 defendants), both military and civilian, who oversaw the forces, teams, and individuals who committed the violations; and material offenders, individuals involved in material violations (soldiers, police, officers, interrogators).[61] It also filed accusations against 73 top

[58] Ibid
[59] Ibid
[60] Procedure of Granting and Implementing Amnesty Proclamation No 1089/2018, pp. 170
[61] Alebachew Birhanu, 'Transitional Justice and the Creation of a Human Rights Culture in Ethiopia' (University of Oslo 2008), pp. 21

Derg officials, including former president Mengistu, in October 1994 at the First Criminal Bench of the Central High Court, and then at the Federal High Court. The charges were based on genocide, aggravated homicide, and willful bodily injury violations of articles 522 and 538 of the Ethiopian Penal Code of 1957. They were also accused of abusing their positions of authority and holding people against their will. According to article 113 of the Ethiopian Criminal Procedure Code, alternative charges may be brought when it is unclear what crime has been committed. The Office charged 5,198 political and military officials of the Derg regime, of whom 2,258 were tried in regional supreme courts by a delegation from the Federal High Court.[62]

Regarding its second objective of establishing a historical record, the SPO has not yet taken any separate steps. Article 6 of the SPO's enabling proclamation states that the Office has the authority to investigate the atrocities and bring legal action against those guilty, but it says nothing about compiling a historical record. Therefore, the purpose of the omission is not to make the duty of creating historical records less important, but rather to prevent the Office from overlapping functions.[63] The verdict against the Derg leaders was passed in December 2006, and the sentencing was pronounced in early 2007. Five top political and military officials of the Derg military junta were convicted and sentenced, twenty-two of them in absentia. One dissenting judge argued against the Ethiopian Penal Code's protection for political groups against genocide, which had been repealed during the Derg. The court rejected the Office's request for the death penalty of key defendants and instead sentenced forty-eight defendants to life imprisonment and the others to long-term imprisonment. The punishment aimed to reform, not to exact revenge.[64] The first case to be brought against the senior Derg officials was SPO vs. Colonel Mengistu

[62] National prosecution and transitional justice : the case of Ethiopia - WRAP: Warwick Research Archive Portal, <http://go.warwick.ac.uk/wrap/69465>, pp. 150
[63] Supra note 53, pp. 21
[64] Kjetil Trovoll, 'Ethiopia' in Neil J Kritz (ed), *Encyclopedia of Transitional Justice* (Cambridge University Press 2013) vol 2, 169, 171.

Hailemariam et al., in which 106 defendants were found guilty and 52 received death sentences. Mengistu was found guilty of genocide and given a life sentence, which was later changed to the death penalty. 52 people received the death penalty, 182 were given life sentences; and 921 received lengthy jail terms.[65]

The verdict and sentence were appealed to the Federal High Court by both the SPO and the defendants in the main trial. The SPO argued that there was no extenuating circumstance. It also contended that the defendants committed concurrent crimes in their highest official capacity, and that it was inappropriate to sentence them to a lesser penalty than low-ranking officials and commanders. The defendants argued that the SPO's evidence did not establish that the defendants committed crimes and that the conviction by the Federal High Court was collective punishment solely based on their membership in the Derg. The Federal Supreme Court rejected the defendant's appeal and accepted the SPO's arguments for imposing the death penalty on 18 respondents.[66] In addition to prosecuting defendants, the TGE also launched property restitution. Laws and procedures were promulgated in 1995 to allow victims to reclaim their properties.[67] The EPRDF government also erected museums, memorial centres, and monuments in different parts of the country to honour victims of violence persecuted by the Derg regime.

There were challenges and limitations present in the transitional justice system that was put in place during the time of the Red Terror trials (with a primary focus on prosecutions). First, the approach failed to produce national reconciliation because it neglected other important transitional justice components.[68] It ignored the use of complementary procedures like truth-seeking, reconciliation, and reparation in

[65] Supra note 62, pp. 19
[66] National prosecution and transitional justice: the case of Ethiopia - WRAP: Warwick Research Archive Portal, <http://go.warwick.ac.uk/wrap/69465> pp. 153
[67] Kjetil Trovoll, supra note, 65 169
[68] Supra note 62, pp. 23

favour of bringing a huge number of criminal cases before the courts.[69] The prosecutions were selective, primarily targeting Derg officials and ignoring crimes perpetrated by civilians and other armed groups; this was referred to as "victors' justice" in the process.[70] The trials received criticism for not ensuring fair trial practices.

Third, the victims received little compensation because of their limited involvement in the process, which was primarily limited to testifying. The other constraint is the weak judiciary infrastructure, which was demolished and under-resourced during the Derg. Judges and prosecutors were inexperienced in carrying out complex criminal trials, particularly those of an international nature. This was further exacerbated by the shortage of judges following the purge of judges from the courts. This reduced the capacity of the judiciary and added to the problems of an overloaded system.[71] Overall, the country did not get beyond its dark past because the post-Derg transitional justice process (prosecution) was incomplete, delayed, selective, and a form of victor's justice.

4. Transitional Justice Attempts under the Incumbent Government

Despite having a history marked by socio-political transitions, Ethiopia has yet to establish a comprehensive and integrated framework for transitional justice.[72] This framework would play a crucial role in systematically addressing the nation's past and forging a path toward a better future. Regrettably, in recent transition periods, Ethiopia has not deployed comprehensive processes that assess and provide an independent, accurate, and authoritative account of the diverse types of violence, their underlying nature, causes, recurring patterns, and far-reaching consequences.

[69] Ethiopia Policy Options for Transitional Justice Draft for Stakeholder Consultations" (2023) 5
[70] Sura note 70, pp. 34
[71] Supra note62, pp. 25
[72] Ibid. pp. 4

In 2018, Prime Minister Abiy Ahmed took office, which marked a significant shift in the political and legal landscape. Under Prime Minister Abiy's leadership, Ethiopia's transition is Tran's placement in nature. The term "trans placement" refers to a type of transition that "occurs (s) when democratisation is largely the result of cooperative action by government and opposition groups."[73] Ethiopia has adopted various mechanisms, including establishing the Ethiopian Reconciliation Commission (ERC), amnesty, official acknowledgement and apology, criminal prosecutions, legal and institutional reforms, Ethiopia's National Dialogue Commission, and the Policy Options for Transitional Justice in Ethiopia as a means to reckon with legacies of a repressive past.

4.1 Official Acknowledgement of Atrocities Committed During the EPRDF

Governmental and non-governmental human rights organisations had accused the EPRDF regime during the pre–PM Abiy Ahmed era of egregious human rights breaches. Ethiopia's government has acknowledged the human rights abuses that have occurred since the EPRDF assumed power in 1991, following the nomination of Abiy Ahmed as prime minister. Torture is a kind of state terrorism, according to PM Abiy, who also declared this. He claimed that not only at the federal level but also at every lower level, these unconstitutional acts had taken place in every Kebele, Woreda, and Zone. Testimonies from victims of torture and other human rights violations support the government's claims. The Prime Minister, in his inauguration speech, said that “the EPRDF had publicly apologised to the public, saying we have made mistakes, blunders… I have apologised and asked for forgiveness … There

[73] Huntington, Samuel, “The Third Wave, Democratization in the Late Twentieth Century”, Oklahoma: University of Oklahoma Press (1993), 114

were serious mistakes. Compassionate people have forgiven us. We need to seize this opportunity." [74]

4.2. Amnesty

In 2018, Proclamation No. 1089/2018 was enacted to provide for the Procedure of Granting and Implementing Amnesty. This, along with subsequent legislation and Amnesty Proclamation No. 1096/2018, were enacted to holistically regulate the grant of amnesty. The amnesty law grants amnesty to persons convicted of several political crimes, including those found guilty of committing crimes punishable under the anti-terrorism proclamation, as well as crimes punishable based on various provisions of the Criminal Code of Ethiopia. However, criminals convicted of genocide, extrajudicial killings, forced abduction/kidnapping, and committing inhuman torture and beating will not benefit from the legislation.[75] Thousands of prisoners, including several senior opposition leaders accused of charges such as incitement to topple the government, have been pardoned. The parliament also ruled that the Oromo Liberation Front and the Ogaden National Liberation Front (two secessionist groups) and the Ginbot 7 (an exiled opposition movement) were no longer considered terrorist groups.[76] However, the amnesty process offered a blanket reprieve and failed to consider victims' voices, and did not meet the objectives of repentance. Many perpetrators who had been released returned to prison, and public confidence in the government's capacity to enforce laws was questioned. Beneficiaries of the amnesty system were expected to obtain a certificate from the

[74] The Government's Approach to Past Human Rights Violations Needs to Be Transparent - Addis Standard' (Addis Standard, 25 January 2019) <https://addisstandard.com/oped-the-governments-approach-to-past-human-rights-violations-needs-to-be-transparent/>accessed on 16 June 2024.

[75] Amnesty Proclamation 1096/2018 Ratified by the Parliament of Ethiopia - ETHIOPIAN LAW GROUP' (ETHIOPIAN LAW GROUP) < on https://ethiopianlawgroup.com/index.php/articles-amnesty-proclamation-1096-2018-ethiopia/> accessed 22 May 2024.

[76]Ethiopian Parliament Approves Amnesty for Political Prisoners', *Al Jazeera*, 21 July 2018 < <https://www.aljazeera.com/news/2018/7/21/ethiopian-parliament-approves-amnesty-for-political-prisoners> accessed on 22 May 2024

federal and regional bureaus, but there was no follow-up in its implementation, negatively affecting the credibility of the process.[77] For instance, the military wing of Oromo Liberation, which calls itself OLA, also called "Shene" by the government, started a war against the incumbent government in the Oromia region in 2019. In addition to this, other armed groups called Fano, in the Amhara region, are also fighting with the government. Accordingly, the TJ process has encountered critical challenges and criticism among political actors, highlighting the absence of genuine commitment, manipulation of the TJ for political purposes and the absence of a comprehensive TJ implementation in the country.

4.3. Attempt of Criminal Prosecution

At both the federal and local levels, there have been numerous criminal prosecutions of individuals suspected of having committed serious corruption and/or human rights breaches in the past. There are cases against some former officials, including former Somalia regional state president Abdi Muhamud Omer et al (Cr. File No. 231812, some 43 accused charged for various crimes).[78] Also, former prison officials (nine accused from Makelawi and eight accused from Qilinto) are charged with various crimes. The case against the previous higher officers of Metals and Engineering Corporation and the case against Bereket Simon and Tadesse Tenkeshu before the Amhara Regional Supreme Court are two other well-known trials for prior offences. It is also important to note that the Federal Attorney General recently withdrew charges against 63 people, including the cases cited above.

To address the above cases, there was no special court or special prosecution office was established. The prosecutions of the suspects are being carried out by and before

[77] Ethiopia Policy Options for Transitional Justice Draft for Stakeholder Consultations" (2023), 6
[78] Addis Standard, "News: Ex-Somali Region President Pleads Not Guilty to All Charges",(2019) https://addisstandard.com/news-ex-somali-region-president-pleads-not-guilty-to-all-charges/ .accessed July 4 , 2024

the existing justice machinery. This raises issues of independence and impartiality.[79] The criminal prosecutions for crimes against humanity and torture are mostly for lesser crimes, such as abuse of power. This situation is reminiscent of Ethiopia's transition from the Derg to the EPRDF, which faced challenges due to an inadequate legal framework regarding crimes against humanity and torture. [80] In Ethiopia, the arrests of Tigrayan officials associated with the Tigray People's Liberation Front (TPLF) have sparked significant debate. Critics allege that these arrests are politically motivated, targeting individuals based on their affiliation with the TPLF rather than focusing on the individual responsibility for alleged crimes.[81] These claims have raised concerns about ethnic profiling and discrimination, particularly in the context of Ethiopia's history of ethnic tensions and political fragmentation.[82] For example, human rights organisations have documented cases where Tigrayan civilians and officials have been subjected to arbitrary detention and harassment, fueling perceptions of bias in the government's actions.[83]

On the other hand, supporters of the arrests argue that they are aimed at holding individuals accountable for serious offences, including corruption, human rights abuses, and crimes against humanity, regardless of their ethnicity or political affiliation.[84] They point to ongoing investigations and legal proceedings as evidence that the arrests are part of a broader effort to address impunity and restore the rule of

[79] Marshet Tessema and Markos Debebe Belay, "Confronting Past Gross Human Rights Violations in Ethiopia: Taking Stock of the Reconciliation Commission" (2020) 33 South African Journal of Criminal Justice 563 <http://dx.doi.org/10.47348/sacj/v33/i3a3> accessed on 16 June 2024. pp. 568

[80] Marshet Tadesse, "Dealing with the Legacies of Repressive Past: Transitional Justice in 'Transitional' Ethiopia" Jimma University Journals: <https://journals.ju.edu.et/index.php/jlaw/article/download/3275/1354/>

[81] Human Rights Watch, Ethiopia: Ethnic Targeting in Arrests of Tigrayan Officials (2021) <https://www.hrw.org > accessed on 15 October 2024.

[82] René Lefort, 'Ethiopia's Crisis: The Need for a Comprehensive Approach' (2021) 45 Review of African Political Economy 321, 325-327.

[83]Amnesty International, Ethiopia: Arbitrary Detentions and Harassment of Tigrayans (2022) <https://www.amnesty.org > accessed on 15 October 2024.

[84]Ethiopian Government Press Release, Statement on the Arrest of TPLF Officials (2021) <https://www.ethiopia.gov.et> accessed 15 October 2023.

law.[85] However, the lack of transparency in these processes and the absence of clear, publicly available evidence linking specific individuals to alleged crimes have undermined the credibility of these claims.[86] From this debate, it is evident that Ethiopia's deeply rooted problems cannot be resolved through discrete or selective measures. The polarisation surrounding these arrests highlights the need for a comprehensive legal and institutional framework to address issues of accountability, justice, and reconciliation impartially and transparently.[87] Such a framework should include robust mechanisms for investigating and prosecuting crimes, safeguarding the rights of the accused, and ensuring that justice is perceived as fair and equitable by all segments of society.[88] Additionally, efforts to address historical grievances and promote national unity should be integrated into this framework to prevent the perpetuation of cycles of violence and retribution.[89]

4.4. The Ethiopian Reconciliation Commission

On December 25, 2018, the Ethiopian government established a nationwide "Reconciliation Commission."[90] The Reconciliation Commission is Ethiopia's first of its kind, marking the start of the nation's new direction in restorative justice. The establishment of the Ethiopian Reconciliation Commission (ERC) was rushed due to a lack of proper public consultation and dialogue. This would have increased the legitimacy and credibility of the commission and helped lawmakers to have a clear picture of the needs of victims and the types of violations that need priority and

[85] Ibid
[86] International Crisis Group, Ethiopia's Tigray Crisis: The Path to Justice and Reconciliation (2022) https://www.crisisgroup.org accessed 15 October 2023.
[87] United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010) 5-7.
[88] African Union, Transitional Justice Policy (2019) 12-14.
[89] Lefort, Supra note, 83, pp. 330-332.
[90] Proclamation No. 1102/2018, Reconciliation Commission Establishment Proclamation, Federal Negarit Gazette.

focus.[91] The objectives of the Reconciliation Commission of Ethiopia are to ensure peace and justice, promote national unity, and promote reconciliation among Ethiopians.[92] These objectives are stated in generic terms, rather than in terms of measurable and specific goals. Under the Reconciliation Commission proclamation, the procedure for appointing commission members is enshrined in Article 4. This provision does not state the number of commissioners. Rather, it empowers the government to determine the number of members of the commission. The law states that the chairman, vice-chairman, and other members of the commission will be appointed by the House of Peoples' Representatives upon the recommendation of the Prime Minister.[93] The HPR had appointed 41 Ethiopians as commissioners, including His Eminence Cardinal Berhane Yesus Sourafel and Mrs. Yeteneberesh Nigusse as Chairperson and Deputy Chairperson, respectively. However, the law does not specify conditions for being appointed as commissioners.[94] The law does not provide for eligibility conditions and factors that make a person ineligible for the position, as there was the possibility of including controversial and politically active individuals as commissioners.[95]

The same proclamation provides the mandate of the commission to investigate the causes of conflicts[96] and promote national unity and reconciliation[97]. However, the provision does not clearly state whether the mandate is limited to only uncovering and recording egregious human rights violations. Article 6 of the law provides both

[91] Supra note 81, pp. 563 <http://dx.doi.org/10.47348/sacj/v33/i3a3>, accessed on 16 June 2024. p. 570
[92] Reconciliation Commission Establishment Proclamation 1102/2018, Article 5
[93] Ibid., Article 4(1)
[94]Supra note 81 pp. 573
[95] Ibid.
[96] Proclamation No. 1102/2018, Réconciliation Commission Establishment Proclamation, Article 6 (4)
[97] Ibid, Article (Art 6 (3) (10)

the mandate of the commission and legal powers, but these two matters should have been addressed in separate provisions.[98]

The ERC has the legal power to search, seize, and have access to archives based on Article 6 (1), (5), (6), (7) and Article 15 of the proclamation. From the reading of the proclamation, the commission has the power to order the presence of anyone; however, it is not clear whether the commission has the power to issue a summons itself. Furthermore, there is no mention of conditional amnesty. In addition, the commission was not empowered to name and identify perpetrators of human rights violations or recommend collective reparation to identified victims.[99]

Most importantly, the period covered by the grave human rights crimes is not included in the establishing proclamation of Ethiopia's Reconciliation Commission. It does not restrict the commission's authority in terms of the time frame from when and up to which it will investigate serious human rights violations. It is important to determine the time frame within which a commission should confine its operation. The lawmakers should specify the period that falls within the ambit of the ERC's temporal jurisdiction.[100]. The commission tried to solve this issue through a regulation, but for various reasons, the draft regulation was unable to clear the initial legislative procedure. Later on, the commission decided to investigate the social, political, and human rights violations that were occurring nationwide as of September 12, 1974, as part of its strategic plan. It is unclear why the ERC decided to limit its temporal jurisdiction to the year specified.[101]According to Article 14 of the proclamation, the commission's term is set at three years with the option of an extension.[102] The Ethiopian Reconciliation Commission was dissolved three years

[98] Supra note 80, pp. 563 <http://dx.doi.org/10.47348/sacj/v33/i3a3>, p. 575 accessed on 16 June 2024.
[99] Supra Note 90, pp. 33
[100] supra note 81 pp. 575
[101] The Ethiopian Reconciliation Commission Strategic Plan 2020-2022 (2020), p. 2.
[102] Proclamation No. 1102/2018, Reconciliation Commission Establishment Proclamation, Article 14

into its formation by the parliament in February 2022, even though the commission had requested an extension of its term from the HPR. It was ordered to hand over its unused budget and office materials to the newly formed National Dialogue Commission (NDC) and dissolve. The HPR urged the commission to submit a summary of its activities over the past three years.[103] The Reconciliation Commission was expected to empower victims and collaborate with them to bring peace to Ethiopia, but its term ended without significant achievements. The failure of the commission was largely due to the lack of political commitment, public participation, and consultation, the vague powers and functions of the commission, its relationship with other mechanisms, and the large number of commissioners (41), exceeding the average size of most truth commissions.[104]

4.5. National Dialogue Commission (NDC)

The Ethiopian National Dialogue Commission (NDC) Establishment Proclamation No. 1265 /2021 established the Commission, containing 11 members nominated, appointed, and accountable to it by the HPR for a term of three years. The commission's mission is to implement inclusive dialogue on national issues to forge consensus at the national level and identify common ground. It acknowledged differences and disagreements on fundamental national issues, declared that resolving them is necessary, and projected that the ultimate goal is to build national consensus and bolster a culture of trust.[105] It also incorporated fundamental principles of the ND, such as inclusiveness, transparency, credibility, tolerance and mutual respect, rationality, implementation and context-sensitivity, impartial

[103] Addis Standard, "News: Ethiopian Reconciliation Commission Dissolves - Addis Standard" (Addis Standard, March 1, 2022) <https://addisstandard.com/news-ethiopian-reconciliation-commission-dissolves/> accessed on May 22, 2023

[104] Ethiopia Policy Options for Transitional Justice Draft for Stakeholder Consultations" (2023)

[105] Addis Standard, "Commentary: Ethiopian National Dialogue Proclamation: A Camouflage for Monologue? - (September 6, 2022) <https://addisstandard.com/commentary-the-ethiopian-national-dialogue-proclamation-a-camouflage-for-monologue/> . Accessed May 22, 2024

facilitator, depth and relevance of agendas, democracy, and rule of law, national interest, and using national traditional knowledge and values.[106]

According to Professor Mesfin Araya, NDC commissioner, the National Dialogue is divided into four stages, namely preliminary preparation, preparation, and dialogue. The process and implementation stage will be determined by the results of the dialogues.[107] During the early phases of preparation, the commission met with relevant organisations and had discussions with them. The commission established its secretariat and created the procedural systems needed to choose participants, find debate moderators and facilitators, and create a discussion agenda. To create agenda items, it also organised conversations with input from various society groups. Farmers, pastoralists, academics, professionals, women, young people, religious leaders, political parties, teachers, organisations for people with disabilities, Ethiopians living abroad, and more took part in these discussions.[108] On March 25, 2023, FBC reported that the Ethiopian National Dialogue Commission (ENDC) said it has been working tirelessly to commence the National Dialogue, which is believed to bring lasting solutions to the longstanding problems in June 2023.[109]

Even though the commission has made progress in gathering agenda items for consultations across various regions, it is still facing several significant challenges. The process has been criticised for excluding key stakeholders, including major opposition parties and armed groups like the Oromo Liberation Army (OLA) and

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[106] The Ethiopian National Dialogue Commission Establishment Proclamation No. 1265 /2021, Article 3

[107] Borkena Ethiopian News, "National Dialogue Commission Entering Next Phase of Work, Faced 'Internal and External Intervention'" (April 27, 2022) < https://borkena.com/2022/04/26/ethiopia-national-dialogue-commission-entering-next-phase-of-work/ > accessed May 22, 2023

[108] Ethiopian Monitor "Commission Plans to Launch National Dialogue in May" (March 1, 2023) <https://ethiopianmonitor.com/2023/03/01/commission-plans-to-launch-national-dialogue-in-may> accessed on May 22, 2024

[109] "Ethiopian National Dialogue Set to Start in June" (Welcome to Fana Broadcasting Corporate S.C., March 25, 2023) <https://www.fanabc.com/english/ethiopian-national-dialogue-set-to-start-in-june/ > accessed May 22, 2024

Fano. This lack of inclusivity undermines the legitimacy of the dialogue and limits its potential for meaningful change. The unresolved conflicts and deep-seated grievances also make it difficult to create a conducive environment for constructive dialogue. Moreover, the ongoing violence in Amhara, Oromia, and other regions continues to overshadow the dialogue.

4.6. Transitional Justice Policy of the FDRE

As mentioned above, Ethiopia's transitional justice (TJ) policy emerges from a complex historical context marked by successive regimes of violence, from imperial rule to the Derg's Red Terror (1974-1991) and the ethnic federalism period (1991-2018).[110] Despite its experience in socio-political transitions in its modern history, Ethiopia has neither designed nor implemented comprehensive and integrated transitional justice mechanisms to systematically deal with the past and craft a better future. In the context of recent transitions, no comprehensive processes have been deployed that have been assessed and provided an independent, accurate, and authoritative account of the types, nature, causes, patterns, and consequences of violent pasts. Following political reforms unveiled in 2018, the government undertook specific measures to address past injustices, grievances, and serious human rights violations. The measures aimed at creating a conducive environment for democratic consolidation: as it was mentioned previously, they included the issuance of an official apology, the establishment of the Reconciliation Commission, the formation of the Identity and Boundary Commission, the enactment of progressive legislations, and the pursuit of institutional reforms that support transitional justice. Yet, the purposes of transitional justice were not fully met; key limitations included failure to anchor and coordinate the process on a holistic framework, and ineffectiveness of the individual measures that were implemented.

In its initial report on the war in northern Ethiopia in 2021, the Joint Investigation Team (JIT) provided a proposal for transitional justice, which the government

[110] Transitional Justice Policy of the Federal Democratic Republic of Ethiopia (Ministry of Justice, 2023)

accepted. Despite calls from the United Nations, international human rights organisations, and Western countries to permit foreign investigators to investigate human rights violations during the Tigray War, the Ethiopian government plans to establish its transitional justice system. There were 59 public consultations performed nationwide in various locations.[111] The green paper offers alternatives as a starting point for public consultation, but the choices that are made in the end will depend on a variety of approaches to identifying and fixing the issues with the transitional justice system.[112] By soliciting input from many stakeholders, the paper represents a first step towards a locally owned transitional justice program. This furthers Ethiopia's duties under Article 10(3) of the Cessation of Hostilities Agreement (CoHA/Pretoria Agreement), an agreement for lasting peace between the government and the Tigray People's Liberation Front (TPLF). The provision states that the Ethiopian government shall implement a comprehensive national transitional justice policy consistent with the FDRE Constitution and the AU Transitional Justice Policy Framework.[113]

As a turning point, the Ministry of Justice introduced a comprehensive TJ policy titled "Transitional Justice Policy of FDRE." It has passed through a rigorous process of drafting, consultation, and validation since November 2022 and was finally adopted by the Council of Ministers in April 2024. This policy aims to deal with the country's violent past through transitional justice. It is the first of its kind in Ethiopia's history and potentially a major step forward in bringing peace. It focuses on the pillars of transitional justice and cross-cutting issues and outlines the role of regional states, federal government offices, and civil society in the implementation process. Victim groups, opposition political parties, transitional justice experts, civil society

[111] The Reporter Ethiopia, Setting Up Ethiopia's Transitional Justice System to Pardon Or Prosecute | The Reporter | Latest Ethiopian News Today" (March 11, 2023) <https://www.thereporterethiopia.com/31958/> accessed May 22, 2024

[112] Ibid

[113] Agreement for Lasting Peace Through Permanent Cessation of Hostilities Between the Government Federal Democratic Republic of Ethiopia and the Tigray People's Liberation Front (TPLF) 2022, Article 10(3)

organisations, and representatives of regional and federal courts and justice offices participated in the policy drafting process.

The current policy represents the most comprehensive attempt to address systematic human rights violations that have characterised the nation's modern history.[114] The policy is divided into three main sections, the first of which examines Ethiopia's experience with transitional justice and how it relates to the current situation. In the second section, various policy alternatives are analysed for pursuing transitional justice in Ethiopia through various approaches. The final section examines and suggests various institutional arrangements to establish transitional justice systems in Ethiopia.[115] To achieve this, the policy incorporates several key components, including criminal accountability, truth-seeking, reparations, institutional reform, and conditional amnesty. Furthermore, by combining traditional justice mechanisms with formal legal processes, this holistic approach seeks to address the complex challenges of the past and build a more just and peaceful future for Ethiopia. However, the traditional mechanisms should be considered in their interventions. In the area of grave human rights violations and gender-based violence, for instance, this traditional mechanism these traditional mechanisms may not be effective in redressing the issues.

4.6.1 Structural Framework of the TJ Policy

As mentioned above, the transitional justice initiative builds upon earlier accountability efforts, particularly the 2021 Joint Investigation Team (JIT) report on the northern conflict which first proposed a comprehensive TJ framework. This locally owned approach, while controversial given allegations of government-imposed limitations, represents an attempt to balance international standards with national ownership. The resulting policy document adopts a tripartite structure:

[114] Human Rights Watch, 'Ethiopia: Justice for Past Crimes Key to Future Peace' (2023) <https://www.hrw.org> accessed on June 15, 2024

[115] Ethiopia Policy Options for Transitional Justice Draft for Stakeholder Consultations" (2023), p. 3

historical analysis of Ethiopia's TJ experiences, an evaluation of policy alternatives, and recommendations for institutional design.[116]

The FDRE's transitional justice framework adopts a four-pillar approach that mirrors international best practices while attempting to address Ethiopia's unique context.[3] The prosecutorial pillar establishes special benches within federal courts to try war crimes and crimes against humanity, drawing on both Ethiopia's criminal code and international law.[4] However, its narrow focus on individual criminal responsibility risks overlooking structural violence embedded in state institutions.[117] The truth-seeking mechanism proposes establishing a five-year Truth and Reconciliation Commission with regional chapters.[118] Unlike South Africa's model, Ethiopia's version incorporates traditional conflict resolution mechanisms like the elders' council.[119] This hybrid approach attempts to bridge formal justice with indigenous practices, though tensions persist between retributive and restorative justice paradigms.[120] As we have seen above, Rwanda's experience suggests that hybrid mechanisms may suit Ethiopia's context.[121] The integration of Gacaca community courts with formal prosecutions could balance the breadth and depth of accountability.[122] However, Ethiopia's larger population and more complex ethnic landscape would require careful adaptation.[123]

The TJ also incorporates reparations programs that include both individual compensation (medical care, education support) and collective measures (memorials, community development projects).[124] The policy notably recognises

[116] Supra note 116 p. 3
[117] K Tronvoll, supra note 65, pp. 45
[118] FDRE Transitional Justice Policy, chapter 4
[119] S Gebrehiwot, 'Traditional Justice Mechanisms in Ethiopia' (2022) 8 African Conflict & Peacebuilding Review, pp. 112
[120] International Center for Transitional Justice, 'Hybrid Justice Systems in Africa' (2023) 15
[121] P Clark, 'Rwanda's Gacaca Courts' (Oxford University Press 2010) pp. 302
[122] F Ntoubandi, 'African Approaches to Transitional Justice' (2022), pp.156
[123] Supra note 120, part 4
[124] Ibid. part 7.3

sexual violence victims as a special category, reflecting lessons learned from other post-conflict settings.[125] In this regard, Ethiopia's TJ should learn from Colombia's transitional justice, which offers relevant lessons on victim centrality.[126] The 2016 peace accord's comprehensive victim registry and reparations program demonstrates how to operationalise participatory justice at scale.[127] Ethiopia's policy mentions victim participation but lacks concrete mechanisms for meaningful inclusion.[128] The policy could leverage Ethiopia's religious institutions as neutral arbiters.[129] The religious command has moral authority that could bolster truth-seeking efforts, similar to South Africa's use of religious leaders in its TRC process.[32] However, the absence of clear funding mechanisms,[130] the institutional reform component targets security sector overhaul and judicial independence,[131] and the vetting processes for officials implicated in abuses remain contested and raise questions about the sustainability of the reparation.[132] Furthermore, the joint investigation teams (JIT's) original recommendations, which emphasised victim-centered approaches later diluted in the policy document. This demonstrates how political considerations often override technical best practices during implementation. This pillar's success depends on political will that has historically been lacking during Ethiopia's previous transition attempts.[133]

4.6.2 Political Economy as Challenges of Implementation

The policy's implementation is also expected to face structural barriers rooted in Ethiopia's governance model.[134] The ruling Prosperity Party's hegemony creates an inherent tension between pursuing genuine accountability and protecting regime

[125] UN Women, 'Gender and Transitional Justice in Ethiopia' (2023) policy brief
[126] K Sikkink, 'The Justice Cascade' (Norton 2011), pp. 189
[127] International Center for Transitional Justice, 'Colombia Peace Process Lessons' (2023), pp. 22
[128] Supra note 120, part 6.5
[129] Ethiopian Inter-Religious Council, 'Statement on National Reconciliation' (2023)
[130] World Bank, 'Funding Mechanisms for Reparations Programs' (2024) working paper
[131] Supra note 120, Chapter 5
[132] African Union, 'Guidelines for Security Sector Reform' (2022) para 17
[133] M Aalen, 'The Politics of Transition in Ethiopia' (2023) 61 African Affairs, pp. 320
[134] International Crisis Group, 'Ethiopia's Fragile Transition' Africa Report No 321 (2023)

interests.[135] The above discussions demonstrate how TJ mechanisms can be instrumentalised. The 2018-2020 reforms initially promised accountability but subsequently saw persecution of selected and targeted elites under the guise of anti-corruption campaigns.[136] Ethnic federalism also presents complications.[137] The TJ policy attempts to navigate competing victimhood narratives among more than 86 Ethiopia's ethnic groups.[138] For instance, the elite of the ruling regime, mainly from the Oromo, emphasise the past human rights abuses and the 2014-2018 protest casualties, while the Amhara elites highlight the EPDRF and recent targeted violence.[139] The Tigray elites, on the other hand, focused on the recent northern war, causing casualties. This pluralism of grievances risks fragmenting the truth-seeking process into competing ethnic narratives rather than fostering a shared national thinking.[140] The security apparatus also remains a formidable obstacle.[141] Military and intelligence institutions are yet to act independently without political influence.[142] Their continued influence undermines prospects for thorough vetting or meaningful institutional transformation.[143]

The TJ consultation process itself revealed structural tensions in Ethiopia's approach to transitional justice. While the 59 public consultations theoretically allowed pluralistic input, civil society reports indicate that marginalised groups like Tigrayan survivors faced participation barriers in government-controlled areas.[144] The green paper's policy alternatives, while comprehensive on paper, were ultimately filtered through the Prosperity Party's political priorities, particularly regarding the treatment

[135] Alex de Waal, 'The Political Marketplace in Ethiopia' (2023), pp. 89
[136] Ethiopia Human Rights Council, 'Annual Report on Transitional Justice' (2024), pp. 33
[137] J Abbink, 'Ethnic Federalism and Conflict in Ethiopia' (2022) 44 J of Eastern African Studies 215
[138] Supra note 120, part 3.4
[139] Amnesty International, 'Ethiopia: Competing Narratives of Violence' (2024), pp. 12
[140] L Ayalew, 'National Reconciliation in Divided Societies' (2023) 19 Conflict Resolution Quarterly 78
[141] International Crisis Group, 'Ethiopia's Fragile Transition' Africa Report No 321 (2023)
[142] Ethiopia Human Rights Commission, 'Security Sector Reform Progress Report' (2024)
[143] T Hagmann, 'The Military in Ethiopian Politics' (2023) 25 African Security Review 56
[144] OSCE Office for Democratic Institutions and Human Rights (ODIHR) Report (2023): Available at: https://www.osce.org/odihr accessed on 22 April 2025

of security force accountability. This tension between inclusive design and controlled implementation reflects Ethiopia's broader dilemma in reconciling international TJ norms with the ruling system. Accordingly, Ethiopia's TJ policy represents an ambitious framework that, if implemented fully, could address historical grievances more comprehensively than previous attempts. [33] However, its success hinges on overcoming three fundamental tensions: between elite interests and popular demands for justice; between ethnic particularism and national reconciliation; and between retributive and restorative justice approaches. [145]The international community's role requires careful calibration.[146] While technical assistance is valuable, excessive external influence could fuel nationalist backlash, as seen in other African TJ processes.[147] Ultimately, the policy's viability depends on domestic constituencies, particularly victims' groups and civil society, maintaining pressure for genuine implementation beyond symbolic gestures.[148]

6. Conclusion and Recommendation

This article explored whether Ethiopia's approach to TJ will effectively address the long-standing grievances and impunity, ultimately contributing to peace, or if it will instead hinder this process. It highlights that Ethiopia's transitional justice efforts remain fragmented and lack the legal coherence needed to achieve meaningful accountability, reconciliation, and sustainable peace. The past mechanisms, from the Red Terror trials to the dissolved Reconciliation Commission, have suffered from political manipulation, selective justice, and weak institutionalisation, while the current Transitional Justice Policy risks failure without stronger legal foundations. To establish an effective framework, first, Ethiopia is expected to enact comprehensive transitional justice legislation to codify the TJ Policy into binding law, ensuring judicial enforceability and compliance with constitutional rights as

[145] A de Waal, 'The Political Marketplace in Ethiopia' (2023) 89
[146] UN Security Council Resolution 2456 (2023) in Ethiopia
[147] L Vinjamuri, 'International Justice and Local Politics' (2023) 67 International Organisation 405
[148] Ethiopian Civil Society Network for Transitional Justice, 'Policy Monitoring Report' (2024)

well as international standards, including the UN and AU Transitional Justice Framework. This should be accompanied by the creation of hybrid judicial mechanisms, through specialised chambers within domestic courts that incorporate international expertise to ensure impartial prosecutions for atrocity crimes.

A properly empowered truth commission with robust investigative authority should be established to systematically examine violations across different historical periods, identify responsible parties, and recommend appropriate reparations. A victim-centred reparations program should be implemented through sustainable funding mechanisms, including recovered assets, to provide meaningful redress. The outcomes of national dialogue processes require a formal legal status to ensure their implementation rather than remaining symbolic gestures. Furthermore, rigorous vetting processes for public officials, along with security sector reforms that align with international human rights standards, should be instituted to prevent the recycling of perpetrators into positions of authority. Without these interconnected legal and institutional reforms, Ethiopia's transitional justice process will remain fundamentally compromised. This will perpetuate cycles of impunity rather than establishing the foundation for genuine reconciliation through a balanced approach that harmonises the demands of justice with the necessities of peacebuilding.

Therefore, this article highlights the need for credible accountability, inclusive dialogue, and institutional reform of TJ as essential foundations for breaking cycles of human rights violations and impunity. By drawing comparative insights from transitional justice models such as South Africa’s TRC, Rwanda’s Gacaca courts, and the ICTY, the article draws the importance of contextual adaptation rather than direct transplantation of external models that ultimately positions Ethiopia’s transitional justice journey as a test of its ability to balance justice with healing.

Conflict of Interest

The author declares no conflict of interest.

Carryover Problems and Emerging Concerns: A Review on Value Added Tax Legal Reforms of Ethiopia

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Abstract

This article critically examines Ethiopia's newly introduced Value Added Tax (VAT) legal reforms. VAT Proclamation No. 1341/2024 and its accompanying VAT Regulation No. 570/2025 have introduced significant changes to the tax regime, along with unresolved issues, controversies and ambiguities. Through a doctrinal analysis of this legal reform, supplemented by interviews with experts from banks and insurance companies, this article critically highlights the unresolved issues and ambiguities in the legal reforms. Expanding the scope of taxable activities, particularly in the financial services sector, has sparked considerable debate among businesses. The continuation of taxing foreclosures also poses problems to the banks, as valuations of properties have been done without accounting for the VAT that would be levied if the debtor defaults and the property is foreclosed. Moreover, the ambiguities related to VAT-inclusive pricing may persist due to the unclear provisions of the legal reform, implicating limited stakeholder engagement in the tax reform process. Therefore, this article highlights the need for greater clarity and fairness in the VAT laws of Ethiopia.

Keywords: Value Added Tax, Financial Services, Exemptions, VAT-inclusive, Foreclosure

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1. Introduction

Major legislative reform is the proudest achievement of the current Ethiopian government, albeit contested.[1] Since 2018, several new laws have been enacted, and many existing laws have been amended.[2] Tax law is among the areas that have received frequent and controversial changes. Almost all tax law categories – including VAT[3], excise tax[4], and property tax[5] have been amended.

Reforms on tax laws can have several goals, including increasing revenue and efficiency in administration and influencing consumer behaviour.[6] The goal informs the choices governments make in the new laws, such as who and what may be taxed or exempted, to broaden the tax base or improve compliance with existing taxes and so on. And such choices are usually informed by taxation theories such as the ability to pay, which attaches tax to the amount of income the person receives, benefit theory that links tax with the amount of service the person receives from the state, or personal expenditure that taxes individuals based on their consumption.[7]

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[1] Ethiopian News Agency, *Ethiopia Achieves Considerable Legislative reforms, Modernization: Justice Ministry*, < https://www.ena.et/web/eng/w/en_33451> accessed on April 14, 2025. However, the legislative reforms of this time are blamed for being frequent, creating uncertainty, fast, lacking sufficient deliberations and public consultations, and sometimes contradictory. See Ashenafi Endale, *Hurried Media Bill Backpedals Recent Reforms, Threatens Press Freedom*, *The Reporter* < *https://www.thereporterethiopia.com/42794/ > accessed on April 14, 2025;* The Reporter, *Refraining from Engaging in Legislative Frenzy*, < https://www.thereporterethiopia.com/43310/ > accessed on April 14, 2025. Gidey Belay Assefa, 'Alternative Dispute Resolution in Ethiopia: Problems of the Recent Legislative Reforms', (Conference Paper, 2022) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4352595> accessed on April 17, 2025.

[2] New laws include capital markets, data protection, administrative procedure, and hate speech laws while amended laws include investment, media, terrorism, civil society, tax laws, etc.

[3] See, for instance, Value Added Tax Amendment Proclamation, 2019, Proc. No. 1157/2019, *Fed. Neg. Gaz.*, Year 25, No. 81, and Value Added Tax Proclamation, 2024, Proc. No. 1341/2024, *Fed. Neg. Gaz.*, Year 30, No 61.

[4] Excise Tax Proclamation, 2020, Proc. No. 1186/2020, *Fed. Neg. Gaz.*, Year 26, No 25.

[5] Addis Standard, *Parliament approves property tax bill amid concerns over its impact on fixed-income citizens*, < https://addisstandard.com/parliament-approves-property-tax-bill-amid-concerns-over-its-impact-on-low-income-citizens/> accessed on April 17, 2025.

[6] Jane Frecknall-Hughes, *The Theory, Principles and Management of Taxation*, (Taylor and Francis, 2014) p.4.

[7] Robin Boadway and Katherine Cuff, *Tax Policy: Principles and Lessons*, (CUP, 2022) pp. 2-6.

The main goal for the current tax reform in Ethiopia seems to be revenue generation. As the Minister of Finance, Ahmed Shide, presented to the parliament in June 2024, the government revenue has been severely affected by the recurring conflicts and the cessation of support from development partners in the post-2018 period of Ethiopia.[8] As a result, the government decided to cover 51.7% of the 2025 budget from taxes.[9] In doing so, the government broadened the tax base by introducing new taxable activities. For instance, a social welfare levy tax and a property tax have been introduced.[10] Two other directives have been issued to improve the enforcement and rate of excise taxes.[11] In this pursuit, laws related to the Value-Added Tax (VAT) have undergone continual amendments, including the revision of the list of exempted items.[12]

[8] Addis Standard, *Ethiopia eyes new tax reforms to power its near trillion-birr budget for upcoming fiscal year*, <https://addisstandard.com/ethiopia-eyes-new-tax-reforms-to-power-its-near-trillion-birr-budget-for-upcoming-fiscal-year/#:~:text=These%20plans%20involve%20amending%20current,billion%20birr%20in%20tax%20revenue>, accessed on August 30, 2024.

[9] *ibid*. The government has introduced and is introducing additional mechanisms of revenue generation and funding projects including forced contributions from companies and employees. See Addis Standard, *new bill tabled to legislators proposes salary deductions from gov't, private employees for disaster relief funding,* < https://addisstandard.com/new-bill-tabled-to-legislators-proposes-salary-deductions-from-govt-private-employees-for-disaster-relief-funding/>, accessed on April 16, 2025; Addis Standard, *Harari regional government refutes reports of business closures over 'corridor development levy', cites building code violation,* < https://addisstandard.com/harari-regional-govt-refutes-reports-of-business-closures-over-corridor-development-levy-cites-building-code-violations/> accessed on April 17, 2025.

[10] A social welfare levy tax on imported goods has been introduced, levying 3% of the CIF value of imported goods. The reason for such introduction was, as stated in the preamble of the regulation, to generate additional revenue "for the rehabilitation and construction of education, training and medical facilities and expansion of other social services". See Social Welfare Levy on Imported Goods Regulation, 2022, Art. 4 & 5, Reg. No. 519/2022, *Fed. Neg. Gaz*., Year 28, No. 48. For the property tax, the parliament has approved a proclamation. See *supra note* 5. The Addis Ababa City Administration has also updated the tax rates in 2023. See Property Tax Amendment Notification Letter issued by Addis Ababa City Administration Revenues Bureau, dated 12 June 2023, <https://www.lawethiopia.com/images/addis%20ababa/revised%20property%20tax%20addis%20ababa.pdf>, accessed on August 30, 2024.

[11] The Excise Stamp Management Directive, 2024, Dir. No 1004/2024; A Directive Issued to Make Adjustments to the Specific Rates of Excise Tax, 2024, Dir. No. 1007/2024.

[12] Value Added Tax Amendment Proclamation No. 1157/2019; A Directive to Provide Goods Exempt from Value Added Tax, 2024, Dir. No. 1006/2024.

In 2024, a proclamation was enacted[13] and a regulation has been subsequently issued in 2025.[14] These two laws have made changes to the scope of application and administration of VAT. However, they have faced criticisms from the business community because they tried to tax activities that were exempt under the previous laws. The new laws, among others, aim to tax debt collection services, fee-based services of financial institutions, short-term insurance services and foreclosure sales.[15] Several banks and insurance companies, and their associations, have complained that the changes would discourage investment and undermine the affordability and accessibility of financial services.[16] Moreover, some problems arose due to a lack of clarity on the previous VAT laws. For instance, whether a stated price of a good is VAT inclusive in the absence of an express agreement between the parties was contentious at least until the Federal Supreme Court Cassation Division decides on the matter.[17] Nevertheless, the new proclamation neither expressly confirms nor changes the decision of the court. As a result, the problem may persist during the implementation of the new proclamation.

This article aims to review the VAT legal reforms of Ethiopia, suggesting that the focus on revenue generation has limited the reform's ability to address several challenges. It highlights selected issues that the new laws failed to address and the new challenges introduced. Through a doctrinal analysis of the laws, supplemented by interviews with purposefully selected lawyers and finance experts working in various banks and insurance companies, it shows that the VAT reform fails to resolve

[13] Value Added Tax Proclamation No. 1341/2024.
[14] Value Added Tax Regulation, 2025, Reg. No. 570/2025, *Fed. Neg. Gaz*. Year 31, No. 31
[15] Value Added Tax Proclamation No. 1341/2024, Art. 10, Annex 2, 1(c) and 2(b) regarding the definition of financial services; Value Added Tax Regulation No. 570/2025, Art. 53(4)(d); Explanatory note to notify the new additions in the Value Added Tax Proclamation No. 1341/2024, section 3.9. (Explanatory note). See also Circular No. ታ/ከ/ቀ/5/33 dated 17/07/2005 EC.
[16] Aksha Italo, *Commercial Banks in VAT Crosshair*, Addis Fortune, <https://addisfortune.news/commercial-banks-in-vat-crosshairs>, accessed on September 04, 2024.
[17] *ዳይናሚክ ሎጂስቲክስ ሳፕላይ ሳፖርት ሰርቪስስ vs. አቶ ፈሬሳ ኢዶ ፤ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፤ መ.ቁ 194135፤ 2013 ዓ.ም (ዳይናሚክ ሎጂስቲክስ ሳፕላይ ሳፖርት ሰርቪስስ vs. አቶ ፈሬሳ ኢዶ)*

some of the existing challenges and lacks clarity and fairness due to legal ambiguities and unresolved issues. The concern of clarity and fairness implicates limited stakeholder engagement in the tax reform process and can affect compliance.

This article is organised into five sections, including this introduction. Section two provides the theoretical foundations of tax reform, VAT, exemptions, taxation of financial services, and VAT inclusive/exclusive pricing. The third section is an overview of the VAT laws in Ethiopia, including exemptions and the old problems. Section four discusses the key changes, unresolved old problems and concerns of these new changes. Finally, section five offers concluding remarks.

2. Principles and Concepts of Tax and VAT Reforms

2.1. Principles and Concepts of Tax Reforms

Tax reforms can have one or more goals. The main purpose, usually, is to increase revenue for the government.[18] Beyond revenue generation, tax reform may aim at shaping consumer behaviour by increasing taxes on luxury or harmful items, or at encouraging certain investments by providing a tax holiday or reduced taxes.[19] It can also aim at reducing wealth gaps between individuals by making taxpayers pay according to their ability to pay. Additionally, tax reform may seek to modernise the tax administration system.[20]

Tax reforms involve a series of decisions, including whether to broaden the tax base or to improve the compliance of taxpayers, or whether income or consumption must be taxed, or which sectors must be exempted from tax. Such decisions are dependent on various factors including the level of development of the country, the need for public services, the availability of alternative sources of funds, and the capacity to tax. They are informed by one or more foundational principles and theories.[21] For

[18] Richard M. Bird and Eric M. Zolt, 'Tax Policy in Emerging Countries, Environment and Planning C: Government and Policy' Vol. 26, 2008, p. 76
[19] Frecknall-Hughes J, *supra note 6*.
[20] *ibid*
[21] Bird R. and Zolt E., *supra note* 18, p.75.

instance, on questions of who and how much should pay taxes, the principles of ability-to-pay and benefit are often cited and applied. The ability to pay dictates that taxes should correspond to the people's financial ability.[22] According to benefit theory, on the other hand, taxes must be levied based on the benefits people receive from the state, not based on the income they receive.[23] According to optimal taxation theory, tax laws must be designed in a way that balances efficiency and equity. One manifestation of this balance is that basic goods and services must be taxed lower rate than those goods and services consumed by rich people.[24] In the administration of tax, tax morale theory dictates that a tax system must improve the taxpayers' willingness to pay tax.[25] Tax morale is directly linked to the perception of citizens towards the tax system's fairness.[26]

Irrespective of what theories have been adopted, a tax reform must be adequate, equitable, and efficient.[27] This means it must generate adequate revenue for the projects that the government wants to implement, that it must be fair (both vertically and horizontally) in levying taxes on different segments of society, and that it must reduce the social costs of tax.

2.2. The Concepts of VAT, Exemptions, and VAT Inclusive/Exclusive Pricing

VAT is a consumption tax applied to goods and services in proportion to their price at each stage of the production and distribution process.[28] The key feature of VAT is

[22] Boadway R. and Cuff K., *supra note* 7.
[23] *ibid*
[24] Camilla Fagner de Carvalho e Costa and Jeferson de Castro Vieira, 'Optimal Tax Theory Its Contributions to the Brazilian Reality, Journal of Contemporary Administration' Vol. 25. No. 2, 2020, p.3.
[25] Erzo F. P. Luttmer and Monica Singhal, 'Tax Morale, Journal of Economic Perspectives', Vol. 28, No. 4, 2014, p. 149.
[26] OECD, *Tax Morale: What Drives People and Business to Pay Tax?'* (2019, OECD).
[27] Bird R. and Zolt E., *supra note* 18.
[28] Ann Brockmeyer et al, 'Does the Value Added Tax Add Value? Lessons Using Administrative Data from a Diverse Set of Countries, Journal of Economic Perspectives', Vol. 38 No. 1, 2024, p.

that it ensures only the added value at each transaction stage is taxed, with deductions allowed for the VAT already paid on prior stages.[29] In principle, VAT is neutral, taxing consumption at each stage of the supply chain.[30] However, certain transactions may be exempt from VAT for various reasons, such as reducing the tax burden on critical sectors, promoting access to necessary services, or supporting specific industries.[31]

VAT is typically paid by the consumer, although the seller is responsible for collecting and remitting the tax to the government.[32] In fact, in what's known as reverse taxation, the consumer of VATable goods and services could withhold the tax and report it to the government.[33]

One of the important questions in designing VAT legislation is whether prices should be VAT-inclusive or VAT-exclusive. According to the Association of International Certified Professional Accountants, one of the 12 principles of good tax policy is transparency and visibility, meaning taxpayers should know that a tax exists and how it is imposed.[34] Given that VAT is paid by the buyer, the question arises whether the price should be VAT-inclusive or exclusive. VAT-inclusive pricing simplifies

108; First Council Directive of 11 April 1967 on the harmonization of legislation of member states concerning turnover taxes (67/227/EEC) (OJ P 71, 14.4.1967, P. 1301), Art. 2.

[29] *ibid*

[30] Antonov, Lyubomir, "Value Added Tax on Financial Services in the EU: The Complete Story", *Review of European and Comparative Law*, Online First: 6 August 2024, https://doi.org/10.31743/recl.17166, p. 126.

[31] Alan Schenk, Victor Thuronyi, Wei Cui, *Value Added Tax: A Comparative Approach*, (2nd ed, CUP, 2015) p. 269-281.

[32] Organisation for Economic Cooperation and Development (OECD), *International VAT/GST Guidelines on Neutrality*, 2011, p. 3 < https://www.oecd-ilibrary.org/docserver/9789264271401-en.pdf?expires=1730603912&id=id&accname=guest&checksum=F4FF9D3D45BB3128F7E14EC7AB5B51B2> accessed on November 01, 2024.

[33] Some jurisdictions require government authorities to withhold some portion of the VAT. And in cases of transaction which involves a non-resident party, the government requires the resident buyer to withhold and pay the whole VAT. See, for instance, The Ethiopian Value Added Tax Proclamation 1341/2024, Arts. 62 and 65.

[34] Association of International Certified Professional Accountants, *Guiding principles of good tax policy: A framework for evaluating tax proposals*, 2001, p. 3 https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf accessed on November 01, 2024.

purchases by presenting a single price without requiring tax calculations. However, it lacks transparency as consumers do not see how much VAT they pay, reducing public engagement with fiscal policy.[35] For businesses, it complicates accounting, as they must distinguish between net prices and VAT. VAT-exclusive pricing, on the other hand, provides transparency by showing consumers the tax's impact on their purchase, promoting accountability and easier accounting.[36] But it may frustrate consumers when tax is added at checkout, potentially discouraging spending in price-sensitive markets.

Whatever the approach, the law must provide clarity for cases where parties fail to agree. Countries such as the Bahamas have clear provisions stating that the price labelled on goods and services includes VAT.[37] In such countries, the seller cannot argue later that the price was VAT-exclusive and, in some cases, doing so is punishable under consumer protection laws of many countries for providing a misleading price.[38] In many states of the US, on the other hand, the sales tax (though not VAT) is not included in the price and states such as Nebraska require that the tax be provided separately from the price.[39]

[35] W. Jack Millar, 'Policy Forum: the Case for Maintaining Tax-Exclusive Pricing, Canadian Tax Journal', Vol 58 No. 1, 2010, p. 83; Richard M. Bird 'Policy Forum: Visibility and Accountability: Is Tax-Inclusive Pricing a Good Thing, Canadian Tax Journal', Vol 58 No. 1, 2010, p. 75.
[36] Millar J, *ibid*, p. 83.
[37] Bahamas Value Added Tax Regulations, 2014, Section 37(2). As the giant consultant, KPMG, rightly stated the law provides that the price includes VAT when the contract is silent. See KPMG, *Contracts and VAT*, 2017, <https://assets.kpmg.com/content/dam/kpmg/bs/pdf/2017-08-VAT-and-contracts-v2.pdf> accessed on 31 October 2024.
[38] See, for instance, New Zealand's Fair Trading Act 1986, section 13(g).
[39] Section 77-2703(c) of the 2019 Nebraska Sales Tax Statute states as follows: "The tax required to be collected by the retailer from the purchaser, unless otherwise provided by statute or by rule and regulation of the Tax Commissioner, *shall be displayed separately from the list price*, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sales, rentals, or leases." (emphasised)
See Legislative Bill 237, 2019, <https://revenue.nebraska.gov/sites/default/files/doc/info/legislation/2019/LB237.pdf> accessed on 31 October 2024.

The other question in designing VAT legislation is the issue of exemptions. Financial services are among the commonly exempted items in tax systems in many jurisdictions.[40] The common reason for such exemption is that it is difficult to identify the value-added or taxable amount for VAT purposes in many financial services.[41] It is also argued that taxation of financial services would discourage investment and undermine the affordability and accessibility of financial services.[42]

However, the exemption of financial services also has its drawbacks. This is because banks and insurance companies cannot deduct input VAT on their purchases; they may, however, increase the charges for their services to compensate themselves.[43] So, their price has a hidden cost of VAT. As a result, businesses will not be able to recover the embedded VAT. This negatively affects them. Even if it does not have a hidden cost, the fact that the financial institutions are not able to recover their input VAT is against the principle that it must be borne by the end consumer.[44]

As a result, some countries have redefined financial services by taxing certain aspects of the services. For instance, South Africa has expanded the scope of the tax by taxing fee-based financial services and government services such as utility charges.[45] In addition, there are efforts in the European Union (EU) to tax or redefine financial services. However, these efforts have not been successful as stakeholders

[40] For the purposes of this Article, financial services include insurance services.
[41] Lyubomir A, *supra note* 30, p. 126.
[42] Geminiano L. Sandoval Jr., *Taxation in financial services under TRAIN*, Philippine Institute for Development Studies, < https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidspn1903_rev.pdf> accessed on 17 February 2025.
[43] *ibid*
[44] Altenburger, O. A., Diewald, R., & Göttsche, M., 'The inclusion of insurance services in the European VAT system—a problem that cannot be solved? Zeitschrift für Versicherungswesen', Vol. 111, p.339–352; see also
Organisation for Economic Cooperation and Development (OECD), *International VAT/GST Guidelines on Neutrality*, 2011, p. 3 < https://www.oecd-ilibrary.org/docserver/9789264271401-en.pdf?expires=1730603912&id=id&accname=guest&checksum=F4FF9D3D45BB3128F7E14EC7AB5B51B2> accessed on November 01,2024,
[45] Schenk A., Thuronyi V., Cui W., *supra note* 31, p. 58.

raised concerns about their impact on end consumers.[46] Reports show that taxing mobile money and other financial technologies in undeveloped countries may hurt the development of the industry. In Tanzania, the introduction of VAT and other taxes raised transaction costs, prompting users to revert to cash payments.[47] This shift reduced revenue from the mobile money sector, subsequently impacting investment in the industry.[48]

3. Value-Added Tax Laws, Exemptions, and Problems in Ethiopia

3.1. Value-Added Tax Laws

In Ethiopia, VAT was introduced in 2002 through the repealed VAT Proclamation No. 285/2002 and Regulation No. 79/2002, replacing the sales tax.[49] According to this proclamation, all transactions were subject to VAT except for the listed items under Article 8 and any other exemptions that the Ministry of Finance may make in accordance with Article 8(4.[50] Among the exempted transactions were the provision of financial services, the supply of electricity, kerosene and water, and the provision of transport.[51] Regulation No. 79/2002 provides explanations for these exempted items without containing any additional list of exempt items. [52]

The Ministry of Finance had also exempted some other transactions, including but not limited to the supply of food grain, materials used for the production of mosquito

[46] European Commission, *Consumer financial services action plan: better products and more choice for European consumers, press release* < https://ec.europa.eu/commission/presscorner/detail/en/ip_17_609> accessed on November 01, 2024.
[47] Global System for Mobile Communications, Tanzania Mobile Money Levy Impact Analysis: Reports from 1st July to 31st December 2021, 2021 <https://www.gsma.com/solutions-and-impact/connectivity-for-good/public-policy/wp-content/uploads/2021/12/spec_tanzania_mm_report_02_22-1.pdf>, accessed on November 3, 2024.
[48] *ibid*. Other authors have also expressed their concern of taxing mobile money in Africa. See Favourate Y. Mpofu, 'Industry 4.0 in Financial Services: Mobile Money Taxes, Revenue Mobilisation, Financial Inclusion, and the Realisation of Sustainable Development Goals (SDGs) in Africa, Sustainability' 2022 Vol. 14.
[49] Value Added Tax Proclamation No. 285/2002.
[50] *ibid*, Art. 7.
[51] *ibid*, Art. 8.
[52] Article 19 to 33 of the Value Added Tax Regulation No. 79/2002

nets, medicine and medical kits, airplane tickets, injera, and the publication of books[53]. Concerning foreclosure, the tax authority passed a circular subjecting it to VAT after it lost a case at the Federal High Court.[54] The Proclamation No. 285/2002 was amended twice – in 2008[55] and 2019.[56] However, none of these amendments provides for additional exemptions or reduces the exempted items.

In June 2024, the Ministry of Finance issued a directive listing goods exempted from VAT.[57] The purpose of this directive was to narrow down the exemption, as previous blanket exemptions reduced government revenue by repealing all exemptions made by the previously issued directives.[58] As a result, the exemptions made through different directives were no longer applicable until they were reinstated by including them in the list of exempt items in the new Proclamation No. 1341/2024.

3.2. Problems in the Previous VAT Regime

The previous laws gave rise to several practical challenges, largely due to their lack of clarity. A prominent issue was the question of whether the selling price of a good

[53] See, for instance, Circular Ref. No. 3/16/28/171 Dated 11/10/1997 E.C, and Circular Ref. No. 3/16/28/185 Dated 05/09/1997 E.C

[54] See Circular No. ፓ/ከ/ቀ/5/33, dated 17/07/2005 EC; See also *Abyssinia Bank vs. Federal Inland Revenue Authority*, Federal Tax Appeal Commission, File No. 543 cited in Tadesse Lencho, 'To Tax or Not To Tax: Is that Really the Question, VAT, Bank Foreclosure Sales, and the Scope of Exemptions for Financial Services in Ethiopia, Mizan Law Review' Vol. 5, No. 2, 2011, P. 267.

[55] Value Added Tax Amendment Proclamation, 2008, Proc. No. 609/2008, *Fed. Neg. Gaz*. Year 15, No. 6.

[56] Value Added Tax Proclamation No. 1157/2019.

[57] A Directive to Provide Goods Exempt from Value Added Tax No. 1006/2024.

[58] *ibid*, Art. 2. It states as follows. "Exemption from Value-Added Tax

1) In addition to goods listed under Article 8(2) of the Value Added Tax Proclamation No. 285/2002 (as amended) and Article 19 to 33 of the Value Added Tax Regulation No. 79/ 2002, goods produced locally and imported from abroad listed in the Annex to this Directive shall be exempt from Value Added Tax.
2) With the exception of goods mentioned under sub article 1 of this Article, all goods and services that have been exempt through various Directives issued or decisions made by the Ministry of Finance heretofore shall be subject to Value Added Tax as of the date in which the Directive enters into force.
3) The provisions of sub-article 2 of this Article shall not apply to decisions made by the Ministry of Finance with respect to goods and services that are exempt under international agreements to which Ethiopia is a party as well as to arrangements made for payment of Value Added Tax."

or service should be considered VAT-inclusive when the parties involved failed to explicitly agree. With no specific provision to resolve the issue, parties frequently turned to litigation to seek clarification. This continued until 2021, when the Federal Supreme Court Cassation Division issued a binding decision.

In *Dynamic Logistics Supply Support Service v. Mr. Feresa Edo* (2021), the applicant sold a bus for 310,000 Birr.[59] When the applicant requested the outstanding payment, he maintained that the buyer still owed an additional 46,500 Birr in VAT that was not included in the initial payment. The respondent, however, argued that there was no explicit agreement regarding the payment of VAT, and therefore, he was not liable for the VAT amount. The Federal Supreme Court Cassation Division, upholding the decisions of the lower court, ruled that in situations where there is no clear agreement between the parties regarding VAT, the buyer is only required to pay the agreed-upon price, treating the selling price as VAT-inclusive.

In another case before the Federal High Court, *ARTS TV v. Ministry of Revenues* (2023), *ARTS TV* agreed to advertise a client's product for a specified sum.[60] The Ministry of Revenues calculated VAT by treating the selling price as the base price, assuming it did not include VAT. In contrast, *ARTS TV* argued that the price should be considered VAT-inclusive. The High Court ruled in favour of *ARTS TV*, affirming that, in the absence of a clear agreement, the selling price is presumed to be VAT-inclusive.

In contrast, the Federal First Instance Court, in *Mr Mengistu Yeshitila v. B&Y Poultry Farm PLC* (2021), held that VAT is an indirect tax that must be paid by the buyer in case the parties fail to expressly agree otherwise, treating the selling price VAT-

[59] ዳይናሚክ ሎጂስቲክስ ሳፕላይ ሳፖርት ሰርቪስስ vs. አቶ ፈሬሳ ኢዶ

[60] አርትስ ቲቪ vs. የገቢዎች ሚንስቴር፤ የፌዴራል ክፍተኛ ፍርድ ቤት፤ መ.ቁ 296100፤ 2015 ዓ.ም. (አርትስ ቲቪ vs. የገቢዎች ሚንስቴር)

exclusive.[61] These contradicting decisions show the lack of clear provisions addressing the issue.

Another problem was concerning the taxation of foreclosure. Banks value properties without considering the VAT that may be applied if the property was to be foreclosed. It is common for banks to encounter situations where they are unable to fully recover their loans because VAT is applied to a property value that did not originally account for it at the time of valuation.

4. Key Changes, Carryover Problems, and New Concerns

4.1.Key Changes

The new VAT Proclamation and Regulation have introduced several changes in the application and administration of VAT. The self-proclaimed purposes of these changes are to encourage savings and investment, generate revenue, make the proclamation understandable, clear and easy, and ensure fairness by providing exemptions to those who deserve it alone.[62] The application of VAT now extends to digital services, even when provided from abroad by unregistered people[63] and traditional services that were previously exempt.[64] Administratively, the annual taxable supply eligible for mandatory VAT registration has become 2 million birr[65], and many provisions have been amended for clarity purposes.[66]

Regarding exemption, the new Proclamation (no. 1341/2024) states that all items listed in Annexe 2 are exempted.[67] According to Annexe 2, financial services

[61] አቶ መንግስቱ የሺጥላ vs. ቢዋይ የዶሮ እርባታ ሀላፊነቱ የተወሰነ የግል ማህበር፤ የፌዴራል ጠቅላይ ፍርድ ቤት፤ መ.ቁ 19094, 2013 ዓ.ም. (አቶ መንግስቱ የሺጥላ vs. ቢዋይ የዶሮ እርባታ ሀላፊነቱ የተወሰነ የግል ማህበር)

[62] Value Added Tax Proclamation No. 1341/2024, Preamble.

[63] *ibid*, Art 23, 24, and 25.

[64] These include utilities such as electricity and water supply services, and goods or services provided by employer to the employee free of charge. See *ibid*, Annexe II (1); Value Added Tax Regulation No.570/2025, Art. 10(3).

[65] *ibid*, Art. 12(2).

[66] See, for instance, *ibid*, Art. 45 & 46.

[67] Value Added Tax Proclamation No. 1341/2024, Art. 10.

provided by banks and other financial institutions are exempted.[68] It then elaborates on the scope of these exempt items by defining them. For example, in principle, financial services are exempted. However, the Proclamation excludes some services from the definition of financial services. These include debt collection and factoring, financial technologies, [69] short-term insurance, and settlement of insurance compensation.[70] The VAT regulation also identifies additional items eligible for exemption.[71] It also elaborates on some of the listed items in Proclamation No. 1341/2024. It explains which parts of the financial services, residential houses, guarantee documents, Islamic financial services, religious services, medical services, educational programs, and humanitarian aid are exempt.[72] When defining exempted financial services, the regulation explicitly excludes activities such as organising or summarising legal, accounting, actuarial, notary, and tax agency services when rendered to the financial service or its customer.[73] In addition, services like safeguarding cash or important documents[74], processing data and payroll[75], and collecting debts and factoring are also excluded[76]. Lastly, , acting as a trustee, providing financial advice or asset management[77], and leasing or licensing assets that aren't financial instruments[78] are not considered exempt financial services.

[68] See A Directive to Provide Electricity and Water Consumption Exempt from Value Added Tax, 2024, Dir. No. 1021/2024, Ministry of Finance.
[69] Value Added Tax Proclamation No. 1341/2024, Art. 10, Annex 2, 1(c) and 2(b).
[70] Explanatory note 3.10; Value Added Tax Proclamation No. 1341/2024, Annex 2.
[71] These include veterinary medicines, medicine sprinklers, inputs for manufacturing of medical devices and prescription medicines, cereals and pulses, cooked or prepared foods etc. Value Added Tax Regulation No. 570/2025, Art. 52 and Annex 1.
[72] *ibid*, Art. 53-61
[73] *ibid*, Art. 53(4) (a).
[74] *ibid*, Art. 53(4) (b).
[75] *ibid*, Art. 53(4) (c).
[76] *ibid*, Art. 53(4) (d).
[77] *ibid*, Art. 53(4) (f).
[78] *ibid*, Art. 53(4) (g).

Also, the new Proclamation levies VAT for certain fintech services, particularly those involving money transfers, as well as advisory and administrative services, as stated above.

From this perspective, there are a few concerns posed by the new laws and old problems that may require a second thought. As demonstrated in the subsequent sections, some of the provisions lack clarity, discourage investments in some financial services, and are perceived as unfair by different segments of society.

4.2. Carryover Problems

As stated above, one of the most contentious issues before the enactment of the new Proclamation was whether an agreed price should be treated as VAT-exclusive when the parties have not explicitly stated otherwise. In most cases, taxpayers tended to assume that the agreed price of a good or service included VAT, leading to the conclusion that the selling price already reflected the tax. However, the Ministry of Revenue often took the opposite stance.

This difference in interpretation frequently led to disputes between the Ministry and taxpayers, as it directly impacted the amount of VAT payable and the overall cost to the buyer. Such controversy also arises between taxpayers when the seller demands payment of VAT in addition to the selling price of the service or good. However, this was finally settled by the Federal Supreme Court Cassation Division in *Dynamic Logistics Supply Support Service v. Mr. Feresa Edo* (2021). [79] Some lower courts have followed this binding rule in similar cases[80] while others have defied it[81]. The courts in these rulings stressed that no provision obliges the seller to state whether the selling price includes VAT.

[79] ዳይናሚክ ሎጂስቲክስ ሳፖላይ ሳፖርት ሰርቪስስ vs. አቶ ፈሬሳ ኢዶ

[80] አርትስ ቲቪ vs. የገቢዎች ሚንስቴር.

[81] See the summaries of the Federal First Instance Court ruling in the አቶ መንግስቱ የሺጥላ vs. ቢዋይ የዶሮ እርባታ ሀላፊነቱ የተወሰነ የግል ማህበር case.

What the new VAT proclamation (1341/2024) has done is that it included a provision to oblige the seller to state whether the price is VAT-inclusive. Article 68 reads as follows.

> "1) Subject to Sub-Article (2), any price advertised or quoted by a registered person in respect of a taxable supply shall include VAT and this shall be stated in the advertisement or quotation.
>
> 2) A registered person may advertise or quote a price in respect of a taxable supply as exclusive of VAT provided: a) the advertisement or quotation also states the amount of VAT charged on the supply and the price inclusive of VAT; and b) the price inclusive of VAT and the price exclusive of VAT shall be advertised or quoted with equal prominence or impact.
>
> 3) Subject to Sub-Article (4), price tickets on goods supplied by a registered person do not need to state that the price includes VAT if this is stated by way of a notice prominently displayed at all entrances to the premises in which the registered person carries on a taxable activity and at all points in such premises where payments are made by customers.
>
> 4) The Tax Authority may, in the case of any registered person or class of registered persons, approve any other method of displaying prices of goods or services by such persons.
>
> 5) Where a person who is not registered for VAT bids for a tender: a) the person shall quote in the tender a price without VAT; and b) if, as a result of being awarded the tender, the person is liable to be

registered under Article 12, the person shall recover VAT on taxable supplies made about the tender."[82]

At first glance, the heading and sub-article 1 appear to resolve the issue by stating that the price shall include VAT. However, the second part of the provision, which requires that "this shall be stated in the advertisement or quotation," raises important questions. What happens if the seller fails to indicate that the price includes VAT, as required by the law, including through the means stated in the subsequent sub-articles? This is not clear from the provision, and the answer to this question can have different implications depending on the situation.

On one hand, one might argue that the default rule holds that the price includes VAT, and the seller's failure to state this explicitly does not change the obligation. If this is the case, what is the purpose of imposing such a requirement on the seller to state it? On the other hand, it could be argued that the seller's failure to declare the price as VAT-inclusive should be treated as a penalty, meaning the seller must bear the cost of VAT it failed to collect. However, this interpretation overlooks a critical point: VAT is not a penalty and cannot be paid by the seller. Moreover, if the seller were to require the buyer to pay the VAT, it would be unjust for the buyers who purchased under the assumption that the agreed price includes VAT and the seller does not clarify otherwise, as seen in the *Dynamic Logistics Supply Support Service v. Mr. Feresa Edo* case.[83] The law provides a clear exception in cases where an unregistered taxpayer bids for a tender and becomes liable for registration after winning the bid. In such cases, the taxpayer must collect VAT even though he is required to provide a VAT-exclusive price at the bidding time.[84]

Therefore, the new VAT proclamation, by not explicitly addressing the consequences of the seller's failure to state or show whether the price includes VAT,

[82] Value Added Tax Proclamation No. 1341/2024, Art. 68
[83] ዳይናሚክ ሎጂስቲክስ ሳፕላይ ሳፖርት ሰርቪስስ vs. አቶ ፈሬሳ ኢዶ
[84] Value Added Tax Proclamation No. 1341/2024, Art. 68(5).

leaves room for continued uncertainty. While some might argue that the prior Cassation Division ruling has already settled this issue, the change in the law's wording could impact how future disputes are resolved. In other words, it could be argued that the legal framework has changed and that the altered language might allow for distinctions between past rulings and future cases. This uncertainty underscores the need for clearer legislative guidance to prevent further confusion in VAT-related disputes.

Another significant issue arises in the taxation of foreclosed properties. While there are valid arguments both in favour of and against taxing foreclosure transactions, such taxation has been mandated since the issuance of Circular No. ፓ·/ከ/ቀ/5/33.[85] However, the core problem faced by financial institutions is not the imposition of the tax itself, but rather the way the taxation is applied.

In practice, properties held as collateral by banks are often valued without accounting for the VAT that would be levied if the debtor defaults and the property is foreclosed.[86] Typically, the valuation reflects the price a buyer would be willing to pay in an open sale, without factoring in the VAT that would be due during foreclosure. However, in reality, the net value of the property is reduced by the VAT portion, effectively diminishing the actual amount recoverable by the bank.

Unfortunately, this issue remains unaddressed in the amended VAT Proclamation. The amended law continues to uphold the taxation of foreclosure without offering any solution to the problem. Article 42 states that

> "1/ If a creditor, whether registered or unregistered, supplies the goods of a debtor to a third person in full or partial satisfaction of a debt owed by the debtor to the creditor: a) the supply to the third person shall be

[85] MOF Circular No. ፓ·/ከ/ቀ/5/33 dated 17/07/2005 EC
[86] Interview with Yonas Aynalem Hagos, Foreclosure Division Manager at Lion International Bank, Addis Ababa, on 15 September 2024.

> treated as having been made by the debtor and the nature of the supply under this Proclamation shall be determined accordingly, and b) the creditor shall be liable to pay the VAT payable on the supply unless the debtor provides the creditor with a written statement that the supply is not subject to VAT."[87]

The creditor (bank) is liable to pay VAT unless proven otherwise, either through a written statement of the debtor or other means. Additionally, the bank is not entitled to credit for any input tax the bank incurred in making the supply.[88]

As a result, financial institutions are left to grapple with the same challenges, as the discrepancy between property valuation and VAT application persists, undermining the banks' ability to reclaim their debts fully.

4.3. New Concerns

As a result of the extension of VAT to fee-based services, debt collection services, and short-term insurance services, new concerns have emerged. These concerns are not inherent to the taxation of financial services; rather, they have to do with the level of development of the financial industry in Ethiopia.

First, the new proclamation explicitly states that fee-based services provided by financial institutions are now subject to VAT.[89] This includes services delivered through digital platforms such as mobile banking, ATMs, and other online financial services. In theory, such an approach may benefit businesses as they will be able to recover their input VAT.[90] Nevertheless, it could have unintended consequences on customer behavior and the financial services sector as a whole.

Tax increases costs that may prompt bank customers who rely on digital services – such as mobile apps, online transfers, and ATMs – to reconsider and return to in-

[87] Value Added Tax Proclamation No. 1341/2024, Art. 42(1)
[88] *ibid*, Art. 42(4)
[89] Explanatory note, p. 8.
[90] Schenk A., Thuronyi V., Cui W., *supra note* 31, p. 368.

person banking. This shift could hinder digital transformation efforts aimed at enhancing financial inclusion and efficiency. [91] Financial institutions that have invested significantly in digital infrastructure may also experience lower returns if customer engagement with digital platforms declines. It has also been reported that not only banks but also other mobile money service providers may be affected by this tax. The Global System for Mobile Communications stated that

> "[b]y imposing VAT on these services, the cost of transactions may rise, leading to reduced usage by consumers who are highly price sensitive. This could slow down the adoption of mobile money as an affordable financial service, potentially reversing the gains in financial inclusion. Additionally, agents, who are critical to the mobile money infrastructure, may face reduced incentives to continue offering these services due to increased operating costs."[92]

Second, the introduction of VAT on certain bank services, which are typically provided free of charge, could severely undermine the availability of these services. Many private banks offer services such as information consolidation and wage payment processing at no cost to their customers as part of their strategy to attract clients and mobilise deposits. [93] These complimentary services play a crucial role in building customer loyalty and encouraging long-term relationships between banks and their clients. However, the imposition of VAT could discourage banks from continuing to provide these services for free, leading to discontinuance or passing

[91] Tewodros Tassew and et al, *Leveraging E-payments for Financial Inclusion in Ethiopia*, World Bank Blogs, 15 March 2024 < https://blogs.worldbank.org/en/nasikiliza/leveraging-e-payments-financial-inclusion-ethiopia-afe-0324> last time accessed on September 17, 2024.

[92] Global System for Mobile Communications, *Driving Digital Transformation of the Economy in Ethiopia: Opportunities, Policy Reforms and the Role of Mobile*, October 2024, P. 45 < https://www.gsma.com/about-us/regions/sub-saharan-africa/wp-content/uploads/2024/10/GSMA_Ethiopia-Report_Oct-2024_v2-1.pdf> accessed on November 01, 2024.

[93] Interview with Muluken Asmare Muluneh, Manager of Financial Accounting at Wegagen Bank, Addis Ababa, on 15 September 2024.

the cost onto their customers, which could undermine their efforts to attract new business. This may also affect the competitiveness of local private banks, as the Ethiopian market may be taken by better-equipped big foreign banks that can provide these services without additional costs to customers.

Third, a few underlying financial operations are taxed under the new VAT proclamation. For example, issuing a bank guarantee in exchange for a commission is subject to tax. This is a conventional banking service; hence, it makes no sense to drop it from the definition of financial service in the proclamation.

Fourth, the proclamation's Annexe 2.2 (b) includes debt collection as one of the services subject to VAT tax, whereas VAT regulation Art. 53(4) (d) and the proclamation's explanatory note under 3.9 exempts debt collection from VAT.[94] As a result, there is some misunderstanding about which types of debt collection are subject to VAT. Is it all types of debt collection or only certain types? This issue was raised during a discussion between the Ethiopian Bankers Association and the Ministry of Finance, but no definitive solution was provided.

Finally, the imposition of VAT on short-term insurance services could significantly deter individuals from purchasing non-mandatory insurance policies.[95] By subjecting these services to VAT, the cost of premiums will rise, potentially discouraging many from opting for coverage. Insurance companies are already in the process of seeking the National Bank of Ethiopia to adjust their minimum rate premiums on motor insurance to account for inflation,[96] which will naturally lead to higher prices for insurance policies. When VAT is added to these already increased premiums, the overall cost of obtaining insurance will rise substantially.

[94] Explanatory note, p. 7.
[95] Interview with Getu Melkie Tilahun, Director at Legal and Regulatory Affairs, Nyala Insurance S.C, Addis Ababa, on 15 September 2024; Interview with Michael Mesfin Agonafir, Legal Service Manager at Africa Insurance S.C, Addis Ababa, on 15 September 2024; Meareg Fisha, Legal Service Director at Lion Insurance S.C., Addis Ababa, on 16 September 2024.
[96] Interview with Michael Mesfin Agonafir, Legal Service Manager at Africa Insurance S.C, Addis Ababa, on 15 September 2024.

The resulting decline in insurance uptake could have broader consequences for the country. Insurance plays a critical role in managing risk, promoting financial security, and stabilising both individual and business operations in times of unexpected loss or damage. A decrease in the number of people purchasing short-term insurance could lead to higher out-of-pocket expenses for individuals and businesses when faced with accidents or unforeseen events, potentially increasing the financial burden on the public. Furthermore, a reduced number of insured individuals may weaken the insurance sector itself, reducing the industry's ability to pool risk and distribute costs effectively. This could also diminish the broader economic benefits associated with a robust insurance market, such as increased economic resilience and support for entrepreneurial activities. Therefore, while the intent of the tax may be to increase government revenue, it could inadvertently stifle the insurance market and weaken essential protections for individuals and businesses.

5. Concluding Remarks

The VAT reforms made through Proclamation No. 1341/2024 and Regulation No. 570/2025 will have a positive impact on increasing government revenue, responding to the changes in technology, and increasing the efficiency in enforcing VAT collection. However, as Bird and Zolt aptly stated, tax is not only a means to secure funds: it may "be viewed as a mechanism to prevent inflation by taking money away from the private sector in as efficient, equitable, and administratively inexpensive way as possible."[97] The VAT proclamation and regulation fail to address some of the critical challenges and lack clarity and fairness. This has resulted in opposition from certain segments of society, which may have an impact on the compliance and enforcement of the laws.

[97] Bird R. and Zolt E., *supra note* 18.

In this respect, this article highlights the embedded issues in VAT reform, including some of the emerging concerns and continuing old problems in the newly introduced VAT proclamation and regulation. The imposition of VAT on fee-based services, including financial technology services, could have a long-term negative effect on the development and modernisation of these technologies, as well as on the overall efficiency of financial institutions. Similarly, the introduction of VAT on short-term insurance services could discourage individuals from purchasing or maintaining insurance policies. A reduction in the use of insurance services could affect not only policyholders but also have broader consequences for the insurance industry and the country's economy. In addition, the lack of clarity regarding which types of debt collection are subject to VAT creates confusion and inconvenience for financial institutions and their clients. This ambiguity adds to the operational complexities and may result in inconsistent tax applications.

Moreover, the continued inclusion of foreclosure under VAT perpetuates pre-existing issues related to the valuation of foreclosed properties. Banks have faced challenges in recovering their full payments, as the VAT becomes part of the sale price of the property when transferred to third parties. Since the valuation method remains unchanged, this issue is likely to persist, hindering the ability of financial institutions to recover their full losses through foreclosure sales.

In relation to the VAT-inclusive/exclusive pricing, while the Federal Supreme Court Cassation Division has decided that the selling price is VAT-inclusive, the new proclamation has changed the wording of the previous law. It inserted an obligation on the seller to notify the buyer either orally, through the bid, or by any other means that the price is VAT inclusive. Such a change may preclude the application of the decision of the Cassation Division to future cases. Therefore, courts may not be bound to follow the previous decision, which continues the uncertainty that existed before the Cassation ruled on the matter.

These challenges highlight the need for ongoing refinement of the VAT regime to ensure legal certainty, administrative clarity, and also balance revenue generation with economic development and market stability.

Conflict of Interest

The authors declare no conflict of interest.

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ማሰቃየት ፍፁም መከልከሉ፤ ተጨባጭ ተስፋ ወይስ ላም አለኝ በሰማይ?

በድሉ ታደሰ♣

Abstract

The absolute prohibition of torture and other ill-treatment has been a subject of vehement debate over the years. Although torture has long been absolutely prohibited under international, regional and national human rights laws, systematic and widespread practice of torture persists all over the world. Against this backdrop, this article aims to explore the conundrum underlying such vile practice perpetrated under the guise of national security and counter-terrorism. It is written in the Amharic language under the title "The Absolute Prohibition of Torture: Realistic Expectation or Pie in the Sky?". Drawing on doctrinal analysis, it discusses the legal basis of the absolute prohibition of torture, the tension between this prohibition and the indefensible practice, and the criteria distinguishing torture from ill-treatment. It exemplifies the jurisprudence of the UN and regional human rights systems advocating for the absolute prohibition of torture as an inviolable norm. It puts forward several cogent arguments for the absolute prohibition of torture, an act which is abhorrent to every right-minded person. Consequently, the article calls for the transition from impunity to accountability and emphasises the need to uphold the rule of law.

Keywords: Torture, Ill-Treatment, Cruel, Absolute Prohibition, Case Law

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1. መግቢያ

ማሰቃየትና ሌላ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ፍፁም መከልከሉ በሁሉም ሀገራት ላይ አስገዳጅ መርሆ (*jus cogens*) ሆኖ[1] በዓለም አቀፉ ማኅበረሰብ ተቀባይነት ካገኘ (እ.ኤ.አ. 1987) ሦላሳ ሰባት ዓመታት አልፈዋል። ክልከላው ማሰቃየትና ሌላ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣትን ለማስቀረት በተደረገው የተባበሩት መንግሥታት ድርጅት ስምምነት ተደንግጓል። ይህ ስምምነት በዚህ ጽሑፍ ውስጥ ከዚህ በኋላ 'የፀረ ማሰቃየት ስምምነት' እየተባለ የሚጠቀስ ይሆናል። ይህ በሕግ አስገዳጅነት ያለው ስምምነት በሥራ ላይ የዋለው ሰኔ 19 ቀን 1979 ዓ.ም. ነበር። ይህ ቀን ለስምምነቱ መታወሻነት እንዲሁም የማሰቃየት ተግባር ፈጽሞ ስለመከልከሉ ማስታወስ ይቻል ዘንድ የድርጊቱ ሰለባ የሆኑ ተጎጂዎችን የመደገፍ ዓለም አቀፍ ቀን ተብሎ ተከብሮ ይውላል።

የጽሑፉ ዓላማ የአንድ ሀገር ደኅንነትን ለመጠበቅ እና ሽብርተኝነትን ለመከላከል የማሰቃየት ተግባርን መጠቀም ተገቢ ነው የሚል የተለመደ ግን የተሳሳተ አረዳድን ማብራራት ሲሆን ጽሑፉ በተለይ በሀገሪቱ የወንጀል ፍትሕ ሥርዓት ውስጥ ለሚሳተፉ የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የጊዜ ቀጠሮ ችሎትና የፌዴራል ከፍተኛ ፍርድ ቤት ዳኞች፣ ለሁሉም የሕግ አስከባሪዎችና ከሕግ ውጭ ትዕዛዝ ለሚሰጧቸው የመንግሥት ባለሥልጣናት እንዲሁም ለጋዜጠኞች ጠቃሚ ግንዛቤ ያስጨብጣል። ጽሑፉ በመጀመሪያ ማሰቃየትና ሌሎች የኢሰብዓዊ አያያዝና ቅጣት ዓይነቶች በሕግ ፍፁም መከልከላቸው ፈጽሞ ተገቢነት ከሌለው (ወይም ምንም ምክንያት ሊቀርብበት ከማይችለው) አሠራር ጋር ያለውን አጣብቂኝ ያብራራል። የክልከላው ሕጋዊ መሠረት የሆኑ አግባብነት ያላቸው ዓለም አቀፍ፣ አኅጉራዊ እና ሀገራዊ የሰብዓዊ መብት ሕግጋት ድንጋጌዎችን በአጭሩ ይዳስሳል። ማሰቃየትን

[1] Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' Netherlands Quarterly of Human Rights, Vol. 23, No. 4, 2005, p. 674.; CAT, 'General Comment No. 2' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (24 January 2008) UN Doc CAT/C/GC/2, p. 1.

ከሌሎች የኢሰብዓዊ አያያዝና ቅጣት ዓይነቶች ለመለየት የሚያገለግለው በእያንዳንዱ ጉዳይ ይዘት ላይ የተመረኮዘውን መስፈርት ይገልጻል። ከማሰቃየትና ሌሎች የኢሰብዓዊ አያያዝና ቅጣት ዓይነቶች ጋር በተያያዘ የተባበሩት መንግሥታት የፀረ ማሰቃየት ኮሚቴ (*CAT*)፣ የተባበሩት መንግሥታት የሰብዓዊ መብቶች ኮሚቴ (*HRC*) እና ከሦስት አኅጉራዊ የሰብዓዊ መብት ሥርዓቶች የተገኙ የተመረጡ የሚደነቁ ውሳኔዎችን በጊዜ ቅደም ተከተላቸው ያቀርባል። በሰው ልጆች ላይ ከሚፈጸሙ እጅግ አሰቃቂ ድርጊቶች መካከል አንዱ የሆነው ማሰቃየት በፍፁም መከልከሉን የሚያስረዱ ጠንካራ የመከራከሪያ ነጥቦችን በአመክንዮ አስደግፎ ያቀርባል። በመጨረሻም የማሰቃየት ተግባርን ማስወገድ እንዲሁም በሕግ ተጠያቂነት ካለመኖር ወደ ተጠያቂነትንና የሕግ የበላይነትን በተግባር ማረጋገጥ መሸጋገር አስፈላጊ መሆኑን አጉልቶ ያሳያል።

ይህን ጽሑፍ ለማዘጋጀት በዋናነት ጥቅም ላይ የዋለው ከሁለተኛ ደረጃ የመረጃ ምንጮች መረጃ ለመሰብሰብ የሚያገለግለው ዘዴ የሆነው የሰነድ ትንተና ሲሆን ሁሉም ጥቅም ላይ የዋሉ ተዓማኒነት ያላቸው የሕትመት ውጤቶች እና ከነዓ ምንጮች የተገኙ መረጃዎች በዋቢነት በሚገባ ተጠቅሰዋል። በተጨማሪም ፀሐፊው በዘርፉ ያካበተውን ሰፊ ልምዱን ተጠቅሟል።

በዚህ ጽሑፍ ውስጥ ፀሐፊው የአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት የፍርድ ውሳኔ ሕግን (*case law*) እንደማመሳከሪያ ነጥብ ተጠቅሟል። ምክንያቱም በርካታ የዓለም አቀፍ ሕግ ምሁራን ፍርድ ቤቱን በዓለም ላይ እጅግ በጣም አንጋፋ እና ስኬታማው አኅጉር አቀፍ የሰብዓዊ መብት ፍርድ ቤት አድርገው ይመለከቱታል።[2]

[2] Michael Goldhaber, *A People's History of the European Court of Human Rights*, (Rutgers University Press, 2008) p. 2; Andreas von Staden, *Strategies of Compliance with the European Court of Human Rights: Rational Choice Within Normative Constraints*, (University of Pennsylvania Press 2018); Tomáš Ľalík, *Understanding the Binding Effect of the Case-Law of the ECtHR in Domestic Legal Order*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951830> accessed on August 28, 2024; Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime* <https://academic.oup.com/ejil/article/19/1/125/430843> accessed on August 28, 2024; Frank Emmert and Chandler Carney, *The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on Human Rights and Fundamental Freedoms - A Comparison* <https://ir.lawnet.fordham.edu/ilj/vol40/iss4/1/> accessed on August 28, 2024.

ፍርድ ቤቱ የሚጠቀመው ዋነኛ የሕግ አተረጓጎም ዘዴ 'የሕያው ሰነድ ቀኖና' (*'living instrument doctrine'*) በመሆኑ የስምምነቱ ድንጋጌዎች ከወቅታዊ ሁኔታዎች አንጻር ይተረጎማሉ።[3] ሆኖም ፍርድ ቤቱ የሚሰጣቸው ውሳኔዎች በአባል ሀገራት ካለመተግበር ጋር በተያያዘ ተግዳሮቶች አጋጥመውታል።[4]

2. ማሰቃየት ፍፁም ስለመከልከሉ፤ የማሰቃየት ትርጓሜ እና ሌሎች ተያያዥ ጉዳዮች

የፀረ ማሰቃየት ስምምነት አንቀጽ 1(1) 'ማሰቃየት' (*'Torture'*) ማለት፦

> *ከራሱ ወይም ከሦስተኛ ወገን መረጃ ለማግኘት ወይም የእምነት ቃል እንዲሰጥ ወይም እንዲናዘዝ ታስቦ አንድ ሰው ላይ ሆን ተብሎ የሚፈጸም ከመጠን ያለፈ አካላዊ ወይም አዕምሮአዊ ሕመምና ስቃይ እንዲሁም ሰውየው ወይም ሌላ ሦስተኛ ወገን በፈጸመው ወይም ፈጽሟል ተብሎ በተጠረጠረበት ድርጊት ለመቅጣት፣ ለማስፈራራት፣ ለማስገደድ ወይም በማናቸውም ዓይነት ልዩነት ላይ ለተመሰረተ ማንኛውም ምክንያት በመንግሥት ባለሥልጣን ወይም በሌላ የመንግሥት ሥልጣን ይዞ በሚሰራ ሰው አነሳሽነት፣ ፈቃድ ወይም አውቆ ሳለ ባለመቃወም የሚፈጸም ድርጊት ነው' ብሎ ትርጉም ሰጥቶታል፤ ይህም ከሕጋዊ ቅጣቶች ውስጠ-ባህሪይ የሚመነጭ ወይም በአጋጣሚ የሚከሰት ሕመምን ወይም ስቃይን አይጨምርም።*[5]

[3] George Letsas, 'Chapter 4 - The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013).

[4] Dia Anagnostou (ed.), *The European Court of Human Rights Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press, 2013); Kanstantsin Dzehtsiarou and Vassilis P. Tzevelekos, *The Conscience of Europe that Landed in Strasbourg: A Circle of Life of the European Court of Human Rights* <https://brill.com/view/journals/eclr/1/1/article-p1_1.xml> accessed on August 27, 2024.

[5] በተጨማሪም ኢሰመኮ፣ *የሰብአዊ መብቶች ዓለም አቀፍ ቃል ኪዳኖች በኢትዮጵያ ሰብአዊ መብቶች ኮሚሽን የተዘጋጀ*፣ ጥር 2004 ዓ.ም.፣ አዲስ አበባ፣ ገጽ 107 ይመለከቷል።

በዚህ ትርጓሜ መሠረት አንድ ድርጊትን ማሰቃየት ነው ለማለት ቢያንስ አራት መሠረታዊ መስፈርቶችን ማሟላት አለበት። እነዚህም ድርጊቱ ከባድ አካላዊ ወይም አዕምሮአዊ ሕመምና ስቃይ የሚያካትት መሆኑ፣ ሆን ተብሎ የተፈጸመ መሆኑ፣ የተፈጸመው ለተጠቀሰው ዓላማ መሆኑ እና የመንግሥት ባለሥልጣናት ተሳትፎ መኖር ናቸው። ይህን የማሰቃየት ደረጃ የማያሟላ አድራጎት ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ተደርጎ ሊወሰድ ይችላል።

በእርግጥ ሁሉ አቀፍ የሰብዓዊ መብቶች መግለጫ (UDHR) አንቀጽ 5 እና የሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃል ኪዳን (ICCPR) አንቀጽ 7 ማንም ሰው ከማሰቃየትና ሌላ ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት የመጠበቅ መብት እንዳለው ይገልጻሉ። ይሁን እንጂ የመግለጫው ድንጋጌ የተጠቀሰውን አድራጎት ለመከልከል ጠቅላላ አነጋገር ወይም ግልጽ ያልሆኑ ቃላትን ከመጠቀሙም ባሻገር ማሰቃየትና ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣትን በሚከለክለው መለኪያ በሀገራት ላይ የሕግ አስገዳጅነት እንደሚኖረው በግልጽ አላስቀመጠም፤ የቃል ኪዳኑ ድንጋጌ ደግሞ በተለይ የሕክምና ወይም ሳይንሳዊ ሙከራን የሚመለከት ተጨማሪ ዐረፍተ ነገር በማከል የመግለጫውን ድንጋጌ ቋንቋ ከመድገሙ በቀር የተፈጻሚነት ወሰኑን አይገልጽም።[6] እንዲሁም ይኸው የቃል ኪዳኑ ድንጋጌ የድርጊቱ ፈጻሚ 'በመንግሥት ባለሥልጣን ወይም በሌላ የመንግሥት ሥልጣን ይዞ በሚሰራ ሰው' መሆን እንዳለበት በፀረ ማሰቃየት ስምምነት አንቀጽ 1 ላይ የተደነገገውን መስፈርት አላካተተም። ይሁን እንጂ አንዳንድ ጽሑፎች ሀገራት

[6] Christof Heyns, Carmen Rueda and Daniel du Plessis, 'Chapter 6. Torture and ill treatment: the United Nations Human Rights Committee' in Malcolm D. Evans and Jens Modvig (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention* (Edward Elgar Publishing Limited, 2020).

መግለጫውን ያለማቋረጥ ከሃምሳ ዓመታት በላይ ምክንያት አድርገው በማቅረባቸው የልማዳዊ ዓለም አቀፍ ሕግ አካል በመሆን አስገዳጅ ሆኗል በማለት ይከራከራሉ።[7]

የፀረ ማሰቃየት ስምምነትን ያጸደቁ ሀገራት ላይ በርካታ ግዴታዎች ተጥሎባቸዋል። ከእነዚህም መካከል በአንቀጽ 4 እና አንቀጽ 12 ላይ እንደተገለጸው የሁሉም ሀገራት መሠረታዊው የሕግ ግዴታ ማንኛውንም የማሰቃየት ተግባር የሚያስቀጣ ወንጀል ማድረግና ተፈጽመዋል በሚል የሚቀርቡ ውንጀላዎችን መመርመር ነው። ነገር ግን በቅርቡ ለተባበሩት መንግሥታት የሰብዓዊ መብቶች ምክር ቤት በቀረበው የማሰቃየት ጉዳይ የሚመለከተው ልዩ ራፖርተር ሪፖርት ላይ እንደተመለከተው በሀገራት ዘንድ የማሰቃየት ወንጀል ምርመራና ክስን በተመለከተ ተግዳሮቶችና መልካም ልምዶች እንዳሉ እንዲሁም ማሰቃየት ተፈጽሟል በሚል የሚቀርቡ ውንጀላዎች (*allegations*) ላይ የተሟላና ፈጣን ምርመራ ለማካሄድ የሚከለክሉ ተቋማዊ፣ የሕግ፣ ፖለቲካዊና ተግባራዊ መሰናክሎች መኖራቸው ተገልጿል።[8]

በአኅጉር ደረጃ ደግሞ ክልከላው በአፍሪካ የሰዎችና የሕዝቦች መብቶች ቻርተር አንቀጽ 5፣ በአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3፣ በአውሮፓ ኅብረት የመሠረታዊ መብቶች ቻርተር አንቀጽ 4፣ በአሜሪካ የሰብዓዊ መብቶች ኮንቬንሽን አንቀጽ 5(2)፣ ማሰቃየትን ለመከላከል እና ለመቅጣት የወጣው የኢንተር አሜሪካ ስምምነት አንቀጽ 2(1)፣ በደቡብ ምሥራቅ እስያ መንግሥታት ማኅበር የሰብዓዊ መብቶች መግለጫ አንቀጽ 14፣ በእስያ የሰብዓዊ መብቶች ቻርተር አንቀጽ 3.3፣ 3.5፣ 14.2፣ በአረብ የሰብዓዊ መብቶች ቻርተር አንቀጽ 8(1) እና በካይሮ የሰብዓዊ መብቶች መግለጫ አንቀጽ 20 ውስጥ ተካትቷል። በእርግጥ እያንዳንዱ አኅጉር

[7] Australian Human Rights Commission, *What is the Universal Declaration of Human Rights?* <https://humanrights.gov.au/our-work/commission-general/projects/what-universal-declaration-human-rights> accessed 11 February 2025.

[8] UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Alice Jill Edwards), 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Good practices in national criminalization, investigation, prosecution and sentencing for offences of torture' (2023) A/HRC/52/30.

አቀፍ የሰብዓዊ መብቶች ሥርዓት የራሱ የሆኑ ልዩ ባህሪያት እንዳሉት ልብ ሊባል ይገባል።

ከአብዛኛዎቹ ሰብዓዊ መብቶች በተለየ መልኩ ከማሰቃየት ወይም ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት የመጠበቅ መብት ከጥቂት ፍፁም መብቶች መካከል አንዱ ነው።[9] **ይህ ማለት ሰዎችን ለማሰቃየት ምንም እንደመከላከያ ምክንያት አድርጎ ማቅረብ አይቻልም። ማሰቃየትና ሌላ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት መከልከሉ ፍፁምና ምንም ልዩ ሁኔታ (*exception*) የሌለው ነው። ፍፁም መብቶች በማንኛውም ምክንያት ሊገደቡ እና በአስቸኳይ ጊዜ ሁኔታ ውስጥም ቢሆን ሊታገዱ አይችሉም።**[10]

ይሁን እንጂ የማሰቃየት መከልከል ፍፁምነት እስካሁን ድረስ በፖለቲከኞች፣ በሕግ አስከባሪዎች እና በምሁራንም ዘንድ ጥያቄ ውስጥ ገብቷል። ለአብነት ለመጥቀስ ያህል አንዳንድ የሰብዓዊ መብት ምሁራን በዓለም አቀፍ የሰብዓዊ መብቶች ሕግ ውስጥ የተደነገገው ማሰቃየትና ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት መከልከሉ ፍፁም ነው መባሉ ችግር ያለበት ወይም አጠያያቂ ነው ሲሉ ይተቻሉ።[11] **ለዚህም በርካታ ምክንያቶች ያቀርባሉ፤ በመጀመሪያ ፍፁምነት የተጠቀሱት ድንጋጌዎች ግልጽ፣ ተፈጥሯዊ፣ የተረጋገጠ**

[9] የሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃል ኪዳን [በጠቅላላ ጉባዔው ውሳኔ ቁጥር 2200 A (XXI) እ.ኤ.አ. ታኅሣሥ 16 ቀን 1966 ዓ.ም. የጸደቀና እ.ኤ.አ. መጋቢት 23 ቀን 1976 ዓ.ም. ሥራ ላይ የዋለ] አንቀጽ 7፣ አንቀጽ 8(1) እና 8(2)፣ አንቀጽ 11፣ አንቀጽ 15 እና አንቀጽ 16 ይመለከቷል፤ እነዚህም ከማሰቃትና ሌላ ጭካኔ ከተሞላበት፣ ኢሰብአዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት የመጠበቅ ነፃነት፤ በባርነትና በግዴታ አገልጋይነት ያለመያዝ ነፃነት፣ የውል ግዴታን ባለማሟላት ምክንያት ያለመታሰር ነፃነት፤ የወንጀል ሕግ ወደኋላ ተመልሶ እንዳይሰራ መከልከሉ፤ በሕግ ፊት ዕውቅና የማግኘት መብት ናቸው።

[10] የሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃል ኪዳን አንቀጽ 7; Nowak (n 1) 688; CAT (n 1) 2; The UN Committee on International Covenant on Civil and Political Rights, 'General Comment No. 20' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (10 March 1992).

[11] Steven Greer, Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law? Human Rights Law Review, Vol. 15, No. 1, 2015, p. 101; Mirko Bagaric and Julie Clarke, 'Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable', University of San Francisco Law Review, Vol. 39, No. 3, 2005, p. 581.

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ወይም አስፈላጊ ባህሪይ ስላልሆነ ይህ አቋም ከተፈጥሮአዊ የአስገዳጅነት/አስፈላጊነት ሕግ ይልቅ ውጫዊ ባህሪይ የመስጠት ጉዳይ ነው። ሌሎች ፍፁም አይደለም የሚሉ አተረጓጎሞች እውነት ሊሆኑ ወይም ላይሆኑ የሚችሉ እና በአንዳንድ ዝነኛ ብሔራዊ የሰብዓዊ መብቶች ሰነዶች ላይ የሰፈሩትን ተመሳሳይ ክልከላዎች በግልጽ ያረጋግጣሉ። 'ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ' የሚለው ቃል በተለምዶ ማሰቃየትን በሚከለክሉ ተመሳሳይ አንቀጾች ውስጥ የተካተተ በመሆኑ እነዚህ በጣም የተለያዩ ጎጂ ድርጊቶች የግድ ተመሳሳይ ቦታ ሊኖራቸው ይገባል ወደሚል ድምዳሜ አያደርስም። በተጨማሪም ክልከላው በመርህ ደረጃ ፍፁም ነገር ግን በተፈጻሚነቱ አንጻራዊ ነው መባሉ አሳማኝ አይደለም። በመጨረሻም በሞራል ወይም በሕግም ሆነ በአመክንዮ ማንኛውም 'ፍፁም' መብት ካሉት ሁለት ተፎካካሪ አጋጣሚዎች ለእያንዳንዱ ትርጉም ባለው መልኩ እኩል 'ፍፁም' መሆኑ የማይቻል ነው። በዓለም አቀፍ የሰብዓዊ መብቶች ሕግ ውስጥ የተደነገገው ማሰቃየት እና ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት መከልከሉ በጥብቅ ፍፁም ሳይሆን ይልቁንም 'ለፍፁም ትንሽ የቀረው' ብቻ ሊሆን ይችላል። በጣም አልፎ አልፎ ካልሆነ በስተቀር በሁሉም ሁኔታዎች ላይ ተፈጻሚ ይሆናል በማለት ይከራከራሉ።

በእርግጥ አንድ ታዋቂ የዓለም አቀፍ የሰብዓዊ መብት ሕግ ምሁር በጽሑፋቸው ውስጥ ማሰቃየት መከልከሉን በተመለከተ አራት የተለያዩ ተግዳሮቶች እንዳሉ እና ለእነዚህ ተግዳሮቶች የሚሰጡ (እውነት ሊሆኑ ወይም ላይሆኑ የሚችሉ) የሕግ ምላሾችን ያብራራሉ። እነዚህም 1ኛ) የጊዜ ቦምብ ክስተት (ማለትም በቶሎ መፍትሔ ካልተበጀለት ውሎ አድሮ አደገኛ ሊሆን የሚችል ችግር ያለበትን ሁኔታ ይገልጻል) ('*ticking time bomb scenario*')፣ 2ኛ) በአንድ በኩል ማሰቃየት መከልከሉ እንደ ፍፁም መብት እና በሌላ በኩል ደግሞ ጭካኔ የተሞላበት ኢሰብዓዊና ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት መከልከሉ እንደ አንጻራዊ መብት መካከል ያለው ልዩነት፣ 3ኛ) በፀረ ማሰቃየት ስምምነት አንቀጽ 1 ላይ የሰፈረው ሕጋዊ የተፈቀዱ ሁኔታዎችን የያዘው ድንጋጌ፣ እና 4ኛ) ከማሰቃየት መከልከል የመነጨውን

ስደተኞችንና ጥገኝነት ጠያቂዎችን ማሳድደ ወይም ስቃይ ይደርስብናል ብለው ወደሚሰጉበት ሀገር አስገድዶ ያለመመለስ መርሆ (*principle of non-refoulement*) ፍፁማዊ ተፈጥሮን ለመጣስ ዲፕሎማሲያዊ ማረጋገጫዎችን (*diplomatic assurances*) እንደ ዘዴ መጠቀም ናቸው።[12]

2.1 ኢሰብዓዊ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ምንድን ነው?

በአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት የፍርድ ውሳኔ ሕግ መሠረት አንድ አያያዝ 'ኢሰብዓዊ ወይም ክብርን የሚያዋርድ' ('*inhuman or degrading*') ተብሎ እንዲወሰድ፡-

- በአንድ ግለሰብ ላይ የተፈጸመው ስቃይ እና ውርደት በሕግ የተደነገገ ተገቢ የሆነው አያያዝ ወይም ቅጣት ያስከተለው የማይቀር ስቃይ ወይም ውርደት አካል ከሆነው መጠን/ወሰን በላይ/ያለፈ መሆን አለበት።
- በግለሰቡ ላይ ተፈጽሟል የተባለው ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት (*ill-treatment*) መጠኑ ዝቅተኛ ከሆነው ከባድነት/ክብደት ላይ መድረስ አለበት፤ ከባድነቱን መወሰንም ከሌሎች ነገሮች መካከል በተለይ ከአያያዙ ቆይታ፣ በግለሰቡ ላይ ከደረሰው አካላዊ እና/ወይም አዕምሮአዊ ተጽዕኖ እና ከግለሰቡ ፆታ፣ ዕድሜና የጤና ሁኔታ ጋር በተያያዙ የጉዳዩ ተጨባጭ ሁኔታዎች ላይ የተመሰረተ ነው።

በተለይም ነፃነታቸውን የተነፈጉ ሰዎች ጠባያቸው በጥብቅ አስፈላጊ ያላደረገውን አካላዊ ኃይል ለመጠቀም የወሰዱት ማናቸውም አማራጭ እርምጃ ሰብዓዊ ክብርን ያሳንሳል፤ እናም በመርህ ደረጃ የአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 ድንጋጌን ይጥሳል።[13]

ፍርድ ቤቱ በዚሁ ድንጋጌ መሠረት አንድ ቅጣት ወይም አያያዝ 'ክብርን የሚያዋርድ' መሆኑን ሲገመግም የሚከተሉትን ይመለከታል፡-

[12] Nowak (n 1) 675.
[13] *Ribitsch v Austria* App no 18896/91 (ECtHR, 4 December 1995) para. 38.

- **የአያያዙ ዓላማ ግለሰቡን ለማዋረድ እና ክብሩን ዝቅ ለማድረግ እንደሆነ[14] እና እንደአማራጭ፣**
- **አያያዙ የሚያስከትለውን ውጤት በተመለከተ በአንቀጽ 3(10) ላይ ከተደነገገው ጋር በማይጣጣም መልኩ በግለሰቡ ስብዕና ላይ አሉታዊ ተጽዕኖ የሚያሳድር/የሚጉዳ እንደሆነ[15]፣**
- **እንዲሁም ክብርን የሚያዋርድ አያያዝ ተጎጂውን ሊያዋርድ ወይም ክብሩን ዝቅ ሊያደርግ እና ምናልባትም የተጎጂውን አካላዊ ወይም ሞራላዊ የመቋቋም ኃይል መስበር የሚችል ለምሳሌ ፍርሃት፣ ጭንቀት እና የበታችነት ስሜትን የሚቀሰቅስ አያያዝን የሚያካትት ተደርጎ ይታያል።[16] ለምሳሌ አንድ ሐኪም አደጋ የደቀነ መሆኑን ያመላከተ ማንኛውም ማስረጃ ሳይኖር በቤተሰቡና በጎረቤቶቹ ፊት ለፊት እጁን በካቴና ማሰር እንዲህ ዓይነት ስሜት እንደቀሰቀሰ እና ስለዚህ ክብርን የሚያዋርድ አያያዝ ተደርጎ ተወስዷል።[17]**

በፀረ ማሰቃየት ስምምነት ላይ የሰፈረውን ትርጓሜ ፍርድ ቤቶች እንደተረጎሙት፤ ‘ማሰቃየት’ (‘torture’)፦

- **ከባድ የአካል ወይም የአዕምሮ ሕመም ወይም ስቃይ ያስከትላል።**
- **ሆን ተብሎ የሚፈፀም ነው።**
- **ለተወሰነ ዓላማ (ማለትም እንደ የእምነት ቃል ያለ መረጃ ለማግኘት፣ ለቅጣት፣ ለማስፈራራት፣ ወይም ለሌሎች አድሎአዊ ምክንያቶች) የሚፈፀም ነው።**
- **በአንድ የመንግሥት ባለሥልጣን ወይም ቢያንስ ያለተቃውሞ በመቀበሉ** (acquiescence) **የተፈጸመ ነው። በቀጥታ እርምጃ በመውሰድ ወይም**

[14] *Campbell and Cosans v United Kingdo*m App no 7511/76 (ECtHR, 25 February 198) para. 30.
[15] ዝኒ ከማሁ
[16] *Keenan v United Kingdom* App no 27229/95 (ECtHR, 3 April 2001) para. 109.
[17] *Erdogan Yagiz v Turkey* App no 27473/02 (ECtHR, 6 March 2007).

በሌሎች የሚፈጸም ማሰቃየትን ለመከላከል ተገቢውን እርምጃ ባለመውሰድ የሆነ ዓይነት የመንግሥት ባለሥልጣናት ተሳትፎ መኖር አለበት።[18]

2.2 ማሰቃየት ኢሰብዓዊ ከሆነ ወይም ክብርን የሚያዋርድ ከሆነ አያያዝ እንዴት ይለያል?

በሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃል ኪዳን፣ በፀረ ማሰቃየት ስምምነት እንዲሁም በአፍሪካ የሰዎችና የሕዝቦች መብቶች ቻርተር ላይ በማሰቃየት እና ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት መካከል ያለው ትክክለኛ ልዩነት ግልጽ አይደለም።[19] በሁሉም ዓለም አቀፍ የሰብዓዊ መብቶች ስምምነቶች ላይ ሌላ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣትን በተመለከተ ምንም ዓይነት ትርጓሜ አልተሰጠም።

በአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት የፍርድ ውሳኔ ሕግ መሠረት አንድ ድርጊት ማሰቃየት ወይም ኢሰብዓዊ የሆነ/ክብርን የሚያዋርድ አያያዝ መሆኑ በሚወሰንበት ጊዜ ከግምት ውስጥ መግባት ያለባቸው ሦስት ዋና ዋና ሁኔታዎች አሉ። እነዚህም፦

(i) *ድርጊቱ ሆን ተብሎ የተፈጸመ መሆኑ (ድርጊቱን የመፈጸም አሳብ መኖሩ)*፤ አንድ ሰው ከድርጊቱ በስተጀርባ ያለውን ዓላማ ማየትና መመዘን አለበት።

[18] Manfred Nowak, Moritz Birk and Giuliana Monina (eds.), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (Oxford University Press, 2019); The United Nations Voluntary Fund for Victims of Torture, *Interpretation of Torture in the light of the Practice and Jurisprudence of International Bodies* <https://www.ohchr.org/sites/default/files/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf> accessed on August 1, 2024; Nigel S. Rodley, 'The Definition(s) of Torture in International Law' Current Legal Problems (Oxford University Press), Vol. 55, No. 1, 2002, p. 467.; Gerrit Zach, 'Article 1 Definition of Torture' in Manfred Nowak et. al. (eds.), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (Oxford University Press, 2019).

[19] United Nations Office on Drugs and Crime (UNODC), *Module 9: Prohibition against Torture and other Cruel, Inhuman and Degrading Treatment* <https://www.unodc.org/e4j/zh/terrorism/module-9/key-issues/regional-human-rights-instruments.html> accessed on August 2, 2024; Manfred Nowak, 'Civil and Political Rights, including the Question of Torture and Detention: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to China' (2006) UN Doc E/CN.4/2006/6/Add.6.

ማሰቃየት 'በአጋጣሚ' ሊከሰት አይችልም። በአንዣሩ ኢሰብዓዊ ወይም ክብርን የሚያዋርድ አያያዝ በቸልተኛነት ወይም ድርጊቶች (ለምሳሌ ባለማወቅ አንድ እስረኛን ለሕመም ወይም ለስቃይ መዳረግ እና የመሳሰሉት) በሚያስከትሏቸው ያልታሰቡ ውጤቶች ሊከሰት ይችላል።

(ii) *የሕመሙ ክብደንት*፤ ተፈጽሟል የተባለው ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት በአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 ወሰን ውስጥ እንዲወድቅ ከተፈለገ ዝቅተኛው የከባድነት ደረጃ ላይ መድረስ አለበት።[20] የዚህ ዝቅተኛ መለኪያ ግምገማ አንጻራዊ ነው፤ ማለትም በአያያዙ ቆይታ፣ በአካላዊ እና/ወይም አእምሯዊ ውጤቶቹ እና በአንዳንድ ሁኔታዎች ደግሞ በተጎጂው ፆታ፣ ዕድሜ እና የጤና ሁኔታ ላይ የተመሰረተ ነው።[21] ስለሆነም አንድ አያያዝ በአንቀጽ 3 ላይ የተደነገገው ዝቅተኛ ደረጃ ላይ መድረሱን ለመወሰን ሁሉንም የአንድ ጉዳይ ሁኔታዎችን መመልከትን ይጠይቃል። ለማሰቃየት ወይም ጭካኔ ለተሞላበት፣ ኢሰብዓዊ ለሆነ ወይም ክብርን ለሚያዋርድ አያያዝ ወይም ቅጣት ሊተገበሩ በሚችሉ የከባድነት ደረጃዎች መካከል ያለውን የልዩነት መስመር መወሰን በጣም አስቸጋሪ ነው። በተጨማሪም የሰብዓዊ መብቶች ሕግጋት 'ሕያው ሰነዶች' በመሆናቸው እየተለወጡ ያሉ የሕዝቡ ግንዛቤና አመለካከቶች መስመሩ በሚሰመርበት ቦታ ላይ ተጽዕኖ ያሳድራሉ። ስለዚህ በአስፈላጊነቱ እና በሚፈለገው የከባድነት ደረጃ ላይ ጠንካራ ክርክር መኖሩ አያስገርምም። በአውሮፓ ዐውድ ውስጥ የአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት የፍርድ ውሳኔ ሕግ በጣም ጠቃሚ ነው።

(iii) *ዓላማው*፤ ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት በተቃራኒው ማሰቃየት ለአንድ ዓላማ የሚደረግ ድርጊት ነው፤ ይኸውም መረጃ ለማግኘት (ለምሳሌ የእምነት ቃል)፣

[20] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para. 30.
[21] *Keenan* (n 16) para. 108; *Campbell* (n 14) para. 30.

ለመቅጣት፣ ለማስፈራራት እና አድልዎ/ልዩነት ለማድረግ ነው። ነገር ግን ቀደም ሲል እንደተገለጸው እንዲህ ያለ ዓላማ ባይኖረውም እንኳ ከመጠን ያለፈ የኃይል አጠቃቀም ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ሊያስከትል ይችላል።

በአንፃሩ ደግሞ አንዳንድ ፀሐፍት የአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤትና ብዙ ምሁራን እንደሚከራከሩት ማሰቃየትን ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት ለመለየት ወሳኙ መስፈርት የደረሰው ሕመም ወይም ስቃይ ከባድነት ሳይሆን የድርጊቱ ዓላማና የተጎጂውን አቅም ማጣት ነው፤ ልዩነቱ በዋናነት ከግል ነፃነት ጋር የተያያዘ ነው ሲሉ ይከራከራሉ።[22]

2.3 የተባበሩት መንግሥታት ድርጅት የፀረ ማሰቃየት ኮሚቴ ተግባራትና የፍርድ ውሳኔ ሕግ

የተባበሩት መንግሥታት ድርጅት የፀረ ማሰቃየት ኮሚቴ በዋናነት በሪፖርት አቀራረብ ሥርዓት አማካኝነት የፀረ ማሰቃየት ስምምነቱን ባጸደቁ አባል ሀገራት መተግበሩን ይከታተላል። ኮሚቴው ከማሰቃየት ጋር የተያያዙ ተጨማሪ ማብራሪያ የሚያስፈልጋቸው ወይም ስምምነቱን ያጸደቁ ሀገራት የበለጠ ትኩረት መስጠት አለባቸው ብሎ ባመነባቸው የዘርፍ ጉዳዮች ላይ አጠቃላይ አስተያየቶችን ያጸድቃል። በፀረ ማሰቃየት ስምምነት አንቀጽ 20 ላይ በተደነገገው መሠረት ኮሚቴው በማንኛውም የፀረ ማሰቃየት ስምምነቱን ባጸደቀች ሀገር ውስጥ ማሰቃየት ስልታዊ በሆነ መልኩ እየተፈፀመ መሆኑን የሚያመለክት አሳማኝ መረጃ ሲቀበል ሚስጥራዊ ምርመራ ሊያካሄድ ይችላል። እንዲሁም ኮሚቴው በተለያየ ጊዜ ለቀረቡለት አቤቱታዎች የተለያዩ በርካታ ታሪካዊና ወሳኝ ውሳኔዎችን ሰጥቷል። ከእነዚህ መካከል ኮሚቴው በማሰቃየት ትርጓሜ ውስጥ የተደነገጉትን ድርጊቱን የሚያቋቁሙት ፍሬ ነገሮችን (*elements*) በተመለከተ (በተለይም ከባድ ሕመምና ስቃይ ማድረስ ምን ማለት ስለመሆኑ እና ከባድነት ማሰቃየትን ሌላ ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት

[22] Manfred Nowak & Elizabeth McArthur, 'The distinction between torture and cruel, inhuman or degrading treatment' TORTURE, Vol. 16, No 3, 2006, p. 147.

መለያ መስፈርት ስለመሆኑ) በቡሩንዲ፣ በሩሲያ፣ በካዛኪስታን፣ በስዊዲን እና በአልጄሪያ መንግሥታት ላይ የሰጣቸው የሚከተሉት ውሳኔዎች ተጠቃሽ ናቸው።

በፓትሪስ ጋሁንጉ እና ቡሩንዲ ጉዳይ ኮሚቴው በአቤቱታ አቅራቢው (ተጎጂ በተባለው) ላይ የተፈጸመበት አያያዝ 'ምናልባት የእምነት ቃል እንዲሰጥ ለማስገደድ ያለመ ነው እና በዚህም ምክንያት በፀረ ማሰቃየት ስምምነት አንቀጽ 1 መሠረት ማሰቃየት ደርሶበታል በማለት ደምድሟል።[23] እንዲሁም በኢ.ኤን. እና ቡሩንዲ ጉዳይ ሀገሪቱ አቤቱታ አቅራቢው ከተያዘ በኋላ በፖሊስ ጣቢያ ውስጥ የፖሊስ አባላት የፈጸሙት ከባድ ድብደባ እንደ ማሰቃየት ሊመደብ እንደማይችል ተከራክረች። ምክንያቱም የቡሩንዲ የወንጀል ሕግ መረጃ ለማግኘት ወይም የእምነት ቃል ለማግኘት የማሰቃየት ድርጊቶች መፈፀም እንዳለባቸው ያስገድዳል። ኮሚቴው ግን ድብደባው የተፈፀመው አቤቱታ አቅራቢው ፈጽሟል ተብሎ በተገመተው ድርጊት ለመቅጣት ሳይሆን አይቀርም ሲል ደምድሟል።[24] በሁለቱም የቡሩንዲ ጉዳዮች ላይ ኮሚቴው በአጠቃላይ አስተያየቱ ላይ የገለጸውን አካሄድ የተከተለ ይመስላል፤ ማለትም የመፈጸም አሳብና ዓላማ የተባሉ ፍሬ ነገሮች ወንጀል አድራጊዎች ያነሳሳቸው ምክንያት ላይ በተጨባጭ መረጃዎች ለማረጋገጥ የማያስችል ምርመራ ማድረግን አያካትትም፤ ነገር ግን በምትኩ በሁኔታዎች ውስጥ ተጨባጭ ውሳኔዎች ሊኖሩ ይገባል።[25]

ነገር ግን በሰርጌ ኪርሳኖቭ እና የሩሲያ ፌዴሬሽን ጉዳይ ኮሚቴው አቤቱታ አቅራቢው የታሰረበት ሁኔታ... በፀረ ማሰቃየት ስምምነት አንቀጽ 1(1) ላይ በሰፈረው ትርጉም መሠረት ከባድ ሕመምና ስቃይ ያስከተለ አይመስልም ሲል ደምድሟል።[26] ስለሆነም ኮሚቴው ምንም ዓይነት ማብራሪያ ሳይሰጥ በአንቀጽ 16 መሠረት ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ

[23] *Patrice Gahungu v Burundi* (2015) UN Human Rights Committee, paras 7.2, 7.3.
[24] *EN v Burundi* (2015) UN Human Rights Committee, para 4.4.
[25] CAT (n 1), para 9.
[26] *Sergei Kirsanov v Russian Federation* (2014) UN Human Rights Committee, para 11.2.

ሆኖ አግኝቶታል። በኮሚቴው አመለካከት የከባድነት መስፈርት ባለመሟላቱ ምክንያት ከዚህ መደምደሚያ ላይ የደረሰ ይመስላል።

በአሌክሳንደር ጌራሲሞቭ እና ካዛኪስታን ጉዳይ አቤቱታ አቅራቢው እጆቹ ወደኋላው ታስረው በወለሉ ላይ እንዲደፋ ከመገደዱ በፊት በኩላሊቱ ላይ ብዙ ከባድ ድብደባና የወሲባዊ ጥቃት ዛቻ ይደርስበት ነበር። በኋላም አቤቱታ አቅራቢው ራሱን ከመሳቱ በፊት የፕላስቲክ ቦርሳ በጭንቅላቱ ላይ ተጭኖ ከአፍንጫው፣ ከጆሮው እና ፊቱ ላይ ካሉ የቆዳ ጭረቶች ደም እስኪፈስ ድረስ ታፍኗል። ኮሚቴው ይህ አያያዝ እንደ ከባድ ሕመምና ስቃይ ሊገለጽ ይችላል በማለት ግኝቱን በግልጽ አሳይቷል፤ እናም ምንም ተጨማሪ ምክንያት ወይም ትንታኔ አልጨመረም። ኮሚቴው ካዛኪስታንን ለብዙ የፀረ ማሰቃየት ስምምነት ጥሰቶች ተጠያቂ አድርጓታል። የጌራሲሞቭ አያያዝ እስከ ማሰቃየት ድረስ በቂ ክብደት የነበረው በመሆኑ የፀረ ማሰቃየት ስምምነት አንቀጽ 1 ድንጋጌን በመጣስ የእምነት ቃል ለማግኘት የተደረገ ነበር።[27]

ከዚህም በተጨማሪ ኮሚቴው አስገድዶ መድፈርና ሌሎች ዓይን መሠረት ያደረጉ ጥቃቶች እንደ ማሰቃየት እንደሚቆጠሩ በግልጽ ዕውቅና ሰጥቷል። በሲ.ቲ.ና ኬ.ኤም. እና ስዊድን ጉዳይ ኮሚቴው በመንግሥት ባለስልጣናት የተፈጸመውን አስገድዶ መድፈር ማሰቃየት እንደሆነ አመላክቷል፤ በዚህም የተነሳ የተከሰተውን ሕመምና ስቃይ ከባድነት አምኖ ተቀብሏል።[28]

በኤች.ቢ.. እና አልጄሪያ ጉዳይ ኮሚቴው አቤቱታ አቅራቢውን በሚስጢር ማሰር፣ ማዋረድ እና ኢሰብዓዊ የእስር ቤት ሁኔታዎች የፀረ ማሰቃየት ስምምነት አንቀጽ 1 ጥሰት እንደሆነ ወስኗል።[29]

ይሁን እንጂ ከፀረ ማሰቃየት ኮሚቴ ጎን ለጎን የተባበሩት መንግሥታት የሰብዓዊ መብቶች ኮሚቴ በሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃል ኪዳን አንቀጽ 7 ላይ በተደነገገው መሠረት ተጨማሪ ተመሳሳይ ውሳኔዎችን እንደሚሰጥ ልብ

[27] *Gerasimov v Kazakhstan* (2012) UN Human Rights Committee, paras 2.3, 12.2.
[28] *CT and KM v Sweden* (2006), UN Human Rights Committee, para 7.5.
[29] *HB v Algeria* (2015) UN Human Rights Committee, para 6.3.

ይሏል። ለአብነት ያህል ለመጥቀስ በጊሪ እና ኔፓል ጉዳይ የሰብዓዊ መብት ኮሚቴ በፀረ ማሰቃየት ስምምነት የሰፈረውን የማሰቃየት ትርጓሜ እንደሚከተል ከገለጸ በኋላ አጠቃላይ አቀራረቡ በአንድ በኩል በማሰቃየት እና በሌላ በኩል ደግሞ ሌላ ጭካኔ በተሞላበት፣ ኢሰብዓዊ በሆነ ወይም ክብርን በሚያዋርድ አያያዝ ወይም ቅጣት መካከል ያለው ወሳኝ ልዩነት አግባብነት ያለው ዓላማ መኖር አለመኖር ይሆናል ሲል ተከራክሯል።[30] ሌላው በሜግሪሲ እና ሊቢያ አረብ ጃማሂሪያ ጉዳይ የሰብዓዊ መብት ኮሚቴው ከሦስት ዓመታት በላይ ከሰዎች መገናኘትን በማይፈቅድ ሁኔታ በድብቅ ቦታ የተፈጸመ እስር ማሰቃየት እና ጭካኔ የተሞላበት እና ኢሰብዓዊ አያያዝ መሆኑን አረጋግጧል።[31] ከኮሎምቢያ ጋር በተያያዘ ኮሚቴው የአስገድዶ መሰወር ጉዳዮች ከተመረመሩና የሚኞች አስከሬኖች ከተገኘ በኋላ የማሰቃየት ተግባር መፈጸሙን ግልጽ ግኝቶችን አሳይቷል።[32]

ሁለቱም የፀረ ማሰቃየት ኮሚቴም ሆነ የሰብዓዊ መብት ኮሚቴው በደረሰው ከባድ ሕመምና ስቃይ እና ሌሎች የአንቀጽ 1 ላይ የተካተቱት ሌሎች ፍሬ ነገሮች በመሟላታቸው ምክንያት በተለይም በአንድ ሰው ሕይወት ላይ የሚሰነዘር ዛቻ/ማስፈራሪያ ማሰቃየት እንደሆነ ተገንዝበዋል።[33]

2.4 አኅጉራዊ የሰብዓዊ መብቶች ኮሚሽኖችና ፍርድ ቤቶች የተመረጡ ውሳኔዎች እና ብሔራዊ የሕግ ማዕቀፎች

በዚህ ንዑስ ርዕስ ስር ማሰቃየትና ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣትን የተመለከቱ ጥሩ ልምዶች ሊባሉ የሚችሉ አኅጉራዊ የሰብዓዊ መብቶች ኮሚሽኖችና ፍርድ ቤቶች የሰጧቸው የተመረጡ ውሳኔዎች እና የሁለት ሀገራት ብሔራዊ የሕግ ማዕቀፎች በአጭሩ ይቀርባሉ። እነዚህ ለሕግ ጥናት ጠቀሜታ ባላቸው ታሪካዊ ጉዳዮች ላይ የተሰጡ

[30] *Giri v Nepal* (2011) UN Human Rights Committee, para 7.5.
[31] *El-Megreisi v Libyan Arab Jamahiriya* (1991) UN Human Rights Committee.
[32] *Bautista de Arellana v Colombia* (1995) and *Arhuacos v Colombia* (1996) UN Human Rights Committee.
[33] CAT 'Report of The UN Committee against Torture' (1997) UN Doc A/52/44, para 257.

ውሳኔዎች በመሆናቸው ጉልህ የሆነ አዲስ የሕግ መርሆ ወይም በሌላ መልኩ ነባሩን የሕግ አተረጓጎም በእጅጉ የሚለውጥ ጽንሰ ሐሳብ ያስተዋውቃሉ።

2.5 የአፍሪካ የሰዎችና የሕዝቦች መብቶች ኮሚሽን

የአፍሪካ የሰዎችና የሕዝቦች መብቶች ቻርተር አንቀጽ 5 የተፈጻሚነት ወሰንን በተመለከተ የአፍሪካ የሰዎችና የሕዝቦች መብቶች ኮሚሽን ውሳኔ የሰጠባቸው በርካታ አቤቱታዎች አሉ።[34] በተለይም እ.ኤ.አ. በ1998 ዓ.ም. በኢንተርናሽናል ፔንና ሌሎች እና ናይጄሪያ ጉዳይ ላይ አንድ መመሪያ ሰጥቷል፤ ኮሚሽኑ እ.ኤ.አ. በ1993 ከኬን ሳሮ-ዊዋ እስር እና እ.ኤ.አ. በ1994 እና በ1995 በእስር ላይ ሳለ ከተፈጸመበት አያያዝ ጋር በተያያዘ (ከሌሎች ነገሮች መካከል) የአፍሪካ ቻርተር አንቀጽ 5 እና 16 ድንጋጌዎች ተጥሰዋል ሲል ወስኗል።[35] በተለይም አንቀጽ 5 ማሰቃየትን ብቻ ሳይሆን ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝንም ይከለክላል፤ ይህም ከባድ የአካል ወይም የሥነ ልቦና ስቃይ ድርጊቶችን ብቻ ሳይሆን ግለሰቡን የሚያዋርዱ ወይም ከፈቃዱ/ከሕሊናው ውጪ እንዲያደርግ የሚያስገድዱ ድርጊቶችንም ይጨምራል።

ኮሚሽኑ ማሰቃየትና ሌሎች ጥሰቶች ተፈጽመዋል ተብለው በቀረቡለት አቤቱታዎች ላይ በሰጣቸው ውሳኔዎች ካዳበረው የፍርድ ውሳኔ ሕግ በተጨማሪም ማሰቃየትና ሌሎች ጥሰቶች ላይ የቀረቡ አቤቱታዎችን በተመለከተ የአፍሪካ የሰብዓዊና ሕዝቦች መብቶች ኮሚሽን 'በአፍሪካ ውስጥ ማሰቃየትን ለመከልከልና ለመከላከል የወጣው ሮበን ደሴት መመሪያ' (*Robben Island Guidelines for the Prohibition and Preventing of Torture in Africa*) የተባለ ሰነድ አዘጋጅቷል። እ.ኤ.አ. በ2017 የአፍሪካ የሰዎችና የሕዝቦች መብቶች ኮሚሽን የማሰቃየትና ሌላ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ወይም ክብርን የሚያዋርድ ቅጣት ወይም አያያዝ ተጎጂ

[34] International PEN and Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria 1998 ACHPR 1; Civil Liberties Organisation v Nigeria 1999 ACHPR 5; Achuthan (on behalf of Aleke Banda) and Others v Malawi 1994 ACHPR 10; Commission Nationale des Droits de L'Homme et des Liberté v Chad 1995 ACHPR 12; Huri-Laws (on behalf of the Civil Liberties Organization) v Nigeria 2000 ACHPR 23; Ouko v Kenya 2000 ACHPR 27.

[35] ዝኒ ከማሁ International PEN, para. 79.

የሆኑ ሰዎች ካሳ/መፍትሔ የማግኘት መብትን የተመለከተ በአፍሪካ የሰዎችና የሕዝቦች መብቶች ቻርተር አንቀጽ 5 ላይ አጠቃላይ አስተያየት ቁጥር 4 አውጥቷል። እንደሮበን ደሴት መመሪያ በተመሳሳይ አኳኋን ይህ ሰነድ የወጣው "ማሰቃየትና ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት በአፍሪካ አኅጉር ውስጥ አሁንም አሳሳቢ ጉዳይ ሆኖ ቀጥሏል እናም ኮሚሽኑ የማሰቃየትና ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ሰለባ የሆኑ ተጎጂዎች መፍትሔ ለማግኘት የሚያጋጥሟቸውን ፈተናዎች ይገነዘባል" ለሚለው እውነታ ምላሽ ነው።[36]

2.6 የኢንተር አሜሪካ የሰብዓዊ መብቶች ኮሚሽን እና የኢንተር አሜሪካ የሰብዓዊ መብቶች ፍርድ ቤት

ሁለቱም የኢንተር አሜሪካ የሰብዓዊ መብቶች ኮሚሽን እና የኢንተር አሜሪካ የሰብዓዊ መብቶች ፍርድ ቤት የማሰቃየት መከልከል ግዙፋዊ ገጽታዎችን በሚወስኑበት ጊዜ ድርጊቶቹ ያስከተሉት ሕመም ወይም ስቃይ የቆየበትን ጊዜ፣ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዙ ወይም ቅጣቱ የተፈጸመበትን ምክንያትና ዘዴ፣ አጠቃላይ ዐውዱን፣ ነፃነትን ማሳጣቱ ዘፈቀዳዊ መሆኑን እና የመሳሰሉ ምክንያቶችን እንዲሁም እንደየታ፣ ዕድሜ እና ማኅበራዊ አቋም ያሉ የተጎጂዎች ግለሰባዊ ባህሪያትን ከግምት ውስጥ ያስገባሉ።[37] በተጨማሪም እ.ኤ.አ. በ1996 የኢንተር አሜሪካ የሰብዓዊ መብቶች ኮሚሽን አስገድዶ መድፈር እንደማሰቃየት ይቆጠራል ሲል ዕውቅና ሰጥቷል። ይኼ አንድ ዓለም አቀፍ አካል አስገድዶ መድፈር በማሰቃየት ወሰን ውስጥ ወድቆ ያገኘበት የመጀመሪያው አጋጣሚ ነበር።[38]

[36] ACommHPR, General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para. 1.
[37] *Ximenes-Lopes v Brazil* (Inter-American Court of Human Rights Series C No. 149 (July 4, 2006), para. 127.
[38] *Martí de Mejía v Peru* (IACommHR, 1996), para. 157.

2.7 የአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት

እ.ኤ.አ. በ1978 ዓ.ም. የአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት በታዋቂው እና ብዙ ትችት በተሰነዘረበት በአየርላንድ እና ዩናይትድ ኪንግደም ጉዳይ ላይ የተጠረጠሩ አሸባሪዎችን ለመመርመር ጥቅም ላይ የሚውሉ የስሜት መቃወስ የሚያስከትሉ ዘዴዎችን [በእስረኛው ጭንቅላት ላይ መከለያ/መሸፈኛ ማስቀመጥ፣ ለማያቋርጥና አሰልቺ ድምጽ መገዛት፣ እንቅልፍ ማጣት፣ ምግብና ውሃ ማጣት፣ ግድግዳ ተደግፎ መቆም] ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት እንጂ ማሰቃየት አይደለም ብሎ በመወሰን ከፍ ያለ የከባድነት ደረጃ አስቀመጠ።[39] ሆኖም ይህ የአየርላንድ እና ዩናይትድ ኪንግደም ጉዳይ ባለሥልጣናቱ የእምነት ቃል ለማግኘት ሲሉ የሕጋዊ የምርመራ ዘዴዎች አካል አድርገው የተጠቀሙባቸው አምስቱ ዘዴዎች በአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 መሠረት የተከለከሉ ናቸው ብሎ በመወሰኑ ጠቃሚ ነው። እንዲሁም ይህ ጉዳይ ተንሸራታች የከባድነት ሚዛን ላይ የተመሰረተ ሦስት ዓይነት ክብርን ማዋረድ ያካተተ ገደብ በመፍትሔ ሐሳብነት የቀረበበት ነበር። ይህም ማሰቃየት ተፈጽሟል ለማለት ቀደም ሲል ጥቅም ላይ ይውል የነበረውን ዓላማ ተኮር አቀራረብ ተክቷል። በተመሳሳይ ራሚሬዝ ሳንቼዝ እና ፈረንሣይ ጉዳይ በ1970ዎቹ በዓለም ላይ እጅግ አደገኛ አሸባሪ ተብሎ የሚታሰበውን ራሚሬዝ ሳንቼዝ (ወይም በቅጽል ስሙ 'ካርሎስ ቀበሮው' በመባል የሚታወቀው ቬንዙዌላዊ ዜጋ) ከሽብርተኝነት ጋር በተያያዙ ወንጀሎች ከተፈረደበት በኋላ ለብቻው ተገልሎ በመታሰር ያሳለፈውን ጊዜ (8 ዓመታት) በተመለከተ ፍርድ ቤቱ ምንም ዓይነት የአንቀጽ 3 ጥሰት አልተፈጸም ብሎ ወስኖ ነበር።

እንዲህ ዓይነቱ በተለየ የእስር ክፍል ውስጥ ለብቻ ማቆየት የሚያስከትለውን የረጅም ጊዜ ተጽዕኖ በተመለከተ ተገቢ ስጋቶች ቢኖሩም ፍርድ ቤቱ በተለይም የአመልካችን ባህሪይና የደቀነውን አደጋ ከግምት ውስጥ በማስገባት በተጠቀሰው ጊዜ ውስጥ የተያዘባቸው ሁኔታዎች በአንቀጽ 3 መሠረት ኢሰብዓዊ የሆነ ወይም ክብርን

[39] *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), para. 96.

የሚያዋርድ አያያዝ ለማቋቋም የሚያስፈልገው ዝቅተኛ የከባድነት ደረጃ ላይ አልደረሱም የሚል አመለካከት ነበረው።[40]

ሌላው ቁልፍ የአወሳሰን መርሆዎችን ካቋቋሙ ቀደምት መሪ ጉዳዮች አንዱ የነበረው የግሪክ ጉዳይ (እ.ኤ.አ. በ1996 ውሳኔ ያገኘ) ሲሆን መስከረም 1960 ዓ.ም. ዴንማርክ፣ ኖርዌይ፣ ስዊድን እና ኔዘርላንድስ በዚያው ዓመት መባቻ ላይ ሥልጣን የያዘው የግሪክ ወታደራዊ መንግሥት የአውሮፓ የሰብዓዊ መብቶች ስምምነት ጥሰቶችን ፈጽሟል በማለት ለአውሮፓ የሰብዓዊ መብቶች ኮሚሽን ክስ አቅርበው ነበር። እ.ኤ.አ. በ1969 የቀድሞው የአውሮፓ የሰብዓዊ መብት ኮሚሽን ማሰቃየትን ጨምሮ ከባድ ጥሰቶችን አግኝቷል፤ ማሰቃየትን ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት ለይቷል።[41] **ኮሚሽኑ የግሪክ መንግሥት ለእስረኞች ምግብ፣ ውሃ፣ በክረምት ወቅት ማሞቂያ፣ ተገቢ የማጠቢያ መገልገያዎች፣ አልባሳት፣ ሕክምና እና የጥርስ ጤና መጠበቂያ ማቅረብ አለመቻሉ የአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 ድንጋጌን በመጣስ የማሰቃየት ተግባር ነው ብሎ ወስኖ ነበር። ሀገራት ለእስረኞች በቂ ምግብ፣ ውሃ፣ ሕክምና፣ አልባሳት እና የመሳሰሉትን የመስጠት ከተለያዩ ሰብዓዊ መብቶች የሚመነጨ ሕጋዊ ግዴታዎች ስላለባቸው በፀረ ማሰቃየት ስምምነት አንቀጽ 1 ውስጥ የተደነገገው ማሰቃየት መከልከሉ ባለማድረግ የፈጸመውን አይጨምርም ብሎ መደምደም ተገቢ አይደለም። በተመሳሳይ የፀረ ማሰቃየት ኮሚቴም ሀገራት በማድረግም ሆነ ባለማድረግ ለሁለቱም ተጠያቂ መሆናቸውን አብራርቷል። ከዚያ ቀደም ማሰቃየት ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት የሚለየው ልዩ ፍሬ ነገር እንደያዘ ይቆጠር ነበር፣ ይኸውም ከተፈጥሮው ወይም ከክብድነቱ ይልቅ የተፈጸመበት ዓላማ ነበር። ወታደራዊ መንግሥቱ ከአውሮፓ ምክር ቤት አባልነት በመውጣት ምላሽ ሰጠ። ጉዳዩ በስምምነቱ ታሪክ**

[40] *Ramirez Sanchez v France* App no 59450/00 (ECtHR, 4 July 2006).
[41] The Greek case [3321/67 (Denmark v. Greece), 3322/67 (Norway v. Greece), 3323/67 (Sweden v. Greece), 3344/67 (Netherlands v. Greece)]

ውስጥ በጣም ታዋቂ ከሆኑ ጉዳዮች አንዱ ነበር። ስለሆነም ሁሉም ማሰቃየት ኢሰብዓዊና ክብርን የሚያዋርድ አያያዝ እንዲሁም ኢሰብዓዊ አያያዝ ክብርን የሚያዋርድ መሆን አለበት። ኢሰብዓዊ አያያዝ ቢያንስ ሆን ተብሎ ከባድ አዕምሮአዊም ሆነ አካላዊ ማሰቃየትን የሚያስከትልና በዚህ የተለየ ሁኔታም ተገቢ ያልሆነውን አያያዝ ያጠቃልላል ተብሎ ትርጉም ተሰጠው።

ፍርድ ቤቱ በአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 ላይ የተደነገገው ስደተኞችንና ጥገኝነት ጠያቂዎችን ማሳድደ ወይም ስቃይ ይደርስብናል ብለው ወደሚሰጉበት ሀገር አስገድዶ መመለስ መከልከልን ለማሰቃየት እና ሌላ ጭካኔ ለተሞላበት፣ ኢሰብዓዊ ለሆነ ወይም ክብርን ለሚያዋርድ አያያዝ ወይም ቅጣት ከመዳረግ አደጋ ጋር በእኩል ተፈጻሚ አድርጎታል።[42] የተባበሩት መንግሥታት የሰብዓዊ መብቶች ኮሚቴም ከሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃል ኪዳን አንቀጽ 7 ጋር በተገናኘ ይህንኑ የፍርድ ውሳኔ ሕግ ተከትሏል።[43] በዚህ ረገድ የተባበሩት መንግሥታት የማሰቃየት ጉዳይ የሚመለከተው ልዩ ራፖርተር እንዲህ ብሏል፦ 'ሀገራት ማንንም ሰው ማሰቃየት ወይም ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ሊደርስበት ይችላል ብሎ ለማመን በቂ ምክንያት ወዳለበት ሁኔታ እንዳይመልሱ ተከልክለዋል።[44]

የማሰቃየት ትርጓሜና የተፈጻሚነቱ ወሰንን በተመለከተ የአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት ሽብርተኝነትን ለመከላከል ለሚተገበሩ ልማዳዊ አሠራሮች ወይም ለፀረ ሽብርተኝነት እርምጃዎች ልዩ ጠቀሜታ ያላቸው ሌሎች በርካታ ውሳኔዎችን ሰጥቷል። ለምሳሌ እ.ኤ.አ. በ1996 በአክሶይ እና ቱርክ ጉዳይ ላይ አመልካች እ.ኤ.አ. በ1992 የኩርዲስታን የሠራተኞች ፓርቲ አሸባሪዎችን በመርዳትና በመደገፍ ተጠርጥሮ መታሰሩን በሚመለከት አንዱ የአቤቱታው መነሻ አመልካቹ ተሰቃይቷል ወይም ልብሱ ወልቆ ራቁቱን፣ እጆቹን አንድ ላይ ከጀርባው

[42] *Soering v the United Kingdom* Series A no 161 (ECtHR, 7 July 1989) para. 439.
[43] Chitat Ng v Canada, No 469/1991, UN Doc CCPR/C/49/D/469/1991, 5 November 1993.
[44] United Nations Special Rapporteur on Torture (Juan Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc A/HRC/31/57, para 33.

በማሰርና ከዚያም በእጆቹ ተንጠልጥሏል የሚል ነበር (ቅጣቱ 'የፍልስጤም ስቅላት' በመባል ይታወቃል)። ተጎጂው የእጅ አንጓዎቹ ወደኋላ በገመድ ታስረው ከመሬት ላይ ተነስቶ እና ከዚያም በፍጥነትና በድንገት በመሳብ በከፊል ወደ መሬት ወድቆ ለረጅም ጊዜ ተንጠልጥሎ እንዲቆይ የሚደረግበት የማሰቃየት ዓይነት ነው። ፍርድ ቤቱ በአመልካች ላይ የተፈጸመው አያያዝ ከባድና ጭካኔ የተሞላበት በመሆኑ የአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 ድንጋጌን የጣሰና እንደማሰቃየት ሊገለጽ ይችላል የሚል እምነት ነበረው።[45]

ሌላው ፍርድ ቤቱ ከሰጣቸው ውሳኔዎች አንዱ በሆነው በአይዲን እና ቱርክ ጉዳይ (እ.ኤ.አ. በ1997) አስገድዶ መድፈር በማሰቃየት ትርጓሜ ውስጥ እንደሚካተት አረጋግጧል።[46] በዚህ ጉዳይ ላይ ፍርድ ቤቱ እንዲህ በማለት ወስኗል። የመንግሥት ባለሥልጣን በእስረኛ ላይ የሚፈጽመው አስገድዶ መድፈር ወንጀል አድራጊው የተጎጂዋን የተጋላጭነትና የተዳከመ የመቋቋም አቅምን ለመጠቀም ካለው ቅለት አንጻር በተለይ ከባድና አፀያፊ የሆነ ኢሰብዓዊ አያያዝ ተደርጎ መወሰድ አለበት። በተጨማሪም አስገድዶ መድፈር በተጎጂዋ ላይ እንደሌሎች አካላዊና አዕምሮአዊ ጥቃቶች ሳይሆን በጊዜ ሒደት የማይጠፋ ጥልቅ የሥነ ልቦና ጠባሳ ጥሎ ያልፋል፤ እናም ከዚህ ዳራ አንጻር ፍርድ ቤቱ አካላዊና አዕምሮአዊ ጥቃቶች መከማቸታቸው … በተለይም የተፈጸመባት ጭካኔ የተሞላበት የአስገድዶ መድፈር ድርጊት የአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 ድንጋጌን በመጣስ ማሰቃየት እንደሆነ ያምናል።

በአየርላንድ እና ዩናይትድ ኪንግደም ጉዳይ ላይ የተወሰነው ከፍ ያለ የከባድነት ደረጃ አሁን ተፈጻሚነት የለውም።[47] በአሁኑ ጊዜ ፍርድ ቤቱ የሚጠቀመው

[45] *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996), para. 96.
[46] *Aydin v Turkey* App no 57/1996/676/866 (ECtHR, 25 September 1997).
[47] በተመሳሳይ እ.ኤ.አ. በ1997 ዓ.ም. የተባበሩት መንግሥታት ድርጅት የፀረ ማሰቃየት ኮሚቴ መከለያ/መሸፈኛ የማሰቃየት ተግባር እንደሆነ ደምድሟል፤ ይህንኑ አቋም እ.ኤ.አ. በ2004 ዓ.ም. የኮሚቴው ልዩ ራፖርተር "ከተጠረጠሩ አሸባሪዎች መረጃ ለማግኘት ጥቅም ላይ በዋሉ እና ችላ ተብለው የታለፉ የተወሰኑ ዘዴዎች ላይ መረጃ ከተቀበለ በኋላ" በማለት በድጋሚ ገልጿል።

መስፈርት የተቀመጠው ሐምሌ 21 ቀን 1991 ዓ.ም. በሰልማኒ እና ፈረንሳይ ጉዳይ ነበር።[48] ፍርድ ቤቱ በፀረ ማሰቃየት ስምምነት የሰፈረውን የማሰቃየት ትርጓሜን ለመጀመሪያ ጊዜ የጠቀሰበትና ዓላማ ወሳኝ ፍሬ ጉዳይ ነው በማለት ወደ ቀድሞ አቋሙ የተመለሰበት ጉዳይ ነበር። በዚህ ጉዳይ አሕመድ ሰልማኒ የተባለ ትውልደ ኔዘርላንድስ ግን የሞሮኮ ዜጋ ሲሆን ጎዳር 15 ቀን 1984 ዓ.ም. በፈረንሳይ ሀገር በፓሪስ ከተማ ውስጥ በአንድ ሆቴል ላይ በተደረገ ክትትል በአደንዛዥ ዕፅ ዝውውር ወንጀል ተጠርጥሮ በፖሊስ ቁጥጥር ስር ከዋለ በኋላ የፖሊስ አባሉ ወንጀሉን በግድ እንዲያምን ለማድረግ ለሦስት ቀናት በፊጆ ጥቃት ሰልማኒን ደበደበው፣ አስፈራራውና አዋረደው። በዚህ ጊዜ ውስጥ ተጠርጣሪው ተደጋጋሚ ከባድ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ይደርስበት ነበር፤ ይኸውም በተደጋጋሚ በቡጢ፣ በእርግጫ እና በዕቃዎች (የቤዝቦል ካስ መምቻ ዱላን ጨምሮ) ተመታ፣ የፖሊስ አባሉ ሽንቱን እላዩ ላይ ሸናበት፣ በመበየጃና በሐኪም መርፌ አስፈራው፤ በተጨማሪም ሌላ የፖሊስ አባል ዱላውን/በትሩን ተጠቅሞ በፊንጢጣው በኩል አስገድዶ ደፍሮት እና "እናንተ አረቦች ስትሰቃዩ ትዝናናላችሁ" ብሎ ተናግሮት ነበር። የፍርድ ቤቱ ውሳኔ በሚሰጥበት ጊዜ ሰልማኒ የአሥራ ሦስት ዓመት ጽኑ እስራት ተፈርዶበት በሞሜዲ ከተማ በሚገኝ እስር ቤት ውስጥ ይገኝ ነበር። ይህን አካላዊና አዕምሮአዊ ጥቃት እንደማሰቃየት ለመመደብ በበቂ ሁኔታ ከባድ ነበር።[49] ፍርድ ቤቱ ከክሱ አሳሳቢነት እና ካለፈው ጊዜ ጋር በተያያዘ ባለሥልጣናቱ ምርመራውን በፍጥነት ለማጠናቀቅ ሁሉንም አዎንታዊ እርምጃዎች አልወሰዱም ብሎ በመደምደም የፈረንሣይ መንግሥት ያቀረበለትን የመከላከያ መልስ ውድቅ አደረገ። ፍርድ ቤቱ አክሎም አንድ ግለሰብ በጥሩ ጤንነት ላይ ወደ ፖሊስ ከተወሰደ በኋላ ነገር ግን በሚለቀቅበት ጊዜ ጉዳት ደርሶበት ከተገኘ ጉዳቱ እንዴት እንደተከሰተ አሳማኝ ማብራሪያ እንዲሰጥ ግዴታ አለበት፤ ይህ ካልሆነ ግን የአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 ድንጋጌን ይጥሳል ሲል አመከነየ (ውሳኔውን በምክንያት አስደገፈ)። በሰልማኒ እና

[48] *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999).
[49] ዝኒ ከማሁ

ፈረንሳይ ጉዳይ ላይ የተሰጠው ውሳኔ በበርካታ ምክንያቶች ጥልቅ ነው፤ በተለይም ፍርድ ቤቱ አጽንኦቱን ከተከሳሹን ባህሪይ ወደ ተጠርጣሪው ስቃይ በመለወጥ በአንቀጽ 3 ላይ የትርጓሜ ዕድገት በማሸጋገር አዲስ ምዕራፍ ከፍቷል። ፍርድ ቤቱ ማሰቃየት እና ኢሰብዓዊ ወይም ክብርን የሚያዋርድ አያያዝ በፍፁም የተከለከሉ መሆናቸውን ጉልህ በሆነ መልኩ ገልጿል፤ እንዲሁም የሀገሪቱን ሕልውና አደጋ ላይ የሚጥል የአስቸኳይ ጊዜ ሁኔታ ቢያጋጥም እንኳ ከዚህ ክልከላ ማፈንገጥ አይቻልም።

በሰልማኒ እና ፈረንሳይ ጉዳይ ላይ ከተሰጠው ውሳኔ አኳያ ሲታይ ከዚህ በላይ የተገለጹት እና በተለይ መስከረም 1 ቀን 1994 ዓ.ም. በአሜሪካ ሀገር ውስጥ ከተፈጸመው ጥቃት (በተለምዶ 9/11 በመባል ይታወቃል) ጀምሮ ሽብርተኝነትን ለመዋጋት በተለያዩ ሀገራት ሲተገበሩ የነበሩ የስሜት መቃወስ የሚያስከትሉ ዘዴዎች የማሰቃየት ተግባራት እንደሆኑ ግልጽ ነው።[50] በአጠቃላይ እንደ አሜሪካና እስራኤል ያሉ አንዳንድ ሀገራት ከጥቃቱ በኋላ ማስገደድ ያለባቸው የወንጀል ምርመራ ዘዴዎችን ይበልጥ ፈቃጅ የሆነ አካሄድን መከተል መርጠዋል። ሆኖም በግልጽ ለመረዳት እንደሚቻለው ማንኛውም የደኅንነት ኤጀንሲ የሚጠቀማቸው ትክክለኛ ስልቶች በጣም ምስጢራዊ እና ለተፈቀደላቸው ሰዎች ብቻ ተደራሽ ናቸው።[51]

በአካላዊም ሆነ በአዕምሮአዊ ማሰቃየት መካከል ምንም ልዩነት የለም። ስለዚህ ማሰቃየት እፈጽማለሁ ብሎ በማስፈራራት ብቻ ከባድ የሥነ ልቦና ስቃይ ማድረስ እንደማሰቃየት ይቆጠራል።[52]

[50] Manfred Nowak et. al. (n 18); Report of the Committee against Torture (1997), para. 257; Ogechi Joy Anwukah, 'The Effectiveness of International Law: Torture and Counterterrorism' Annual Survey of International & Comparative Law: Vol. 21: Iss. 1, Article 4.
[51] Yuval Ginbar, 'Chapter 25. Torture in the 21st century: three stories, three lessons' in Malcolm D. Evans and Jens Modvig (eds.), *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention*, (Edward Elgar Publishing Limited, 2020).
[52] *Akkoc v Turkey* App Nos. 22947 and 22948/93 (ECtHR, 10 October 2000), para. 116.

በማሰቃየት ላይ በሰፊው ያነጋገረው የጋፍገን እና ጀርመን ጉዳይ (እ.ኤ.አ. በ2010) ነበር። ይኸውም እ.ኤ.አ. በ2002 ፖሊስ የተጎጂውን ሕይወት ለማትረፍ (ተጠልፎ የተወሰደ ልጅን ለማዳን) ሲል በምርመራ ወቅት ማግነስ ጋፍገን የተባለ ግለሰብ ሕግንን በመግደል ወንጀል ተጠርጥሮ ተይዞ ለምርመራ ወደ ፖሊስ ጣቢያ ከመጣ በኋላ የማሰቃየት ዛቻ አድርሶበታል፤ በዚህም ምክንያት ተጠርጣሪው/አመልካቹ የተጎጂው አካል /አስክሬን/ የሚገኝበትን ቦታ ተናግሯል መባሉ ውዝግብ አስነስቷል። ተጠርጣሪው/አመልካቹ የተጎጂው የሚገኝበትን ቦታ ለመግለጽ ፈቃደኛ ካልሆነ ሌላ ለዚህ ዓይነቱ ዓላማ በልዩ ሁኔታ የሰለጠነ ሰው ሊቋቋመው የማይችለው ሕመም እንደሚያደርስበት በፖሊስ አባል ማስፈራራት ደርሶበት ነበር። ምክትል የፖሊስ አዛዡ ተጠርጣሪውን/አመልካቹን እንዲያስፈራሩት ወይም አስፈላጊ ሆኖ ከተገኘ የኃይል እርምጃ እንዲወስዱበት ለበታች ታዛዥ የፖሊስ አባላት በተደጋጋሚ ትዕዛዝ በመስጠቱ ምክንያት ትዕዛዙ እንደድንገተኛ ድርጊት ሊቆጠር አይችልም፤ ይልቁንም አስቀድሞ የታቀደ እና የተሰላ ነው። የፖሊስ አባላቱ የተጎጂውን ሕይወት አሁንም ማዳን እንደሚቻል ባመኑ ጊዜ በተጠርጣሪው/በአመልካቹ ላይ በደል እንደሚያደርሱበት በማስፈራራት የተደረገው ምርመራ በከፍተኛ ውጥረት እና ስሜት በተሞላበት ድባብ ውስጥ ለአስር ደቂቃ ያህል ቆይቶ ነበር። ተጠርጣሪው/አመልካቹ እጁ በካቴና ታስሮ ስለነበር የተጋላጭነት ሁኔታ ውስጥ ነበር። ስለዚህ የደረሰበት ዛቻ ከፍተኛ ፍርሃት፣ ጭንቀትና የአዕምሮ ስቃይ የግድ ያስከትልበታል። የፖሊስ አባላቱ ድርጊቱን የፈጸሙበት ምክንያት ምንም ይሁን ምን የአውሮፓ የሰብዓዊ መብቶች ፍርድ ቤት የአንድ ግለሰብ ሕይወት አደጋ ላይ በሚወድቅበት ሁኔታ ውስጥ እንኳ ማሰቃየት እና ኢሰብዓዊ ወይም ክብርን የሚያዋርድ አያያዝ ሊፈጸም እንደማይቻል በድጋሚ ገልጿል። አመልካቹ የተፈጸመበት/የተገደደበት የምርመራ ዘዴ በአውሮፓ የሰብዓዊ መብቶች ስምምነት አንቀጽ 3 የተከለከለውን ኢሰብዓዊ ድርጊት ተደርጎ ለመቆጠር በበቂ ሁኔታ ከባድ ሆኖ ተገኝቷል።[53] ስለሆነም የጠፋው ልጅ የት እንዳለ ለማወቅ ሲባል በፖሊስ የተፈጸመ የአካል ጉዳት ማስፈራሪያ ጥሰት ነው። የማሰቃየት ዛቻ እንደማሰቃየት

[53] *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010).

ሊቆጠር ይችላል ምክንያቱም የማሰቃየት ባህሪይ ሁለቱንም አካላዊና አዕምሮአዊ ስቃይን ይሸፍናል።

2.8 የኡጋንዳ የፀረ ማሰቃየት ሕግ ማዕቀፍ

በሀገር ደረጃ ኡጋንዳ በአፍሪካ ውስጥ ጠንካራ ፀረ ማሰቃየት የሕግ ማዕቀፍ ካላቸው ጥቂት ሀገራት መካከል አንዷ ናት።[54] የኡጋንዳ መንግሥት እ.ኤ.አ. በ1986 የፀረ ማሰቃየት ስምምነትን አጽድቋል። እንዲሁም የኡጋንዳ ሕገ መንግሥት አንቀጽ 24 ማሰቃየትን፣ ጭካኔ የተሞላበት ኢሰብዓዊ ወይም ክብርን የሚያዋርድ አያያዝና ቅጣትን ይከለክላል። በተጨማሪም ማሰቃየትን እና ሌላ ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣትን ለመከላከል በወጣው ስምምነት አንቀጽ 1(2) ላይ በተደነገገው መሠረት እ.ኤ.አ. በ2012 ዓ.ም. በኡጋንዳ ሀገር ማሰቃየትን ለመከላከልና ለመከልከል የወጣው ሕግ የማሰቃየት ትርጓሜን በማስፋት ግለሰቦችን እንዲያካትት አድርጓል።[55] ለኡጋንዳ የሰብዓዊ መብቶች ኮሚሽን የቀረቡ ብዙዎቹ አቤቱታዎች ላይ ማሰቃየትን የሚመስሉ ድርጊቶች የተፈጸሙት ከፖሊስ ቀጥሎ በግለሰቦች ከመሆኑ አንጻር ይህ ትርጓሜ እጅግ በጣም የሚያስደስት እርምጃ ወይም ሰፊ የተፈጻሚነት ወሰን የያዘ ብሔራዊ ሕግ ነው።[56] እ.ኤ.አ. በ2019 በኢሳ ዋዜምቤ እና በጠቅላይ ዐቃቤ ሕግ መካከል በነበረው ክስ ላይ የሀገሪቱ ከፍተኛ ፍርድ ቤት ማሰቃየትን ፈጽሞ "መታገስ እንደማይቻል" በመግለጽ ከማሰቃየት እና ሌላ ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት ነፃ የመሆን መብት ፍፁምና መጣሱ በማንኛውም ሁኔታ ምክንያት ሊቀርብበት የማይችል መብት ነው ሲል

[54] REDRESS and the Convention against Torture Initiative (CTI), *Anti-Torture Standards in Common Law Africa: Good Practices and Way Forward* <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://redress.org/wp-content/uploads/2022/04/06.04.2022-CTI-REDRESS-Anti-Torture-Law-Standards-in-Africa_Report_WEB.pdf&ved=2ahUKEwjp_dis6eWIAxXHS_EDHU0YDZsQFnoECBQQAQ&usg=AOvVaw13zI3p_wWKNTRRm_SaOVIV> accessed on September 4, 2024.

[55] Article 2(1) of Prevention and Prohibition of Torture Act 3 of 2012

[56] African Center for Treatment and Rehabilitation of Torture Victims (ACTV), 'THE SITUATIONAL ANALYSIS ON THE PREVALENCE OF TORTURE IN UGANDA', 2015, p. 83.

ወሰነ። ይህ ውሳኔ እንደ ጥሩ ልምድ ተደርጎ ሊወሰድ ይችላል።[57] ይሁን እንጂ በሀገሪቱ ውስጥ የማሰቃየት ተግባራት ጨምረዋል የሚሉ ሪፖርቶች በተደጋጋሚ ወጥተዋል።[58]

2.9 ማሰቃየትን የተመለከተ የሕግ ማዕቀፍና አተገባበሩ በኢትዮጵያ

ሀገራችን ኢትዮጵያ መጋቢት 5 ቀን 1986 ዓ.ም. የፀረ ማሰቃየት ስምምነትን ተቀብላ አጽድቃለች። ሆኖም የፀረ ማሰቃየት ስምምነቱን አማራጭ ፕሮቶኮል ፈራሚ አባል ሀገር አይደለችም። የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት አንቀጽ 18 ሁሉም ሰው ከማሰቃየትና ሌላ ጭካኔ ከተሞላበት፣ ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝ ወይም ቅጣት የመጠበቅ መብት እንዳለው ይደነግጋል። ይህ መብት በማናቸውም ሁኔታ ሊጣስ አይችልም ምክንያቱም ድንጋጌው ምንም ዓይነት ልዩ ሁኔታን አላስቀመጥም። ምንም እንኳ በሕገ መንግሥቱ አንቀጽ 28(1) ላይ 'ቶርቸር' የሚለው የእንግሊዝኛ ቃል ወደ አማርኛ 'ኢሰብዓዊ የድብደባ ድርጊት' ተብሎ ቢተረጎምም ሰብዓዊ የድብደባ ድርጊት የሚባል በሕግ የተፈቀደ አድራጎት የለም። በተጨማሪም የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ሕግን[59] ጨምሮ ሌሎች የሀገሪቱ ሕግጋት በፀረ ማሰቃየት ስምምነቱ አንቀጽ 1 ላይ በተቀመጠው ትርጓሜ መሠረት 'ማሰቃየት' ለሚለው ቃል የተሟላ ትርጓሜ አያስቀምጡም። ነገር ግን ሀገሪቱ ይህን ስምምነት በማጽደቋ ምክንያት በስምምነቱ ላይ የሰፈረው የማሰቃየት ትርጓሜ ተፈጻሚነት ይኖረዋል።

በሌላ በኩል ደግሞ አንዳንድ የሕግ ባለሙያዎች ማንኛውም የማሰቃየት ተግባር ኢሰብዓዊ፣ ጭካኔ የተሞላበትና ክብርን የሚያዋርድ በመሆኑ በሕገ መንግሥቱ አንቀጽ 18(1) ላይ ዕውቅና ተሰጥቶታል ቢባልም ይሄ ድንጋጌ ብቻውን በቂ አይደለም

[57] Issa Wazembe v. Attorney General (CIVIL SUIT NO. 154 OF 2016) [2019] UGHCCD 181 (19 August 2019)

[58] Uganda Human Rights Commission (UHRC) Annual Reports of 2021 – 2023; OMCT, *Uganda: Increase in torture cases despite a strong legal framework* <https://www.omct.org/en/resources/reports/uganda-increase-in-torture-cases-despite-a-strong-legal-framework-2> accessed on August 31, 2024.

[59] አንቀጽ 424 ላይ 'የአካልና የመንፈስ ስቃይ' የሚል ሐረግ ሰፍሯል።

ሲሉ ይሞግታሉ።[60] ለዚህም እንደምክንያት የቀረበው ማሰቃየት ልዩ ባህሪያት ስላሉት እና ይህ ድንጋጌ የተጠያቂዎቹን ኃላፊነት በግለሰብ ደረጃ ብቻ ያስቀረዋል የሚል ነው፤ ስለሆነም ሀገሪቱ ራሱን የቻለ ተጨማሪ ብሔራዊ የፀረ ማሰቃየት ሕግ ማውጣት አለባት ሲሉ አጥብቀው ይከራከራሉ። በተጨማሪም ማሰቃየት እስካልቀጠለ ድረስ ሀገሪቱ የፀረ ማሰቃየት ስምምነቱን አማራጭ ፕሮቶኮልን ልትፈርምና ልታጸድቅ ይገባል የሚል መከራከሪያ ያቀርባሉ።

የኢትዮጵያ ሰብአዊ መብቶች ኮሚሽን (ኢሰመኮ) በ2016 በጀት ዓመት መጨረሻ ላይ ይፋ ባደረገው ሦስተኛው ዓመታዊ የሰብዓዊ መብቶች ሁኔታ ሪፖርት፡[61] ጥቅምት 23 ቀን 2016 ዓ.ም. ባወጣው ጋዜጣዊ መግለጫ[62] እንዲሁም ሚያዚያ 16 ቀን 2016 ዓ.ም. የማሰቃየት ጉዳይ ለሚመለከተው ልዩ ራፖርተር ባቀረበው አስተያየት፡[63] ላይ እንደተገለጸው ከቅርብ ጊዜያት ወዲህ በተወሰኑ የሀገሪቱ ክፍሎች ውስጥ በሚገኙ አንዳንድ ለሕዝብ በግልጽ በማይታወቁ (ወይም ምስጢራዊ በሆኑ) እስር ቤቶች ወይም በወታደራዊ ካምፖች ውስጥ ብዙን ጊዜ የአስገድዶ መሰወር ድርጊት ዒላማ በሆኑት የፖለቲካ ተቃውሞ ባላቸው ሰዎች ላይ ማሰቃየትና ሌላ ኢሰብዓዊ አያያዝና ቅጣት ስልታዊ በሆነ መንገድ መፈጸማቸውን የሚያሳይ ማስረጃ መገኘቱና ያለምንም ተጠያቂነት እንደዚህ ያለ ከባድ የሰብዓዊ መብቶች ጥሰቶችን የመፈጸም አዝማሚያ መስተዋሉ አሁንም በጣም አሳሳቢ ነው መባሉ ያስደነግጣል።

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[60] ውብሸት ሙላት፣ *ለአገራዊ መግባባት የፀረ ማሰቃየት (ቶርቸር) ሕግ አስፈላጊነት* <https://www.ethiopianreporter.com/50707/> accessed on January 22, 2018.

[61] ኢሰመኮ፣ *የኢትዮጵያ ዓመታዊ የሰብአዊ መብቶች ሁኔታ ሪፖርት ከሰኔ ወር 2015 ዓ.ም. እስከ ሰኔ ወር 2016 ዓ.ም.*፣ አዲስ አበባ፣ ኢትዮጵያ፣ ሰኔ 2016 ዓ.ም.

[62] ኢሰመኮ፣ *አዲስ አበቡ "ለ7 ወራት ገደማ ተይዣ በቆየሁበት ወታደራዊ ካምፕ ሌሎች 60 የሚጠጉ ሰዎች ተይዘው አንደነበር ተመልክቻለሁ"* <https://ehrc.org/%E1%8A%A0%E1%8B%B2%E1%88%B5-%E1%8A%A0%E1%89%A0%E1%89%A3%E1%8D%A1-%E1%88%887-%E1%8B%88%E1%88%AB%E1%89%B5-%E1%8C%88%E1%8B%B0%E1%88%9B-%E1%89%B0%E1%8B%AD%E1%8B%A4-%E1%89%A0%E1%89%86%E1%8B%A8/> accessed on November 1, 2024.

[63] Ethiopian Human Rights Commission Input for the Special Rapporteur on Torture: Identifying, Documenting, Investigating and Prosecuting Crimes of Sexual Torture Committed during War and Armed conflicts, and Rehabilitation for Victims and Survivors: the case of Ethiopia, 24 April 2024.

በተለይም ኢሰመኮ በ2016 ዓመታዊ የሰብዓዊ መብቶች ሁኔታ ሪፖርቱ ላይ ከአስቸኳይ ጊዜ ሁኔታ አዋጅ ቁጥር 6/2015 አተገባበር ጋር የተያያዘ የሰብዓዊ መብቶች ሁኔታን በተመለከተ የአስቸኳይ ጊዜ ሁኔታ አዋጁ በሥራ ላይ ከዋለበት ከሐምሌ 28 ቀን 2015 ዓ.ም. ጀምሮ ከኮማንድ ፖስቱ ትዕዛዝ ውጪ ለጅምላ እስር ተዳርገው በተለያዩ መደበኛ ባልሆኑ ቦታዎች እና ከመኖሪያ አካባቢያቸው ርቀው የኤርትራ ስደተኞችንና ፍልሰተኞችን ጨምሮ በወቅቱ ተይዘው የታሰሩ ሰዎችን በተመለከተ የኢሰብዓዊ አያያዝ እና የማሰቃየት ተግባራት አሳሳቢ የሆኑ ጉዳዮች እንደነበሩ እና እስከ መስከረም ወር 2016 ዓ.ም. ድረስ ለተራዘመ ጊዜ የመጎብኘት መብታቸውን የተነፈጉ እና በየትኛው ማቆያ ቦታ እንደሚገኙ ያልታወቀ ሰዎች እንደነበሩ ተጠቅሷል።[64]

የፌዴራል ከፍተኛ ፍርድ ቤት በፍርድ ታይተው ሊወሰኑ የሚችሉ በኢፌዲሪ ሕገ መንግሥት ምዕራፍ ሦስት ስር የተዘረዘሩትን ሰብዓዊ መብቶችን ለማስከበር ሲል ተገቢ ውሳኔ፣ ፍርድ ወይም ትዕዛዝ ሊሰጥ እንደሚችል ተደንግጓል።[65] በዚህም መሠረት በፌዴራል ከፍተኛ ፍርድ ቤት ልደታ ምድብ የፀረ ሽብርና ሕገ መንግሥታዊ ጉዳዮች ችሎት ተቋቁሟል።[66] ከዚህም ባለፈ ከቅርብ ጊዜ ወዲህ የፌዴራል ከፍተኛ ፍርድ ቤት ኢሰመኮ በሽብር ወንጀል ተጠርጥረው የተያዙ ግለሰቦች ያቀረቡትን የሰብዓዊ መብቶች ጥሰት አቤቱታ መርምሮ የምርመራውን ውጤት እንዲያቀርብ *ትዕዛዝ* ሲሰጥ ይስተዋላል፤ ኢሰመኮም የምርመራ ሪፖርት የሚያቀርብ ቢሆንም ፍርድ ቤቱ በምርመራው ግኝቶች መሠረት ተፈጽመዋል የተባሉት የሰብአዊ መብቶች ጥሰቶች ላይ በገለልተኛ ቡድን ተጨማሪ ምርመራ/የወንጀል ምርመራ እንዲካሄድ ሲያዝዝ ወይም የድርጊቱ ፈጻሚ የሆኑት የፀጥታና ደኅንነት ኃይል አባላት ተይዘው ለፍትሕ ሲቀርቡና ሕጋዊ የእርምት

[64] ኢሰመኮ፣ የኢትዮጵያ ዓመታዊ የሰብአዊ መብቶች ሁኔታ ሪፖርት (n. 61)፣ ገጽ 40 – 44 ይመለከቷል።

[65] የፌደራል ፍርድ ቤቶች አዋጅ ቁጥር 1234/2013 አንቀጽ 11(3) [ሃያ ሰባተኛ ዓመት፣ ቁጥር 26፣ ሚያዚያ 18 ቀን 2013 ዓ.ም.] ይመለከቷል።

[66] ለአብነት ያህል https://ethiopiainsider.com/2023/11183/ ይመልከቱ።

እርምጃ ሲወስድባቸው አይስተዋልም።[67] ሆኖም ይሄ አሠራር ኢሰመኮ በሕግ ከተሰጠው የሰብዓዊ መብቶች ጥሰት አቤቱታዎችን የመመርመርና የመፍትሔ ሐሳብ ብቻ የመስጠት ሥልጣን[68] አንጻር ሲታይ የግብር ይውጣ መፍትሔ በመሆኑ አጥጋቢ ውጤት ሊያመጣ አይችልም። ምክንያቱም ይኸው የመፍትሔ ሐሳብ ለተፈጸመው ጥሰት ምክንያት የሆነው ድርጊት ወይም አሠራር እንዲቆም፣ ለጥሰቱ ምክንያት የሆነው መመሪያ ተፈጻሚነቱ እንዲቀር፣ የተፈጸመው የፍትሕ መጓደል እንዲታረም ወይም ተገቢ የሆነ ማንኛውም ሌላ እርምጃ እንዲወሰድ በግልጽ ከማመላከት ያለፈ አይሆንም። አሁንም በዚህ አሠራር አማካይነት ከማሰቃየት እና ሌላ ጭካኔ ከተሞላበት ኢሰብዓዊ ከሆነ ወይም ክብርን ከሚያዋርድ አያያዝና ቅጣት የመጠበቅ መብትን ተግባራዊነት ማረጋገጥ ባለመቻሉ ማሰቃየትን በራሱ መርምሮ የሚወስን ተጨማሪ ብቁ ችሎት ያስፈልጋል። በእርግጥ ኢሰመኮ ባቀረበው የምርመራ ሪፖርት ላይ የሚመለከተው አካል በተሰጡት አስተያየቶችና ምክረ ሐሳቦች ላይ ሪፖርቱ በደረሰው በ3 ወር ጊዜ ውስጥ ያለበቂ ምክንያት እርምጃ አለመውሰዱ ወይም እርምጃ የማይወስድበትን ምክንያት አለመግለጽ የሚያስቀጣ መሆኑን ልብ ይሏል።[69] ፀሐፊው የማሰቃየት ተግባርን ወንጀል የሚያደርግ የተለየ ሕግ ከማውጣትና ብሔራዊ የመከላከያ ዘዴ (National Preventive Mechanism) ከማቋቋም ባሻገር በኢትዮጵያ የፌዴራል ፍርድ ቤቶች ውስጥ ማሰቃየትን በራሱ መርምሮ የሚወስን ተጨማሪ ብቁ ችሎት አስፈላጊ ነው ብሎ ያምናል።

2.10 ማሰቃየት በፍፁም መከልከሉ አስፈላጊ ስለመሆኑ የሚቀርቡ መከራከሪያዎች

በዚህ ንዑስ ርዕስ ስር ማሰቃየት በፍፁም መከልከሉ አስፈላጊ መሆኑን የሚገልጹ በርካታ የተለያዩ አሳማኝ መከራከሪያዎች ይብራራሉ።

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[67] ለአብነት ያህል https://www.google.com/amp/s/amharic.voanews.com/amp/addis-ababa-court/7140706.html ይመልከቱ።

[68] የኢትዮጵያ የሰብአዊ መብት ኮሚሽን ማቋቋሚያ አዋጅ ቁጥር 210/1992 አንቀጽ 26(2)(3) [ስድስተኛ ዓመት፣ ቁጥር 40፣ ሰኔ 27 ቀን 1992 ዓ.ም.] ይመለከቷል።

[69] ዝኒ ከማሁ አንቀጽ 41(2) ይመለከቷል።

2.10.1 የሰው ልጅ በሙሉ ተፈጥሯዊ ክብር ያለው መሆኑ

ማሰቃየት የሰው ልጅን ክብር በቀጥታ መጣስ ነው። በሰው ልጅ ላይ የሚደርስ ጥቃት ነው ምክንያቱም በተጎጂዎቹ ላይ ብቻ ሳይሆን በቤተሰቦቻቸውም ላይ መከራ ያመጣል። ሰውን እንደዕቃ ይመለከታል፣ ደኅንነቱን ለሌላው ፍፁም ኃይል አሳልፎ ይሰጣል። ከአካላዊ ጉዳት በተጨማሪ ማሰቃየት ሥልጣንን አላግባብ እስከመጨረሻው በመጠቀም አንድን ሰው የተዋረደ፣ አቅመ ቢስ እና ብልሹ ያደርገዋል። ወርቃማውን ሕግ ቀላል የሰብዓዊ መብቶች መርሆ አድርገን ብንመለከተው ማሰቃየት በሰብዓዊ መብቶች መመዘኛዎች መሠረት ፈጽሞ የማይቃረን ሊሆን እንደማይችል ግልጽ ይሆናል። ከዘነኛው ጀርመናዊ ፈላስፋ ከኢማኑኤል ካንት ሦስቱ ዘመን አይሽሬ የሐሳብ ቀመሮች መካከል ሁለተኛው ጽንሰ ሐሳብን ማለትም በማናቸውም ሁኔታ ትክክል የሆነውን ነገር የማድረግ በምንም ቅድመ ሁኔታ ያልተገደበና ዓለም አቀፋዊ አስገዳጅነት ያለው የሞራል ግዴታን (*Categorical Imperative*)[70] መጥቀስ ጠቃሚ ይሆናል። ይኸውም እንዲህ ይነበባል፡ "ሁልጊዜ ሰብዓዊነትን በራስህም ሆነ በሌላው ሰውነት በምትይዝበት መንገድ፣ በፍፁም ለመጨረሻው ግብ እንደመንገድ ብቻ ሳይሆን ሁልጊዜም በተመሳሳይ ጊዜ በራሱ የመጨረሻው ግብ አድርገህ፣ ተግብር።" በሌላ አገላለጽ አንድ ሰው የራሱንም ሆነ የሌሎችን ሰብዓዊነት ለሌላ ዓላማ ብቻ ያለመጠቀም ፍፁም ግዴታ አለበት። አንድ ሰው ሌላውን ሰው እንደአማራጭ መንገድ የመመልከት የመጠቀም መብት አለው ብሎ ማሰብ አይችልም። ማሰቃየት ፈጽሞ መከልከል አለበት ምክንያቱም አንድ ሰው በሌላው ላይ ሊፈጽም የሚችላቸውን አስከፊ ድርጊቶች ይዟል። አሰቃይ ለመሆን አንድ ሰው ተፈጥሯዊ ርህራሄን እና ለራሱ ያለውን ግምትን ማፈን እና በምትኩ ሰውን ለማሰቃየት የሚያሰላ ማሽን መሆን አለበት።[71]

[70] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (translated and analyzed by H.J. Paton in The Moral Law) (Hutchinson, London, 1972), p. 91.
[71] Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford University Press, New York, 2008) pp. 64-88.

2.10.2 የማሰቃየት ተግባር ሰለባ በሆኑ ተጎጂዎች ላይ አሰቃቂ መዘዞች ማስከተሉ[72]

የፀሐፊው ልምድ እንደሚያስረዳው የማሰቃየት ተግባር በተጎጂዎች ላይ የቅርብና የረጅም ጊዜ አካላዊ እና ሥነ ልቦናዊ ተጽዕኖ ያስከትላል። የማሰቃየት ሰለባዎች የጤና እክል፣ የአካል ጉዳት እና አንዳንዴ ለሞት ይዳረጋሉ። ማሰቃየት በተጎጂዎች ላይ የማይጠፋ አሰቃቂ የስሜት ቀውስ ጥሎ ያልፋል። ማሰቃየት የሚያስከትላቸው መዘዞች ብዙውን ጊዜ እጅግ አሰቃቂ ከመሆናቸው ባሻገር ወዲያውኑ ከሚሰማ ሕመም በላይ ይደርሳሉ። ብዙ ተጎጂዎች በድኅረ አሰቃቂ የሥነ ልቦና ጭንቀት (በአዕምሮ ሕመም) ይሰቃያሉ። ምልክቶቹም ያለፈው መጥፎ ክስተት በአዕምሮ ውስጥ ድንገት እየመጣ የሚረብሽ ትውስታ፣ ከባድ ጭንቀት፣ እንቅልፍ ማጣት፣ ቅዠት፣ ድብርት፣ የማስታወስ ችግር፣ የመሳሰሉት ናቸው። የማሰቃየት ሰለባዎች ብዙውን ጊዜ ባሳለፉት ውርደት ምክንያት የጥፋተኝነት ስሜትና ሀፍረት ይሰማቸዋል። ብዙዎች እራሳቸውን ወይም ጓደኞቻቸውን እና ቤተሰባቸውን እንደከዱ ይሰማቸዋል። እነዚህ ሁሉ ምልክቶች ላልተለመደና ኢሰብዓዊ አያያዝና ቅጣት የተለመዱ ሰዋዊ ምላሾች ናቸው።

[72] *Effects of Torture* <https://www.cvt.org/resources/effects-of-torture/#:~:text=Long%2Dterm%20psychological%20effects%20include,traumatic%20stress%20disorder%20(PTSD).> accessed on August 30, 2024; Amanda C de C Williams and Jannie van der Merwe, 'The psychological impact of torture', [2013] 7(2) British Journal of Pain <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4590125/> accessed on August 27, 2024; Danie Meyer-Parlapanis and Thomas Elbert, 'Psychology of Torture and its Consequences' [2015] University of Konstanz <https://kops.uni-konstanz.de/entities/publication/019e3184-3747-4545-bd98-f1b4cef48e21> accessed on August 26, 2024.

2.10.3 የተፈለገውን ውጤት የማያስገኝ ኢ-ሳይንሳዊ ዘዴ መሆኑ[73]

በአሜሪካ ማዕከላዊ የደኅንነት መረጃ /የስለላ/ ኤጀንሲ (ሲአይኤ) ሲተገበር በነበረው ኤምኬ-አልትራ የተባለው ምስጢራዊ ፕሮጀክት (*Project MKUltra*) እንዳመላከተው ማሰቃየት መረጃ ለመሰብሰብ ውጤታማነቱ በሳይንስ አልተረጋገጠም።[74] ማሰቃየት መፈጸም በደንብ የታሰበ ቢሆንም በመጨረሻ ግን የተፈለገውን ወጤት የማያመጣ ዘዴ ነው። የቆዩና የቅርብ ጊዜ ለሰብዓዊ መብቶች ችሎቶች የቀረቡ ጉዳዮችን ስንመለከት አብዛኛውን ጊዜ በማሰቃየት የተገኘ መረጃ ለውጤታማ የወንጀል ምርመራ አስተዋጽኦ አይኖረውም። አንደኛ፣ አንድ ሰው ማሰቃየት በሚፈጸምበት ጊዜ ስቃዩን ለማስቆም ሲል ብቻ መርማሪው እንዲልለት የሚፈልገውን ማንኛውንም ነገር፣ እውነት ቢሆንም ባይሆንም፣ ማመን ይቀናዋል። ንፁህ የሆነውን ሰው ያላደረገውን ነገር እንዲያምን ማድረግ ትክክለኛ ወንጀል አድራጊው ለፍርድ አልቀረበም ማለት ነው። በዚህም የተነሳ ተጎጂዎቹን የበለጠ ቂመኛ ከማድረጉም ባሻገር ለበቀል ያነሳሳቸዋል። ሁለተኛ፣ በማሰቃየት የተገኙ መግለጫዎች ወይም

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[73] Shane O'Mara, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Harvard University Press, 2015), pp. 174-185; *5 Reasons Why Torture Does Not Work and Can Never Be Justified* <https://www.humanrightscareers.com/issues/reasons-why-torture-does-not-work/#:~:text=1%20Torture%20is%20an%20Ineffective%20Interrogation%20tool&text=Usually%2C%20the%20application%20of%20physical,to%20end%20the%20painful%20experience.> accessed on August 30, 2024; *Why is torture wrong?* <https://www.bbc.co.uk/ethics/torture/ethics/wrong_1.shtml> accessed on August 29, 2024; *The prohibition against torture and its pragmatic effects* <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2023/6/9/the-prohibition-against-torture-and-its-pragmatic-effects> accessed on August 29, 2024; *Torture is ineffective in getting information* <https://www.indystar.com/story/opinion/readers/2014/12/17/guantanamo-bay-detention-center-torture-letter-to-editor/20552437/> accessed on August 30, 2024; M. Usman, 'Torture as an Ineffective Tool of Demoralization in Jean Paul Sartre's Men Without Shadows' [2019] 1(2) International Journal of English Language Studies <https://al-kindipublisher.com/index.php/ijels/article/view/117> accessed on August 29, 2024.

[74] Stephen Kinzer, *Poisoner in Chief: Sidney Gottlieb and the CIA Search for Mind Control* (Henry Holt & Co, New York, 2019); Adam D. Jacobson, 'Back to the Dark Side: Explaining the CIA's Repeated Use of Torture' 33:2 Terrorism and Political Violence <https://www.tandfonline.com/doi/abs/10.1080/09546553.2021.1880193> accessed on August 29, 2024; Rupert Stone, 'Science Shows That Torture Doesn't Work and Is Counterproductive', Newsweek, (May 8, 2016) <http://www.newsweek.com/2016/05/20/science-shows-torture-doesnt-work-456854.html> accessed on August 29, 2024.

እውነተኛ ማስረጃዎች በወንጀል ክስ ክርክሮች ላይ ሊጠቅሙ አይችሉም።[75] ሦስተኛ፣ የፖሊስ አባላት በማሰቃየት ላይ የሚተማመኑ እንደሆነ የበለጠ አስተማማኝ ማስረጃ እንዲያገኙ የሚረዳ ሙያዊ ክህሎታቸውን ማሳደግ አይችሉም።

2.10.4 የፖሊስ ኃይል አጠቃቀምን የሚገዙ የአስፈላጊነትና የተመጣጣኝነት ጥብቅ መስፈርቶች መኖራቸው

የፖሊስ አባላት ኃይልን ከመጠን በላይ ከተጠቀሙ ማሰቃየት ሊያስከትል ይችላል። ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ሊፈጽምባቸው ከሚችሉ ሁኔታዎች መካከል ተጠርጣሪዎችን በካቴና ማሰር (በቁጥጥር ስር በሚውሉበት ጊዜም ሆነ ከታሰሩ በኋላ)፣ ተቃውሞን ለማሸነፍ አካላዊ ኃይል መጠቀም ወይም የጦር መሣሪያ መጠቀም ይገኙበታል። አብዛኛው የፖሊስ ሥራ ኃይል መጠቀምን አያስከትልም። የፖሊስ ተግባራትን ለማከናወን የኃይል አጠቃቀም አስፈላጊ በሚሆንበት ጊዜ እና ከሚያስፈልገው መጠን ያላለፈ እንደሆነ ተገቢ ይሆናል።

ፖሊስ አግባብነት ያላቸው የተግባቦት ክህሎቶችን በመጠቀም በመጀመሪያ ግጭትን በሰላማዊ መንገድ ለመፍታት ጥረት ማድረግ አለበት። እነዚህ ሰላማዊ መንገዶች ውጤታማ ካልሆኑ ወይም የታሰበውን ውጤት ለማሳካት አቅም የሌላቸው እንደሆነ ብቻ አካላዊ ኃይል መጠቀምን ጨምሮ በሰብዓዊ መብቶች ላይ የበለጠ ጣልቃ ገብ የሆኑ ዘዴዎችን ሊተገበሩ ይችላሉ። ሕይወት አደጋ ላይ ከወደቀ ግን ገዳይ የጦር መሣሪያዎችን እንደ የመጨረሻ አማራጭ ብቻ መጠቀም አለበት።

[75] የፀረ ማሰቃየት ስምምነት አንቀጽ 15 ይመለከቷል። Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' [2006] 17/2 EJI <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092712 > accessed on August 25, 2024; Convention against Torture Initiative (CTI), *NON-ADMISSION OF EVIDENCE OBTAINED BY TORTURE AND ILL-TREATMENT: PROCEDURES AND PRACTICES* <https://cti2024.org/wp-content/uploads/2021/01/CTI-Exclusionary_Rule_Tool_8-2020_FINAL_.pdf > accessed on August 25, 2024.

በሕግ ማስከበር ተግባራት ውስጥ የኃይል አጠቃቀም በዋናነት የሚተዳደረው በማንኛውም ጊዜና በሀገር ውስጥ ሕግ ውስጥ ተፈፃሚነት ባለው በዓለም አቀፍ የሰብዓዊ መብቶች ሕግ ነው። ምንም እንኳ የሕግ አስገዳጅነት ባይኖራቸውም እ.ኤ.አ. በ1979 የወጣው የተባበሩት መንግሥታት የሕግ አስከባሪ አካላት የሥነ ምግባር ደንብ እና እ.ኤ.አ. በ1990 በተባበሩት መንግሥታት ድርጅት ጉባኤ የጸደቁት የሕግ አስከባሪ አባላት የኃይልና የጦር መሣሪያ አጠቃቀም መሠረታዊ መርሆዎች በሕግ ማስከበር ተግባራት ውስጥ የኃይል አጠቃቀምን በተመለከተ ተጨማሪ መመሪያ ይሰጣሉ። በተለይ መርህ 8 "ከእነዚህ መሠረታዊ መርሆዎች ለማፈንገጥ የውስጥ የፖለቲካ አለመረጋጋት ወይም ሌላ ማናቸውም የአስቸኳይ ጊዜ ሁኔታና የመሳሰሉ ልዩ ሁኔታዎችን ምክንያት ለማድረግ አይቻልም" ይላል።

የአውሮፓ የሰብዓዊ መብቶች ስምምነት የመኖር መብትን ሳይጥስ ነገር ግን ሕይወትን ሊያሳጣ የሚችል የኃይል አጠቃቀም ሊያስከትሉ የሚችሉ ሁኔታዎችን በዝርዝር የሚጠቅስ ብቸኛው የሰብዓዊ መብቶች ስምምነት ነው። እነዚህም ሁኔታዎች በአንቀጽ 2 ላይ እንደተደነገጉት፡- (ሀ) ማንኛውም ሰው ከሕገወጥ ጥቃት ለመከላከል፤ (ለ) ሰዎችን በሕጋዊ መንገድ ለመያዝ /በቁጥጥር ስር ለማዋል/ ወይም በሕጋዊ መንገድ የታሰረ ሰው እንዳያመልጥ ለመከላከል፤ (ሐ) ሕዝባዊ አመጽ/ሁከትን ለማስቆም ሕጋዊ በሆነ መንገድ የተወሰደ የኃይል እርምጃ ናቸው።

2.10.5 በማሰቃየት እና ሌሎች የኢሰብዊ አያያዝ ዓይነቶች መካከል ያለውን የልዩነት መስመር መወሰን አስቸጋሪ መሆኑ[76]

ማሰቃየት ፈጽሞ የተከለከለ ሲሆን ጭካኔ የተሞላበት፣ ኢሰብዓዊ የሆነ ወይም ክብርን የሚያዋርድ አያያዝ ወይም ቅጣት ስያሜው እንደሚያመለክተው አንጻራዊ ጽንሰ ሐሳብ ነው።[77] ሕይወትን ለማዳን ሲባል ማሰቃየት እንደአስፈላጊ የመጨረሻ አማራጭ ተደርጎ ቢታሰብ እንኳ የሚፈጸምባቸው ልዩ ሁኔታዎችን በግልጽ መወሰን ያስፈልጋል። ማሰቃየት የሚያበቃው እና 'መጠነኛ አካላዊ ጫና' ('*moderate physical pressure*') የሚጀምረው የት ነው? ለማሰቃየት ማስፈራራት የታሰበውን ውጤት ካላስገኘ ምን ይሆናል? ተጠርጣሪው ከባድ ስቃይ እንዲደርስበት ከተደረገ በኋላ አሁንም አስፈላጊውን መረጃ ካላቀረበ ምን ይሆናል/ይደረጋል? በምን ደረጃ ላይ ይቆማል? የተመጣጣኝነት መርሆ በተግባር ምን ይሆናል? 'ተገቢ' ማሰቃየት ወይም 'መጠነኛ አካላዊ ጫና' ተብሎ የሚጠራው ምንድን ነው? ማሰቃየት የሚያበቃው እና 'መጠነኛ አካላዊ ጫና' የሚጀምረው የት ነው? የሚሉ ጥያቄዎችን መመለስ ያስፈልጋል። ለምሳሌ ያህል ከማሰቃየት ዓይነቶች መካከል ሕመም በሚያስከትል መልኩ እስረኞች ላይ አካላዊ ድብደባ መፈጸም፣ ሆን ብሎ በአስርካሪ

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[76] Pau Pérez-Sales, 'Drawing the fine line between interrogation and torture: towards a Universal Protocol on Investigative Interviewing' [2017] 27/2 TORTURE <https://www.researchgate.net/publication/326655778_Drawing_the_fine_line_between_interrogation_and_torture_towards_a_Universal_Protocol_on_Investigative_Interviewing> accessed on August 28, 2024; Association for the Prevention of Torture, *The Definition of Torture Proceedings of an Expert Seminar* <https://www.apt.ch/sites/default/files/publications/Definition%20of%20Torture_Seminar_EN.pdf> accessed on August 29, 2024; *Is torture ever justified?* <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.economist.com/international/2007/09/20/is-torture-ever-justified&ved=2ahUKEwis5OvZyt6IAxXYZ_EDHX4OOKoQFnoECCwQAQ&usg=AOvVaw0r0-aArS8xg5QdhupUn0gR>; Mary-Hunter Morris McDonnell, Loran F. Nordgren and George Loewenstein, 'Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy' [2011] 44:87 Vanderbilt Journal of Transnational Law <https://www.cmu.edu/dietrich/sds/docs/loewenstein/TortureEyesBeholder.pdf> accessed on August 29, 2024; Christian M. De Vos, 'Mind the Gap: Purpose, Pain, and the Difference between Torture and Inhuman Treatment' [2007] 14/2 Human Rights Brief <https://digitalcommons.wcl.american.edu/hrbrief/vol14/iss2/2/> accessed on August 28, 2024.

[77] Nowak (n 1) 676.

አጥንት ላይ ጫና የሚፈጥር ወንበር መጠቀም ወይም እስረኞችን በተወሰኑ የሚያሰቃዩ አቀማመጦች እንዲቀመጡ ማስገድድ፣ ለእስረኞች ስለመብታቸው መዋሸት/ሐሰትን መናገር፣ በምግብ እጦት ወይም በረሃብ ምክንያት ማሰቃየት፣ ከተወሰኑ ሰዓታት ወይም ቀናት በላይ የሚቆይ ሆን ተብሎ እንቅልፍ ማሳጣት፣ ከፍተኛ ድምጽ ያለውን ሙዚቃ ያለማቋረጥ ማሰማት ወይም በጣም ከፍተኛ ሙቀት መጠቀም፣ የመስጠም ስሜትን ለማነሳሳት ውሃ በእስረኛው አፍና አፍንጫ ውስጥ በኃይል እንዲገባ የሚደረግበት የምርመራ ዘዴ፣ የኤሌክትሪክ ንዝረት፣ የእስረኞች ቤተሰብ አባላትን አስገድዶ ለመደፈርና ለማሰቃየት ዛቻ መፈጸም፣ የእስረኞች እጆችን ሕመም በሚያስከትል መልኩ ከወንበራቸው ጀርባ ማሰር፣ እርቃን ማስቀረት እና እስረኛው ላይ ምራቅ መትፋት ወይም ሌላ ክብርን የሚያዋርድ አያያዝ በዋናነት ይጠቀሳሉ። በአንጻሩ ደግሞ ላልተገለጸ ጊዜ ለብቻ ተገልሎ መታሰር ወይም እስረኛን በተለየ የእስር ክፍል ውስጥ ማቆየት፣ በወንጀል የተጠረጠሩ እስረኞች ቤተሰብ አባላትን ለመያዝ (በቁጥጥር ስር ለማዋል) ዛቻ መፈጸም፣ እስረኞች ከቦታ ወደ ቦታ ሲዘዋወሩ ወይም አንዳንዴም ለእስረኞቹ ጨኽት ወይም የስሜት መገንፈል የአጸፋ ምላሽ በሆነ መልኩ ዝቅተኛ ደረጃ በደል መፈጸም /እስረኞችን መምታት/፣ እስረኞችን ስለመብታቸው ለማሳሳት ዝቅተኛ-ደረጃ ማታለል መፈጸም፣ እስረኞችን ወደ ወንበራቸው ጎን በማይመች ሁኔታ ማሰር፣ እንቅልፍ ማጣት (የማያቋርጥ ምርመራ በሚመስል ግን ከተራዘሙ 'ዕረፍቶች' ጋር እየተቋረጠ ስልታዊ በሆነ መንገድ የተፈጸመ እንደሆነ)፣ ከተፈቀደው ዝቅተኛ መስፈርት በላይ የሆነ ምግብን ጨምሮ ማበረታቻዎችን መስጠትና መልሶ መውሰድ፤ ከድምፅ፣ ከሙቀት ወይም ከንጽህና ጋር የተያያዘ ለማይመች ግን የማያሳምም አካባቢ መጋለጥ፤ የማይመች ወንበር መጠቀም ወይም ሕመም ለመፍጠር ተብሎ የተደረገ ባይሆንም እስረኛው በማይመች አቀማመጥ እንዲቀመጥ ማድረግ፤ በአጠቃላይ እስከ ክብርን የሚያዋርድ አያያዝ ድረስ ባይደርስም አንድ እስረኛ አቅም እንደሌለውና እንደቀለለ እንዲሰማው ማድረግ እንደ 'መጠነኛ አካላዊ ጫና' ይቆጠራሉ።

2.10.6 በሕይወት ከመኖር መብት ይልቅ ማሰቃየት መከልከሉ ፍፁም መሆኑ

በሕይወት የመኖር መብት እጅግ በጣም መሠረታዊው የሰብዓዊ መብት ነው። ነገር ግን ከማሰቃየት ወይም በባርነት ከመያዝ የመጠበቅ መብት በተቃራኒው የመኖር መብት ፍፁም መብት አይደለም። በተለይም የሞት ቅጣትን በሚፈቅዱ የሕግ ሥርዓቶች ውስጥ በሕይወት የመኖር መብት ፍፁም ነው ተብሎ ሊወሰድ አይችልም። በተጨማሪም በዓለም አቀፍ የሰብዓዊነት ሕግ (*international humanitarian law*) 'በሕጋዊ የጦርነት ድርጊት' ምክንያት የአንድ ተዋጊ ሞት የሕይወት መብት ጥሰት ተደርጎ አይቆጠርም። በተመሳሳይ የሕግ አስከባሪዎች አንድን ሰው ቢገድሉ (ወይም ሕይወት ቢያጠፉ) እና ሞቱ የተከሰተው ራስን ወይም ሌላ ሰውን ለመከላከልና ለመሳሰሉት ሕጋዊ ዓላማዎች ፍፁም አስፈላጊ በሆነ የኃይል አጠቃቀም ወይም በሕግ በተደነገገው ሥርዓት መሠረት በተፈጸመ መያዝ ምክንያት ወይም በሕጋዊ መንገድ የታሰረ ሰው እንዳያመልጥ ለመከላከል ወይም ሕዝባዊ አመጽ/ሁከትን ለማስቆም በተወሰደ የኃይል እርምጃ እንደሆነ ድርጊቱ በሕይወት የመኖር መብትን ሊጥስ አይችልም። ስለሆነም ፖሊስ የሌሎች ሰዎችን ሕይወት ለመጠበቅ በወንጀለኛው የመኖር መብት ላይ ጣልቃ መግባት ይችላል። ፖሊስ ሰዎቹን በቅርብ ከሚደርስ ከባድ ከሆነ አደጋ ለማዳን ሲሞክር እንደ የመጨረሻ አማራጭ በወንጀል አድራጊው ላይ እንዲተኩስ ይፈቀድለታል። ምክንያቱም በወንጀል አድራጊው እና በተጎጂው መካከል ቀጥተኛ የማስተዋል/የስሜት ግንኙነት የለም። ተጠርጣሪው በትክክል ወንጀለኛው ስለመሆኑ እርግጠኛ መሆን አይቻልም፤ ነገር ግን አንድ ከባድ ውንብድና ወይም ዘረፋ የሚፈጽም ሰው በግልጽና በቀጥታ የሌሎችን ሕይወት አደጋ ላይ ይጥላል።[78]

[78] F. Jessberger, 'Bad Torture – Good Torture?' [(2005] 3/5 Journal of International Criminal Justice <https://academic.oup.com/jicj/article-abstract/3/5/1059/2188899?redirectedFrom=fulltext> accessed on August 26, 2024.

2.10.7 ማሰቃየት የሥራ መግለጫ ቢሆን እንኳ አፀያፊና መልሶ የሚያሰቃይ ሥራ መሆኑ

ማሰቃየትን እንደተገቢ የምርመራ ዘዴ መተግበር ማለት ልዩ ሁኔታ ቢሆን እንኳ የአንድ የፖሊስ አባል (ወይም በፖሊስ ተቋም ውስጥ የአንዳንድ ልዩ ክፍሎች) ሥራ አካል መሆን አለበት የሚል አንደምታ አለው። ይህም ማለት የፖሊስ አባላት ተግባራት በተለዩ ሁኔታዎች ውስጥ ማሰቃየት መፈጸምን ያካትታሉ። ሆኖም በርካታ ጥናቶች እንደሚያሳዩት ማሰቃየት የሚፈጽሙ ሰዎች የሥነ ልቦና ጉዳት ይደርስባቸዋል።[79] ከጅምሩ የሰው ልጅ በሌሎች መሰሎቹ ላይ ከሚፈጽማቸው እጅጉን አሰቃቂና አረመኔያዊ ድርጊቶች መካከል አንዱ ማሰቃየት እንደመሆኑ መጠን ማሰቃየት የሚፈጽሙ ሰዎች የአዕምሮ ሰላም አይኖራቸውም።[80] አይደለም ዘግናኙን የማሰቃየት ተግባር መፈጸም ይቅርና የመገናኛ ብዙኃን ባለሙያዎች እንኳ በሥራቸው ምክንያት ያጋጠማቸውን ጭንቀት መቋቋም አቅቷቸው ራሳቸውን ያጠፉበት አጋጣሚዎች እንደነበሩ መረጃዎች ያሳያሉ።[81] በመሰረቱ ሁሉም መርማሪ የፖሊስ አባላት ሙያዊ ሥነ ምግባርን በተከተለ አኳኋን ነፃና ገለልተኛ ሆነው ተግባራቸውን ሊያከናውኑ ይገባል።

2.10.8 የማሰቃየት ልምድ በእንጭጩ ካልተገራ ልጓም የሌለው ፈረስ መሆኑ

ማሰቃየትን እንደምርመራ ዘዴ መጠቀም ወይም ማሰቃየት ተፈጽሞ ሲገኝ በመንግሥት በቸልታ ከታለፈ በፍጥነት ከቁጥጥር ውጭ ሊሆን ይችላል።[82] ማሰቃየት የሚጀምረው በተለዩ ሁኔታዎች ብቻ እንደሚያገለግል ዘዴ ቢሆንም

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[79] Michael Davis, 'Torturing Professions' [2008] International Journal of Applied Philosophy <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.researchgate.net/publication/314450621_Torturing_Professions&ved=2ahUKEwiQq__33uCIAxWbR_EDHUStALkQFnoECBEQAQ&usg=AOvVaw3Jr_034Dv-0WKzPcoP_aCs> accessed on August 28, 2024.

[80] US Department of Veteran Affairs, *Journalists and PTSD* <https://www.ptsd.va.gov/professional/treat/care/journalists_ptsd.asp> accessed on August 28, 2024;

[81] *How Photographer Kevin Carter's Work During The Sudan Famine Drove Him To Suicide* <https://allthatsinteresting.com/kevin-carter%20%20> accessed on August 28, 2024; Felix Adeoye, *Learn From A Man Who Murdered Himself* <https://medium.com/writers-blokke/lessons-from-kevin-carter-death-42cfb9179019> accessed on August 28, 2024.

[82] Massimo La Torre, *Reopening Pandora's Box: The Return of Torture (and of Moral Monstrosity)* <https://www.researchgate.net/publication/330313120_Reopening_Pandora's_Box_The_Return_of_Torture_and_of_Moral_Monstrosity> accessed on August 20, 2024.

የመስፋፋት እና ወደ አጠቃላይ ልምድነት የማደግ አደጋ አለው። ማሰቃየትን በየትኛውም ስም (ለምሳሌ 'መጠነኛ አካላዊ ጫና' ብሎ መጠሪያ መስጠት) ተቋማዊ ማድረግ በሕግ የበላይነት ላይ የተመሰረተ ዴሞክራሲያዊ መንግሥት የተገነባባቸው እጅግ መሠረታዊ መርሆዎችን ዋጋ የሚያሳጣ አንሸራታች ቁልቁለት መሆኑ አሌ የማይባል ሀቅ ነው። እንደማሳያ በእስራኤል ሀገር በፍርድ ቤት ውሳኔ በወንጀል ምርመራ ወቅት ማናቸውንም ዓይነት አካላዊ ኃይል መጠቀም ሙሉ በሙሉ የታገደበት አጋጣሚም አለ። እ.ኤ.አ. በ1987 እስራኤል በዓለም ላይ ማሰቃየት ሕጋዊ የሆነበት ብቸኛ ሀገር የነበረች[83] ቢሆንም እ.ኤ.አ. ሴፕቴምበር 6 ቀን 1999 (ጳጉሜ 1 ቀን 1991 ዓ.ም.) ፐብሊክ ኮሚቲ አጌንስት ቶርቸር ኢን ኢዝራኤል (*PCATI*) በተባለ መንግሥታዊ ባልሆነ ድርጅት እና በእስራኤል መንግሥት ጉዳይ የእስራኤል ጠቅላይ ፍርድ ቤት የሀገሪቱ የደኅንነት ኤጀንሲ (ወይም '*Shin Bet*' በመባል የሚታወቀው በእስራኤል ደህንነት ላይ የሚፈጸሙ ወንጀሎች የተጠረጠሩ ሰዎችን የመመርመር ኃላፊነት የተሰጠው የደኅንነት ፖሊስ) የሚጠቀማቸው በርካታ አካላዊ የምርመራ ዘዴዎች በወቅቱ በነበረው የእስራኤል ሕግ መሠረት ሕገወጥ እንደሆኑ በአንድ ድምፅ ወስኖ ነበር።[84]

[83] OMCT, *It's now (even more) official: torture is legal in Israel* <https://www.omct.org/en/resources/blog/its-now-even-more-official-torture-is-legal-in-israel> accessed on August 30, 2024.

[84] H.C. 5100/94, Pub. Comm. Against Torture in Israel v. The State of Israel et al.; Matthew G. Amand St., 'Public Committee against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained' 25/3 North Carolina Journal of International Law, 1999.

3. መደምደሚያ

ቀደም ብሎ እንደተገለጸው ማሰቃየትም ሆነ ሌሎች ጭካኔ የተሞላባቸው፣ ኢሰብዓዊ የሆኑና ክብርን የሚያዋርዱ አያያዞችና ቅጣቶች ሁልጊዜም የተከለከሉ ናቸው። እነዚህ ድርጊቶች ሕገወጥ መሆናቸው ከስድስት አስርተ ዓመታት በፊት በዓለም አቀፍ ደረጃ ተደንግጓል። በአሁን ጊዜ 174 ሀገራት የሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃል ኪዳንን እና የፀረ ማሰቃየት ስምምነትን ተቀብለው አጽድቀዋል። ዓለም አቀፍና አኅጉራዊ የሰብዓዊ መብቶች ስምምነቶችን ማጽደቅ አንድ ወሳኝ እርምጃ ቢሆንም ማጽደቅን ተከትሎ ወደ ውጤታማ ትግበራ የሚያመሩ ተጨባጭ ማሻሻያዎች ያስፈልጋሉ። የፀረ ማሰቃየት ስምምነትን ያጸደቁ ሀገራት ማሰቃየትን ለማስወገድ የተለያዩ እርምጃዎችን መውሰድ ይጠበቅባቸዋል። በተለይም የፀረ ማሰቃየት ስምምነት አባል ሀገራት በሥልጣናቸው ስር ባለ ማንኛውም ግዛት ውስጥ የሚፈጸም ማሰቃየትን ለመከላከል ውጤታማ እርምጃዎችን እንዲወስዱ ያስገድዳል። ማሰቃየት ፍፁም መከልከሉ ሕልምና ምኞት ወይም 'ላም አለኝ በሰማይ ወተትዋንም አላይ' ሳይሆን በመርህ ደረጃም ሆነ በተግባር ተጨባጭ ተስፋ መሆን አለበት።

በሁሉም ሁኔታዎች ሌላው ቀርቶ የሽብር ድርጊቶች ወይም የተደራጁ ወንጀሎችን በመሳሰሉ በጣም አስቸጋሪ በሆኑ ሁኔታዎች እንኳ ማሰቃየት ፈጽሞ ተቀባይነት የለውም። በሰላምም ሆነ በጦርነት ጊዜ (ወይም በአስቸኳይ ጊዜ ሁኔታ) ለሀገርና ለሕዝብ ሰላምና ደኅንነት ከፍተኛ ስጋት የሆኑ ወንጀሎች (ለምሳሌ ከፍተኛ የሀገር ክህደት ወይም ከፍ ያለ ክዳት፣ የጦር ወንጀል፣ የሰው ዘር ማጥፋት፣ ከባድ የሰው ግድያ፣ ከባድ ውንብድና፣ የሽብር ወንጀል፣ ወዘተ) እንኳ ቢፈጸሙ ማሰቃየት ፈጽሞ ተቀባይነት የለውም። ብሔራዊ ደኅንነትን ለመጠበቅ እና ሽብርተኝነትን ለመከላከል ማሰቃየት ተገቢ ነው የሚለው የተለመደ መከራከሪያ ውሃ አይቋጥርም።

ይሁን እንጂ በዓለም ዙሪያ ያሉ መንግሥታት ሰዎችን በማሰቃየት ያሉትን ጥቂት የሕግ ጥበቃዎችን መጣስ ቀጥለዋል። መንግሥታት ማሰቃየትን ለተለያየ ምክንያት ይጠቀማሉ፤ በዋናነት መረጃን ለማግኘት፣ ሰላማዊ ተቃውሞን ለማፈን ወይም ጭካኔ የተሞላበት ቅጣት ሆኖ ያገለግላል። ብዙውን ጊዜ ማሰቃየት ወንጀሎችን

ለመመርመር መደበኛው ዘዴ ነው። ብዙ ሀገራት ማሰቃየት የተለየ ወንጀል መሆኑን በብሔራዊ ሕጎቻቸው ውስጥ በግልጽ መደንገግ አልቻሉም። ማሰቃየትን ማስወገድ ያለመው የመጀመሪያው ዓለም አቀፍ ጉባኤ ከተካሄደ ከአምስት አስርተ ዓመታት በኋላ አሁንም ሰዎች ማሰቃየት ይደርስባቸዋል። የሀገርን ሰላምና ደኅንነት የማስከበርና የወንጀል ምርመራ ሥራ በሕግ አግባብ ብቻ ሊሆን ይገባል። ማሰቃየት በመጀመሪያ ደረጃ እንዳይፈጸም ለመከላከል አሁንም ብዙ የውትወታ ሥራ ይቀራል። ማሰቃየትን ሁልጊዜ 'አይ' ማለት አለብን።

Conflict of Interest

The author declares no conflict of interest.

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በእውነት እና በተጠያቂነት ላይ የተመሰረተ የፍትህ እሳቤ፡- በከምባታ ብሔረ-ሰብ ባህላዊ የዳኝነት ሥርዓት መሰረት የቀረበ ምልከታ

ይድነቃቸው አየለ ዝቅአርጌ*

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1. መግቢያ

እንደ ኢትዮጵያ ባሉ ሀገራት የሚገኙ ማህበረሰቦች በረጅም ታሪካዊ ሂደት፣ ትስስር፣ ያዳበሩት የጋራ ልምድ እና እሴት መሠረት የደረጁ እና ብዝሃነት ያላቸው ባህላዊ የፍትህ ስርዓቶች ይገኛሉ። ጤናማ እና ዘላቂ ለሆነ ማህበራዊ፣ ኢኮኖሚያዊ እና ፖለቲካዊ መስተጋብር እነኚህ ባህላዊ የፍትህ ስርዓቶች ፋይዳቸው የላቀ ነው። የህግ ብዝሀነትን እና ባህላዊ የግጭት አፈታትን በሚመለከት ኢትዮጵያ ላይ መሰረት አድርገው የሚያጠኑ ምሁራን እነዚህ ስርዓቶች ሀገራት ለሚገነቡት መደበኛ የፍትህ ስርዓት መሠረት ሊሆኑ እንደሚገባ ይጠቁማሉ።[1] በተቃራኒው ኢትዮጵያ ዘመናዊ እና መደበኛ የሆነ የፍትህ ሥርዓት ለማደርጀት ከአፄ ኃይለ ሥላሴ ዘመነ-መንግስት (1930-1960ዎቹ) ጀምሮ ከምዕራቡ ዓለም በሰፊው የተወሰዱ ልምዶች መሰረት ዝርዝር ህግ፣ ስነስርዓት እና የፍትህ ተቋሟት ተቀርጸው ተግባር ላይ ውለዋል።[2]

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[1] John Griffiths, 'What is Legal Pluralism?' *The Journal of Legal Pluralism and Unofficial Law*, Vol. 18, No. 24 (1986), pp. 1–55; Sally Engle Merry, 'Legal Pluralism' *Law & Society Review*, Vol. 22, No. 5 (1988); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalisation and Emancipation* (2nd ed., Butterworths, London, 2002).

[2] Abera Jembere, Legal history of Ethiopia. Hamburg and London: Lit Verlag (2000).

ይህ መደበኛ ወይም ዘመናዊ የፍትህ ስርዓት በተባራ ዝርዝር ህግ፣ ስነስርዓት እና የማስረጃ መብት ላይ ያማከለ ማስረጃ የማዳመጥ፣ እውነትን የማፈላለግ እና የዳኝነት አሰራርን ብቻ የሚከተል በመሆኑ አብዛኛው የኢትዮጵያ ኅብረተሰብን ዘልቆ ለመግባት እንዳልቻለ ሲነገር፤ በጂኦግራፊያዊ እና በማህበራዊ ደረጃ የራቀ፣ አገልግሎቱ ሊደረስበት የማይችል (inaccessible)፣ ብዙ ወጪ የሚጠይቅ (costly)፣ ከማህበራዊ ዘይቤ ጋር የተናጠበ (socially misaligned) እንዲሁም የተራዘመ (delayed) እና ቀልጣፋ (timely) ፍትህ በሀገሪቱ ሊያሰፍን እንዳልቻለ ይነገራል።[3]

በተቃራኒው ባህላዊ የፍትህ ስርዓቶች እውነትን እና ተጠያቂነትን አጣምረው የያዙ ሲሆን፤ ይህም መደበኛው የፍትህ ስርዓት ላለበት እውነትን የማጥራት እና ፍትሃዊ ተጠያቂነት በማስፈን ሂደቱ የሚያጋጥመውን ተግዳሮት ለመወጣት የሚያስችል እምቅ አቅም እንዳላቸው ይነገራል። በዋናነት ባህላዊ የፍትህ ስርዓቶች መሰረታቸው ማህበራዊ ልማድ፣ የሕዝብ የጋራ ሥነ-ልቦና እሴት እና ስሜት እንዲሁም በታሪካዊ ልምዶች ላይ ነው።[4] በዚህ ስርአት ውስጥ እውነት የሚለካው በማህበራዊ ስምምነት፣ እውነታውን በአካል ተገኝተው በተረዱ ምስክሮች ወይም ባህላዊ ዳኞች እውቀት እና ተፈጥሯዊ እውነቶች ላይ ተመስርቶ ሲሆን፤ ተጠያቂነት ደግሞ በጉዳዩ ዙሪያ ያለውን ማህበራዊ ግንኙነት በመመለስ ወይም በመፈወስ ላይ ያተኮረ ነው።[5] በሌላ በኩል መደበኛ የፍትህ ስርዓቶች በተባራ ሕጎች፣ በማስረጃዎች እና ውስን በሆነ ዳኝነት ስርዓቶች እና ሂደቶች ላይ ብቻ የተመሰረቱ ናቸው ማለት ይቻላል።[6] በመሆኑም እውነት በመደበኛ የፍትህ ስርዓት ውስጥ የሚወሰነው በሳይንሳዊ ማስረጃዎች እና በመደበኛው ሕጋዊ ሂደቶች በኩል ሲሆን፤ የተጠያቂነት ስርዓቱ

[3] Alula Pankhurst and Getachew Assefa, Understanding Customary Dispute Resolution in Ethiopia in Alula Pankhurst and Getachew Assefa (eds.), Grassroots Justice in Ethiopia: The Contribution of Customary Dispute Resolution (Centre Français d'Études Éthiopiennes, Addis Ababa, 2008), pp. 1–76

[4] Ibid

[5] Getachew Assefa, 'Towards Widening the Constitutional Space for Customary Justice Systems in Ethiopia', *Culture and Social Practice*, No. 43 (2020).

[6] Ibid

በዋናነት በግለሰብ ላይ በሚተላለፍ እና በሚፈጸም ቅጣት ላይ ያተኩራል። በመሆኑም መደበኛ የፍትህ ስርዓቶች በጋራ ማህበራዊ ሞራል፣ እምነት እና እሳቤ ላይ የተመሰረተ እውነትን የማጥራት፣ ማህበራዊ ስምምነት የመፍጠር፣ ከግለሰብ ቅጣት ያለፈ ተጠያቂነትን የማስፈን እና ማህበራዊ ሰላምን የመመለስ ውስንነት አለባቸው። ነገር ግን እንደ ከንባታ ማህበረሰብ ያሉ ባህላዊ ዳኝነቶች እውነት እና ተጠያቂነት ማስፈን ዋነኛ ትኩረታቸው ሲሆን፤ እውነት እና ተጠያቂነትን ማረጋገጥ ለባህላዊ ፍትህ ስርዓቶች እና ተቋሟት መሰረት ናቸው።

ከላይ የተጠቀሱትን የዘመናዊ እና መደበኛ ፍትህ ሥርዓት ክፍተቶች በባህላዊ ፍትህ ስርዓት ለመሙላት፣ በማህበረሰብ ውስጥ ያሉ ተሞክሮዎች እና እውቀቶች በበቂ ሁኔታ ተጠንተው እና ተሰንደው፣ ያለባቸው የሀይል ሚዛን ልዩነት እና የስነፆታ አካታችነት እክሎች ታርመው፣ ከመሰረታዊ የሰብአዊ መብት ጥበቃዎች ጋር በማስማማት እና ከሀገሪቱ የፍትህ ስርዓት ጋር በማጣጣም ለፍትህ ስርዓቱ አጋዥ እንዲሆኑ ሲደረግ እምብዛም አይታይም።[7] አንዳንድ የሚስተዋሉ ሙከራዎች እንደሚጠቁሙት በተቆራረጠ መልኩ ክልሎች ባህላዊ የፍትህ ስርዓትን ከመደበኛው ፍትህ ስርዓት ጋር በማጣመር ቀልጣፋ እና ውጤታማ የፍትህ ስርዓት ለማስፈን ሲጣጣሩ ይታያል። በኦሮሚያ ክልል (በዋናነት አርሲ አካባቢ) እየተተገበረ ያለው ጃርሳ ቢያ ተቋም (Jaarsa Biyyaa Institution) በምሳሌነት የሚቀርብ ተሞኩሮ ሲሆን፤[8] ይህም ባህላዊ ስርዓት መሰረት ያላቸው መሪዎች እንዲሁም በብስለታቸው እና ማህበራዊ ሚናቸው መሰረት የተመረጡ ባህላዊ ዳኞች ከመደበኛ የፍትህ ስርዓት ጎን ለጎን እውነትን በማፈላለግ እና የሚነሱ ማህበራዊ ግጭቶችን እንደየአካባቢው

[7] Asafa Jalata, 'Gadaa System and Oromo Resistance' *Journal of Oromo Studies*, Vol. 19, No. 1 (2012); Getachew Assefa, 'Towards Widening the Constitutional Space for Customary Justice Systems in Ethiopia' *Culture and Social Practice*, No. 43 (2020); Alula Pankhurst and Getachew Assefa, Understanding Customary Dispute Resolution in Ethiopia in Alula Pankhurst and Getachew Assefa (eds.), Grassroots Justice in Ethiopia: The Contribution of Customary Dispute Resolution (Centre Français d'Études Éthiopiennes, Addis Ababa, 2008), pp. 1–76

[8] Derara Ansha Roba, 'The Status of Traditional Dispute Resolution Institutions under the Ethiopian Legal System' *Journal of Law and Conflict Resolution*, Vol. 15(1), July–December 2024, pp. 1–12, DOI: 10.5897/JLCR2024.0371; Derara Ansha Roba, 'The Interplay Between Traditional Dispute Resolution Institutions and the Formal Justice System in Ethiopia: The Case of the Jaarsa Biyyaa' *African Journal on Conflict Resolution*, Vol. 24, No. 1 (2024), pp. 47–70, https://journals.co.za/doi/full/10.10520/ejc-accordr_v24_n1_a4 accessed on 16 April 2025.

እሴቶች መሰረት ለመዳኘት አገልግሎት ሲሰጡ ይስተዋላል። ይህን መሰል የተቆራረጡ ሙከራዎች ዘርፈ ብዙ እክሎች እንዳለባቸው ምርምሮች ሲያመላክቱ፤ በዋናነት ትርጉም ያለው አስተዋፅዖ እንዲያደርጉ በሚያስችል መንገድ እና እሳቤ አንዳልተዋቀሩ፤[9] ከማንነት እና የራስን እሴት ከመገንባት ሂደት የሚያናጥቡ ዘመናዊ ትምህርቶች፣ እምነቶች እና አስተሳሰቦች ሰፊ ተግዳሮት እንደፈጠሩባቸው፤[10] እንዲሁም በመደበኛ ፍርድ ቤቶች እና ባህላዊ ፍትህ ተቋማት መሀከል ያለው መስተጋብር በህግ ስርዓት እና ተሞክሮ ያልበለፀገ፣ ክፍተት ያለባቸው እና ያልተቀናጁ እንደሆኑ ይነገራሉ።[11]

በአንድ አጋጣሚ ከጓድኞቼ ጋር ስለከምባታ ብሔረ-ሰብ ባህላዊ የፍትህ ስርዓት አስመልክቶ የነበረን ውይይት ባህላዊ የፍትህ ስርዓቶች እውነትን እና ተጠያቂነትን ከመደበኛው ፍትህ ስርዓት በተሻለ መልኩ ለማስፈን የሚያስችል አቅማቸውን እንድጠይቅ እና ይህንን የግል ምልከታ እንድፅፍ አነሳስቶኛል። የዚህ አጭር ጽሁፍ አላማ የከንባታ ማህበረሰብን የባህላዊ ፍትህ ሥርዓት መሰረት በማድረግ፥ ባህላዊ የፍትህ ስርዓቶች ከመደኛ የፍትህ ስርዓት አንጻር እውነትን በተሻለ ደረጃ የማጥራት እና ተጠያቂነትን የማስፈን እምቅ አቅም እንዳላቸው ለማሳየት እና ፅንሰ-ሀሳብን መሰረት ያደረግ የፀሃፊውን ግላዊ ምልከታ ለማቅረብ ነው። በመሆኑም መደበኛ ያልሆኑ ቃለመጠይቆች እና የቡድን ውይይቶች በመጠቀም የከምባታ ህዝብ ባህላዊ የፍትህ ስርዓትን፣ ልምዶችን እና ትውፊቶች በዚህ ፅሁፍ የተዳሰሱ ሲሆን፤ ይህንን ምልከታ ለማበልጸግ እና ባህላዊ የፍትህ ስርዓቶች ለዘመናዊ የህግ ሥርዓት ያላቸው

[9] Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation (2nd ed., Butterworths, London, 2002).

[10] Gosa Setu Tafese, Anwar Hassen Yunus and Gobezaychu Baye Kassa, 'The Challenges to the Informal Justice System in Ethiopia' *Journal of Law, Policy and Globalization*, Vol. 105 (2021), p.1; Yirga Gelaw, *Native Colonialism: Education and the Economy of Violence Against Traditions in Ethiopia* (The Red Sea Press, 2017).

[11] Derara Ansha Roba, 'The Interplay Between Traditional Dispute Resolution Institutions and the Formal Justice System in Ethiopia: The Case of the Jaarsa Biyyaa' *African Journal on Conflict Resolution*, Vol. 24, No. 1 (2024), pp. 47–70; Getachew Assefa, 'Towards Widening the Constitutional Space for Customary Justice Systems in Ethiopia' *Culture and Social Practice*, No. 43 (2020).

አበርክቶ እና እውነትንና ተጠያቂነትን በማጥራት በኩል ያላቸውን እምቅ አቅም ማስረዳት ይቻል ዘንድ ተዛማጅ የንድፈ-ሀሳብ እና የአካዳሚክ ጽሁፎች በትንታኔው ውስጥ ተካተዋል። የሚከትሉት ንዑስ ክፍሎችም ይህንን ምልከታ ለማጠናከር በመጀመሪያ የከንባታ ማህበረሰብ ባህላዊ ፍትህ ስርዓት ተሞክሮን በወፍ በረር ሲቃኙ፤ በመቀጠል ይህ ባህላዊ ስርዓት እውነትን እና ተጠያቂነትን ለማስፈን ያለውን አበርክቶ ፅንሰ-ሃሳባዊ እንድምታ ይፈትሻል። በመጨረሻም መሰል እሴቶች መደበኛውን የፍትህ ሥርዓት ለማጎልበት ስለሚኖራቸው ሚና በማጉላት ፅሁፉ ማጠቃለያ ይሰጣል።

2. የከንባታ ባህላዊ የፍትህ ስርዓት እና ትውፊት

የከምባታ ብሔረ-ሰብ በማዕከላዊ ኢትዮጵያ ክልል ውስጥ ባለው ከምባታ ዞን ውስጥ የሚገኝ ሲሆን፤ ከምባቲሳ የሚባል ከኩሽቲክ ቋንቋ መደብ የሚመደብ ቋንቋ ይናገራሉ።[12] ግብርና የብዜረሰቡ ቀዳሚው የኑሮ መሰረት ሲሆን፤ በዋነኛነት የጥራጥሬ እህሎችን ጨምሮ እንሰት፣ ሙዝ፣ አቮካዶ፣ ድንች እና ዝንጅብል በማምረት ይታወቃል።[13] የከምባታ ሕዝብ ብዝሀነት ያለው የበርካታ ጎሳዎች ስብጥር ሲሆን፤ በዙሪያው ካሉት እንደ ሀዲያ፣ ጠምባሮ፣ ሲዳማ፣ ኦሮሞ፣ ሃላባ እና ወላይታ የመሳሰሉ ህዝቦች ጋር ጠንካራ የማኅበራዊ፣ ኢኮኖሚያዊ እና ፖለቲካዊ መስተጋብር አለው።[14]

ሙሁራን በተለይም ሲንገር (1975 እና 1980)፣ ሰይፉ (1970)፣ ያእቆብ (2002)፣ አንሳሞ እና ስሪላታ (2023) የከምባታን ባህላዊ ፍትህ ስርዓት በዝርዝር ጥናት አድርገዋል።[15] በጥናታቸውም፣ የከንባታ ሕዝብ ግጭቶችን ለመፍታት

[12] Hailu Tesfaye Habisso, *A Short History of the Kambata People of South-Western Ethiopia* https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=37fa64cb54ea6559945dad9b790b1cd291519e9c

[13] ከማህበረሰቡ አባላት ጋረ በተደረገ መደበኛ ያልሆነ ቃለ መጠይቅ እና ውይይት፤ ታህሳስ 22/2017 ዓም፣ ሐዋሳ።

[14] Ibid

[15] Daniel H. Onsamo and V. Srilatha, 'The Hadiya and Kambata Societies' Customary Dispute Resolution Mechanism in Ethiopia: A Systematic Review and Meta-Analysis' *Journal of Research in Humanities and Social Science*, Vol. 11, No. 4 (2023), pp. 275–280; Norman Singer, 'The Use of Courts as a Key to Legal Development: An Analysis of Legal Attitudes of the Cambata of Ethiopia' in Harold Marcus (ed.), *Proceedings of the First United States Conference of Ethiopian Studies, 1973* (Monograph No. 3, African Studies Center, Michigan State University, East Lansing, 1975), pp. 36–

የሚጠቀምበት በረጅም ዘመናት የዳበረ እና ከትውልድ ወደትውልድ በትውፊት ሲተላለፍ የቆየ ጠንካራ ሴራ (Seera) የሚባል ባህላዊ ፍትህ ስርዓት እንዳለው ያቀርባሉ።[16] **ይህ ስርዓት "ማሬታ" (maretta) ወይም "ለእውነት መቆም" በሚል መርህ ላይ መሰረት ያደረገ ነው። ይህ ባህላዊ የፍትህ ስርዓት አስተዳደራዊ ግዛት መሰረት ያደረጉ** (administrative territory based) **እና የጎሳ ሀረግ** (kinship) **ተከትሎ ያሉ የባህላዊ አስተዳደር እና ፍትህ መዋቅሮችን አጣምሮ የያዘ ነው።**[17] **አስተዳደራዊ ግዛትን መሰረት አድርጎ ሄራ** (*heera*)**፣ ጎቲቾ** (*goticho*) **እና ኮኮታ** (kokota) **ወይም ጎጎታ** (*gogota*) **መዋቅሮች ሲገኙ፤ ሄራ** (heera) **በመንደር ደረጃ፣ ጎቲቾ** (goticho) **ብዙ ሄራዎችን በአንድነት በማካተት በአካባቢ ደረጃ፣ እንዲሁም ኮኮታ** (kokota) **ወይም ጎጎታ** (*gogota*) **ደግሞ ብዙ ጎቲቾዎች እና አካባቢዎችን አካቶ በከፍተኛ ደረጃ የተቋቋሙ ባህላዊ አስተዳደር እና የፍትህ መዋቅር እንደሆኑ ይነገራል።**[18] **ጎጎታ በከምባታ ማህበረሰብ ውስጥ ሰፊ ማህበራዊ፣ ኢኮኖሚያዊ እና ፖለቲካዊ ፋይዳ ሲኖረው፤ ከሶስቱ ባህላዊ አስተዳደር እና ፍትህ ተቋማት ውስጥ ከፍተኛ የስልጣን ደረጃ ያለው ነው። በጎጎታ ተቋም የሚሰጡ ውሳኔዎች እንዲሁም ፍርዶች መጣስ እንደ ከባድ ጥፋት ሲቆጠር፤ ይህም እርግማን ይስባል ወይም ያስከትላል ተብሎ በማህበረሰቡ ዘንድ ይታመናል።**[19]

83; Norman Singer, 'The Relevance of Traditional Legal Systems to Modernisation and Reform: A Consideration of Cambata Legal Structure' in Jean Tubiana (ed.), *Modern Ethiopia from the Rise of Menilek II up to the Present: Proceedings of the Fifth International Conference of Ethiopian Studies, Nice 1977* (A. A. Balkema, Rotterdam, 1980), pp. 537–556; Yacob Arsano, 'Seera: A Traditional Institution of Kambata' *The Challenge of Democracy from Below*, Vol. 45 (2002).

[16] Yacob Arsano, 'Seera: A Traditional Institution of Kambata' *The Challenge of Democracy from Below*, Vol. 45 (2002).

[17] Alula Pankhurst and Getachew Assefa, *Understanding Customary Dispute Resolution in Ethiopia* in Alula Pankhurst and Getachew Assefa (eds.), *Grassroots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (Centre Français d'Études Éthiopiennes, Addis Ababa, 2008), pp. 1–76.

[18] Daniel H. Onsamo and V. Srilatha, 'The Hadiya and Kambata Societies' Customary Dispute Resolution Mechanism in Ethiopia: A Systematic Review and Meta-Analysis' *Journal of Research in Humanities and Social Science*, Vol. 11, No. 4 (2023), pp. 275–280

[19] Abebe Demewoz Mengesha, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, vol. 3, no. 2 (2015): 225-242. doi: 10.12691/education-3-2-17.

ይህ ባህላዊ አስተዳደር እና የፍትህ መዋቅር ዝምድና ወይም የጎሳ ሀረግ (kinship) **መሰረት አድርጎ ከተቋቋሙት የተለያየ የእርከን ደረጃ እና ሚና ካላቸው ሶስት የባህላዊ ፍትህ መዋቅሮች ማለትም ወሸቢ ዳና** (woshebi dana)፣ *ጋቾ ዳና* (gacho dana) **እና** *ዎማ* (woma) *ጋር* **የተሳሰረ ቁርኝት አለው። ወሸቢ ዳና** (woshebi dana) **በመንደር** (village) **ደረጃ እንዲሁም ጋቾ ዳና** (Gacho dana) **በወረዳ ደረጃ ለሚነሱ ግጭቶች ባህላዊ ዳኝነት እና ፍርድ የሚሰጡ ባህላዊ ዳኝነት መዋቅር ነዉ።** [20] *ዎማ* (woma) **በከምባታ ህዝብ እንደ ባህላዊ ንጉስ ተደርጎ የሚወሰድ ሲሆን፤ በዋናነት ከአየታ ጎሳ የሚመረጥ እና ከፍተኛ ደረጃ ያሉ እና ከጋቾ ዳና** (gacho dana)፣ **ቦኮ** (boko) **እና ኢላሞ** (ilamo) **በየደረጃቸው በተሰጡ ፍርዶች ላይ ቅሬታ ያለው ወገን በሚያቀርባቸዉ ጉዳዮች ላይ ባህላዊ ዳኝነት የሚሰጥ ባህላዊ መዋቅር ነዉ።**[21] **ይህን የባህላዊ ፍትህ ስርዓትን ውስብስብ፣ ጠንካራ እና ተደራሽ የሚያደረገው፣ የባህላዊ ዳኝነት ስርዓቱን እሚያግዙ አልፎ አልፎ በተደራራቢነት የሚሰሩ ሚኔ** (mine)፣ **ቦኮ** (boko) **እና ኢላሞ** (llamo) **የሚባሉ የጎሳ** *ሀረግ* (kinship) *ስርዓት መሰረት ያደረጉ ተጨማሪ ተቋሚት መኖራቸው ነው። ሚኔ በቤተሰብ ደረጃ ያሉ ትናንሽ የግል ችግሮችን በቤተሰብ ደንቦች የሚፈታ አደረጃጀት ሲሆን፤ ቦኮ በጎሳ ደረጃ እንዲሁም ኢላሞ በብሄረ-ሰብ ደረጃ የሚነሱ ከፍ ያሉ ግጭቶችን በባህላዊ ሕግ እና በቃል ከትውልድ ወደ ትውልድ የተላለፉ ደንቦች እና ልማዶች መሰረት ፍትህ የሚሰጡ ተቋሚት ናቸው።**[22] **ይህም የከምባታ ባህላዊ ፍትህ በክልላዊ አስተዳደር እና ጎሳ አመራር ውስጥ የተዋቀረ፣ በዘመናት ልምምድ ውስጥ የደረጀ እና በጥልቀት የተቀናጀ እንዲሁም በተዋረድ ተደራሽ የሆነ ባህላዊ የህግ እና የዳኝነት ማዕቀፍ እንደሆነ ያሳያል።**

[20] Alula Pankhurst and Getachew Assefa, *Understanding Customary Dispute Resolution in Ethiopia* in Alula Pankhurst and Getachew Assefa (eds.), *Grassroots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (Centre Français d'Études Éthiopiennes, Addis Ababa, 2008), pp. 1–76.

[21] Daniel H. Onsamo and V. Srilatha, 'The Hadiya and Kambata Societies' Customary Dispute Resolution Mechanism in Ethiopia: A Systematic Review and Meta-Analysis' *Journal of Research in Humanities and Social Science*, Vol. 11, No. 4 (2023), pp. 275–280.

[22] Ibid

እነኚህ በየደረጃው የሚገኙ ባህላዊ ተቋማት፣ ባህላዊ መሪዎች እና ዳኞች ያላቸውን ባህላዊ ስልጣን፣ የሞራል ልዕልና እና ቅቡልነት በመጠቀም የባህላዊ ፍትህ ስርዓቱን እና ህጎቹን ለማህበራዊ ፍትህ እና ዘላቂ ሰላም እያዋሉት ይገኛሉ። በዚህም ሰፊ ልምድ እና ተሞክሮ ያደረጁ ሲሆን፤ እነኚህንም ባህላዊ ህጎች፣ ስርዓቶች እና ትውፊቶች ጠብቀው በቃል ከትውልድ ወደ ትውልድ እያስተላለፉ እዚህ ደርሰዋል። ይህም ቀልጣፍ የፍትህ ተደራሽነትን በማስፈን፣ የፍትህ ጥያቄ ያለው ግለሰብ ስርዓቱን ጠብቆ አቤቱታውን እንዲያሰማ ወይም ቅሬታ ካለው በየደረጃው ይግባኝ እንዲያቀርብ በማድረግ እንዲሁም ቅቡል እና ተገማች የማህበራዊ ፍትህ ስርዓት እንዲኖር አስቻይ አቅም አላቸዉ። ምንም እንኳን ይህ ባህላዊ ፍትህ ስርዓት ከመደበኛ ፍትህ ስርዓቱ ጋር ተጣምሮ እና ህጋዊ ስርዓት ተበጅቶለት በተጠናከረ መልኩ ግልጋሎት እንዲሰጥ ባይደረግም፤ በማህበረሰቡ ውስጥ ዛሬም ድረስ የጎላ ማህበራዊ ፋይዳ እና ፍትህ ጥያቄ ላይ ሰፊ ግልጋሎት እየሰጠ እንደሚገኝ ፅሁፎችም ሆኑ የማህበረሰቡ አባላት ይመሰክራሉ።[23]

ይህ የከምባታ ህዝብ ባህላዊ ፍትህ ስርዓት እውነትን ለማጥራት እና ተጠያቂነትን ለማስፈን የሚያስችሉ በርካታ ህጎች፥ ትውፊቶች እና ስርዓቶች በቃል ከትውልድ ወደ ትውልድ ሲተላለፉ ቆይተዋል። ከነዚህም መሃከል ለዚህ ጽሁፍ ግብዓትነት እና ምሳሌያዊ ማብራርያነት ያገለግል ዘንድ ከማህበረሰቡ አባላት ጋረ በተደረገ መደበኛ ያልሆነ ቃለ መጠይቅ እና ውይይት መሰረት የሚከተሉትን ሁለት ትውፊቶች አቀርባለሁ።[24]

[23] Daniel H. Onsamo and V. Srilatha, 'The Hadiya and Kambata Societies' Customary Dispute Resolution Mechanism in Ethiopia: A Systematic Review and Meta-Analysis' *Journal of Research in Humanities and Social Science*, Vol. 11, No. 4 (2023), pp. 275–280; ከማህበረሰቡ አባላት ጋረ በተደረገ መደበኛ ያልሆነ ቃለ መጠይቅ እና ውይይት፤ ታህሳስ 22/2017 ዓም፣ ሐዋሳ።

[24] በዚህ ክፍል ውስጥ የቀረቡት ባህላዊ እና ትውፊታዊ ዝርዝሮች ከማህበረሰቡ አባላት ጋረ በተደረገ መደበኛ ያልሆነ ቃለ መጠይቅ እና ውይይት መሰረት በታህሳስ 2017 ዓም የተሰበሰቡ እና ለዚህ ፅሁፍ የዳበሩ እንደሆኑ ፀሃፊው ያስረዳል።

2.1. በባህላዊ ዳኝነት ላይ እውነትን ስለመፈልግ እና እውነትን መቀማት ያለው ተጠያቂነት

በባህላዊ ዳኝነት ስርዓቱ ተከራካሪዎች፥ የባህላዊ መሪዎች ወይም ዳኞች የሰጡት እዉነታን የማጠየቅ፤ ዳኝነትን በባህሉ መሰረት አመስግኖ የመቀበል ወይም በተቃራኒው እውነትን የተቀማው ውሳኔውን የመኮንን እና ባህላዊ እርግማን የማስተላለፍ መብት አላቸው። በመሆኑም በባህላዊ ዳኝነት ስርዓቱ እውነት እንዳልተፈረደለት ወይም እውነቱ እንደተቀማ ያመነ ተበዳይ "ቲ ገሪት ሚኒ'ኔ አጉ" ማለትም "ይሄ እውነት/ፍትህ እናንተ ቤት ይግባ" ብሎ ዳኝነቱ ላይ ያለውን ቅሬታ በእርግማን መልክ በመግለፅ ሐቁን አሳልፎ ይሰጣል። በዚህም ቅሬታ ያለው ግለሰብ ዳኝነት ሰጪ ለሆኑት ባህላዊ ዳኞች እውነት ወይም ፍትህ ስላልሰጣችሁ በቤታችሁ ወይም በራሳችሁ ኑሮ እውነት ወይም ፍትህ አታግኙ ብሎ ፍርዱን ለፈጣሪ የሚተውበት እና ለሰጡት ዳኝነት ከፈጣሪ ዘንድ ተጠያቂነት እንዳለባቸው የሚገልጹበት ስርዓት ነው። ይህንን ባህላዊ እርግማን ተከትሎ የባህላዊ ዳኛ/ዳኞች መኃከልም በእውነት ዳኝነት ላይ ቅሬታ ያለው/ያላቸው "እኔ የለሁበትም" በማለት ቅሬታውን ወይም የልዩነት ሃሳቡን (በዘመናዊው የፍትህ ስርዓት dissenting opinion የምንለው ዓይነት) በማቅረብ ከኢፍትሃዊና ፍርደ ገምድልነት ነው ብሎ ካመነበት ውሳኔ እራሱን ነፃ ያወጣል። በዚህም ለእውነት መቆም ስህተትን ያርማል ተብሎ ይታሰባል። ይህም በከንባታ ማህበረሰብ ውስጥ እውነትን ለማጥራት እና ማህበራዊ ፍትህ ለማስፈን መሠረት እንደሆነ በትውፊትነት ይነገራል።

2.2. ከሰማይ ወርዶ እውነትን፣ ተጠያቂነትን እና ፍትህን ያሰፈነ መብረቅ ትውፊት (Myth)

የመብረቅ ፍትህ በከምባታ ህዝብ በሰፊው የሚታመን ትውፊት ሲሆን፤ በከምባታ ዞን በቃጫቢራ ወረዳ ወንድሬ ቀበሌ በአንድ ምስኪን ገበሬ እና ባለጠጋ መኃከል የተከሰተውን የድንበር ግጭትን በባህላዊ ዳኝነት ከመዳኘት ሂደት ጋር ተያይዞ በማህበረሰቡ በትውፊትነት የሚነገረውን ታሪክ ለዚህ ጽሁፍ እንደ ምሳሌ አቀርባለሁ። የግጭቱ መነሻ ባለጠጋው የእርሻ መሬት ድንበሩን ገፍቶ የደሀ ገበሬውን መሬት ወደራሱ አጠቃሎ “ድንበሬ እዚህ ድረስ ነው” ይላል፤ ይህንንም

ደሀ ገበሬው ይቃወማል። ባለጠጋው እና ደሀው ገበሬ በባህላዊ ዳኝነት ስርዓት መሰረት ይህንን ግጭት እንዲዳኟቸው ጉዳያቸውን ለአካባቢው ባህላዊ ዳኞች ያቀርባሉ። በዚህም መሰረት የባህላዊ ዳኞች ጣልቃ ገብተው ሁለቱንም ወገን የሰሙ ሲሆን፤ በወቅቱ ፍሬ ነገሩን በቅጡ የማያውቅ መንገደኛ በጉዳዩ ጣልቃ ገብቶ ለባለፀጋዉ በመወገን እውነትን አጣሞ ምስክርነት ይሰጣል። ዳኞችም እውነቱን እያወቁ ለባለፀጋው አድልተው የገበሬውን ድንበር ቆርሰው ለባለፀጋው ፍርድ ሰጡ። እውነቱን የተቀማው ደሀው ገበሬ "ይሄ እውነት/ፍርድ እናንተ ቤት ይግባ" ብሎ ዳኝነቱን በመርገሙ መብረቅ ከሰማይ ወርዶ ድንበሩን እንዳሰመረ እና እውነትን እንደመሰከረ፣ ባህላዊ ዳኞችን እና የሀሰት መስካሪውን ፍትህ/እውነትን በማጣመማቸው ተጠያቂ እንዳደረገ እና ፍትህ እንዳሰፈነ ይታመናል። በዚህም ከሰማይ የወረደው መብረቅ ባህላዊ ዳኞች በቆሙበት እንደገደላቸው፣ ለእውነት መቆም እንዳለባቸው እና እውነትን አዛብተው በመወሰናቸው ተጠያቂነት እንዳለባቸው ሲያሰፍን፤ ባልተጠራበት ጣልቃ ገብቶ የውሸት ምስክርነት የሰጠውን መንገደኛ ጀርባውን ጠብሶ በሀሰተኛ ምስክርነቱ እንደቀጣው፤ መሬቱን መትቶ አከራካሪውን ድንበር እንዳሰመረው፤ የሀሰት ክስ ያቀረበውን ባለፀጋውን እዛው በቆመበት ንደገደለው፤ በተቃራኒው፣ ተበዳዩ ምስኪን ገበሬ ላይ አንዳች ጉዳት ሳያደርስ በሰላም እንደተወው ይነገራል። ይሄ የመብረቅ ፍትህ ትውፊት እንደ አፈ ታሪክ ሳይሆን መሬት ላይ እንደተፈጠረ እውነተኛ ታሪክ በማህበረሰቡ በሰፊው ይነገራል፤ እምነትም ይጣልበታል። ይህ አፈታሪክ በከምባታ ብሔሰብ የባህላዊ ፍትህ ሥርዓት ውስጥ ያለውን አበርክቶ በሚቀጥለው ክፍል ቀርቧል።

3. የከንባታ ህዝብ ባህላዊ ዳኝነት ስርዓት ለእውነት እና ተጠያቂነት ያለው ቦታ

3.1. የእውነት መሠረት እና እሴት

ከላይ የቀረበው ትውፊት እንደሚነግረን የከምባታ ብሔረ-ሰብ ባህላዊ ፍትህ ስርዓት መሰረቱ እውነት መሆኑ ነው (truth as justice)። በተመሳሳይ ሶቅራጦስ እውነት የፍትህ መሠረት እንደሆነ ሲከራከር፤ አርስቶትል በሐቅ ላይ የተመሠረተ "የእውነት ፍትህ" (truth as justice) የፍትሃዊ ስርዓት ፅንሰ-ሀሳብ መነሻው መሆኑን ያወሳል።

በከንባታ ባህልም፣ አንድ ግጭት በሚዳኝበት ስርዓት ውስጥ የባህላዊ ዳኞች ዋና ተግባር እውነቱን ማግኘት እና ለእውነት መቆም መሰረታዊ እደሆነ ያስረዳል[25]። ይህም ማለት ፍትህ ለማስፈን ዋነኛው ግብ "እውነትን ማግኘት" ሲሆን ይህም በባህላዊ የዳኝነት ሂደት ውስጥ በግልፅ ይታያል።

በዚህ ባህላዊ ዳኝነት ስርዓት እና ሂደት ውስጥ፥ እውነትን ለማጥራት/ለመፈለግ በሚሳተፉት አካላት መካከል ያለው ግንኙነት ከየርገን ሀበርማስ ምክንያታዊ ግንኙነት (communicative rationality) ንድፈ ሃሳብ ጋር ሰፊ ቁርኝት አለው። ሀበርማስ እንደሚለው፥ በቅንነት እና እውነት ላይ የተመሰረተ ግንኙነት ለግለሰብ አብርሆት (enlightenment) ብቻ ሳይሆን የህብረተሰብ ተስማሚነትን (societal harmony) ለማምጣት ከፍተኛ ሚና ሲኖረው፤ በህብረተሰብ ውስጥ ያሉ ውስብስብ ጉዳዮችን ለመፍታት አካታች (inclusive) እና ምክንያታዊነትን የተላበሰ ግንኙነት አስፈላጊነትም ያስረዳል።[26] በከንባታ ባህላዊ የፍትህ ሂደት ውስጥ የማህበረሰብ እምነት እጅግ ወሳኝ ነው። ይህ እሳቤም እውነትን በማግኘት ሂደት ውስጥ ተከራካሪዎች በእኩል የሚያሳተፉበት እንዲሆን፤ ባህላዊ ዳኝነት ሰጪዎችም እውነትን እና ምክንያታዊነት መሰረት ያደረገ ግንኙነት በመፍጠር እውነትን ማግኘት እንደሚችሉ ያመላክታል። በተመሳሳይ በከንባታ ባህላዊ ዳኝነት ትውፊታዊ ታሪክ መሰረት ባህላዊ ዳኞች ሁለቱንም ተከራካሪ ወገኖች እውነታ እና ሀቅ በጥልቀት እና እኩልነት እንዲሰሙ፣ እንዲመርምሩ እንዲሁም ተፈጥሯዊ እና ባህላዊ በሆኑ የጋራ እሳቤ/እምነት/እሴት ላይ የተመረኮዘ ምክንያታዊነት መሰረት ያደረገ እውነት ላይ እንዲደርሱ ሃላፊነት ይጥልባቸዋል። ይህም በባህላዊው የፍትህ ስርዓት ተከራካሪ አካሎችን በዳኝነት ሂደቱ በእኩልነት በማካተት/በማሳተፍ እና በማዳመጥ እውነትን ይፈልጋል፤ ህበረተሰቡ በረጅም ማህበራዊ መስተጋብር በጋራ ያደረጀውን ባህላዊ ህጎች እና ሞራል እሴቶች ላይ ተመርኩዞ ምክንያታዊነት ያደረጃል፤ ማህበራዊ ስምምነት ይገነባል። ዱርክሄም እንደሚለው ማህበራዊ አንድነት (social solidarity)

[25] Gregory Vlastos, 'The Paradox of Socrates' in Gail Fine (ed.), *The Oxford Handbook of Plato* (Oxford University Press, Oxford, 1991), pp. 127–148.
[26] Jurgen Habermas, *The Theory of Communicative Action: Volume 1: Reason and the Rationalization of Society* (Thomas McCarthy, trans., Beacon Press, Boston, 1984).

የሚገኘው በጋራ እሴቶች እና በማህበራዊ ስምምነቶች ላይ ተመስርቶ ሲሆን፤[27] ይህ ባህላዊ ዳኝነት ስርዓት እውነት የፍትህ መሰረት እንደሆነ ከማስረዳት ባለፈ እውነት አሳታፊ እና አካታች በሆነ ምክንያታዊ ግንኙነት ውስጥ እንደሚደረጅ ሲመሰክር፤ በረጅም ሂደት እውነትን መሰረት ያደረገ ማህበራዊ መግባባትን/ስምምነትን እና ዘላቂ ሰላምን ለማደርጀት ለማህበረሰቡ አጋዥ ይሆናል።

ይህ ባህላዊ ፍትህ ስርዓት ከተፈጥሮ ሕግ ንድፈ ሐሳብ (natural law theory) ጋርም ሰፊ ቁርኝት አለው። በ13ኛው ክፍለዘመን የነበረው ቶማስ አኪዩናስ እንደሚለው የተፈጥሮ ህግ ንድፈ ሐሳብ ሞራላዊ መርሆች ያሉት እና በተፈጥሮ ዓለም ውስጥ በፈጣሪ ወይም ልዕለ-ሰብ ኃይል (super natural power) የተጻፉ እና የሚተገበሩ መሆናቸውን ያስረዳል።[28] ከዚህ ጋር በተያያዘ በትውፊታዊ ታሪኩ ውስጥ የተካተተው የመብረቅ ጣልቃ ገብነት (intervention by lightning) የባህላዊ ፍትህ ስርዓቱ የተመረኮዘበትን የተፈጥሮ ኃይል ውስጥ እውነት ሊደበቅ እንደማይችል የሚነገረን እምነታዊ ትውፊት ነው። በመሆኑም ባህላዊ ዳኞች እውነትን ወደጎን አድርገው ለፈለጉት አድልተው ቢወስኑ ይህ በደል በራሳቸው ህይወት እና ኑሮ እንደሚከተላቸው ሲታመን፤ ይህም እውነቱ በተፈጥሮ ኃይል (መብረቅ) ተገልጿል። ይህ ክስተት በባህላዊ ፍትህ ስርዓት ውስጥ እውነት የማይቀበር እና የማይደበቅ መሆኑን አመላካች ነው። በተጨማሪም፣ ተበዳዩ ገበሬ "ቲ ገሪት ሚኒ'ኔ አጉ" ወይም "ይሄ እውነት/ፍርድ እናንተ ቤት ይግባ" በማለት ፍርዱን ለፈጣሪ አሳልፎ ሲሰጥ፤ እውነት ከሰው ልጅ ዳኝነት በላይ የሆነ ተፈጥሯዊ ወይም አምላካዊ ሃይል እንደሆነ የሚያስረዳ የጋራ የሆነ ማህበራዊ እሳቤ ነው። ጆን ፊኒስ እንደሚለው የፍትህ ስርዓቶች ካለንበት አለም ሞራላዊ እውነታዎች ጋር ሊታረቁ ይገባል።[29] እነዚህን እውነታዎች ከተፈጥሯዊ ህግ እና ሞራል ስርዓት

[27] Emile Durkheim, *The Division of Labor in Society*. In Social Theory Re-Wired (pp. 16-39), Routledge, 2016.
[28] Robert Pasnau, *Thomas Aquinas on Human Nature: A Philosophical Study of Summa Theologiae*, 1a 75–89 (Cambridge University Press, Cambridge, 2002).
[29] John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980).

ጋር ለማስታረቅ በከንባታ ማህበረሰብ ባህላዊ ፍትህ ስርዓት ውስጥ ባህላዊ መሪዎች እና ዳኞች የጋራ ሞራላዊ እሳቤዎችን የሚጠብቁ እና አምላካዊ ፍትህ የማስፈን የሞራል ልዕልና እና ሃላፊነት እንዳለባቸው ያስገነዝበናል።

3.2. ተጠያቂነት

በሁለተኛ ደረጃ፣ ከላይ የቀረበው ትውፊት (Myth) የሚነገረን የከንባታ ባህላዊ ዳኝነት ተጠያቂነት ላይ የተመሰረተ የፍትህ ስርዓት መሆኑን ነው። ተጠያቂነት ከእውነት ጋር ተጣምሮ የማህበረሰቡ ባህላዊ ዳኝነት መሰረቱ፣ እሴቱ እንዲሁም በማህበረሰብ ውስጥ ለዳኝነት ስርዓቱ ቅቡልነት ምንጭነት ይነግረናል። በመጀመሪያ ደረጃ በዚህ ትውፊታዊ ታሪክ ውስጥ፣ ባህላዊ ዳኝነት የሰጡት ሽማግሌዎቹ እና የሃሰት ምስክሩ ያለባቸው ተጠያቂነት በመብረቅ ተገልጿል። ይህ ተምሳሌት በከንባታ ባህል ውስጥ ፍትህን በሚያጓድሉ ባህላዊ ዳኝነት ሰጪዎች እና የሃሰት ምስክሮች ላይ የፈጣሪ ቅጣት እንደሚከተል የሚያሳይ ነው። ይህም የሚያስረዳን በባህላዊ የፍትህ ስርዓት ውስጥ ዳኞች ለሚሰጡት ዳኝነት በሰማያዊ ኃይል ተጠያቂ የሚሆኑ ሲሆን፤ ውሳኔያቸው በእውነትና ማህበረሰቡ ባደረጀው ህግ እና ስርዓት ላይ የተመሠረተ መሆን እንዳለበት ነው።

ይህ እሴት በዘመናዊ የህግ ስርዓት ውስጥ ከሚገኘው የዳኞች ግላዊ ተጠያቂነት በተቃራኒ፣ በከንባታ ማህበረሰብ ውስጥ ተጠያቂነት በማህበራዊ፣ አምላካዊ፣ እና ተፈጥሯዊ መንገድ እንደሚያረጋግጥ አስረጂ ነዉ። በዋናነት ባህላዊ ዳኞች ለውሳኔያቸው በሰማያዊ ኃይል የሚጠየቁ መሆናቸው ይነግረናል። ይህ ፅንሰ-ሀሳብ የኢማኑዌል ካንት የሞራል ተጠያቂነት (moral accountability) ንድፈ ሃሳብን ሲያትት፤ የሰው ልጅ ለሚያደርገው ማንኛውም ውሳኔ እና ተግባር በሞራላዊ ህግ (moral law) የሚጠየቅ ይሆናል።[30] ይህም በከንባታ ባህላዊ ዳኝነት ትውፊታዊ ታሪክ ውስጥ፣ የባለፀጋው እና የውሸት ምስክሩ በመብረቅ የተቀጡት አምላካዊ ፍትህ መገለጥ ማሳያ ትውፊት ነው። ይህ የሚያሳየው በዚህ ባህላዊ ፍትህ ስርዓት

[30] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (HJ Paton, trans., Harper & Row, New York, 1964).

ውስጥ የሚሳተፉ ግለሰቦች ተጠያቂነት ከግላዊ እና ማህበራዊ ተጠያቂነት በላይ በሆነ በፈጣሪ ወይም በተፈጥሮ ሃይል የሚሰፍን እንደሆነ ነው። በመሆኑም በክምባታ ማህበረሰብ ባህላዊ ዳኝነት ውስጥ ፍትህ ሰጪዎች ለውሳኔያቸው በሰማይ እና በምድር (በማህበረሰብ ዘንድ) የሚጠየቁ ናቸው። በመሆኑም በዚህ ባህላዊ ፍትህ ስርዓት ውስጥ ተጠያቂነት የማህበራዊ እና አምላካዊ ስምምነት መሰረት ያለው መሆኑን ነው። ይህ የተጠያቂነት ስርዓት ፍትህን በማስቀደም፣ በቡድን ተጠያቂነት፣ በርኅራኄ ማሳመን እና በአምላካዊ እርግማኖች/በረከቶች ላይ በመተግበር ማህበራዊ ትዕዛዝን ያረጋግጣል።

4. መደምደሚያ

ጠንካራ ባህላዊ እና ማህበራዊ እሴት ያላቸው ባህላዊ የፍትህ ስርዓቶች በአብዛኛው የኢትዮጵያ ማህበረሰብ ውስጥ ሲገኙ፤ ከመደበኛው ወይም ዘመናዊው ፍትህ ስርዓት ጎን ለጎን የፍትህ ግልጋሎት በየአካባቢው እየሰጡ ይገኛሉ። እነዚህ ባህላዊ የፍትህ ስርዓት በማስረጃ እና በተፃፈው ህግ አሰራር ብቻ ተመርኩዞ እውነትን ለማግኘት ከሚጥረው ከመደበኛው ወይም ከዘመናዊው የፍትህ ስርዓት በተቃራኒ በባህላዊ መግባባት፣ እምነት እና የሞራል ልዕልና ላይ ተመስርት እውነትን የማውጫ እና ፍትህን የማስፈኛ መንገድ እንደሆነ የክምባታ ብሔረ-ሰብ ተሞኩሮ በምሳሌነት ያስረዳናል። ከዚህ ጋር በተያያዘ መደበኛው ወይም ዘመናዊው የፍትህ ስርዓት በመርህ ደረጃ የግለሰብን ማህበራዊ፣ ኢኮኖሚያዊ እና ፖለቲካዊ መስተጋብር ለማስጠበቅ እና ለማስረፅ እንዲያመች ከተደራጁ የምዕራባውያን የፍትህ እሳቤዎች እና ስርዓቶች በስፋት የተወረሰ ሲሆን፤ ኢትዮጵያ ከግማሽ ክፍለ ዘመን በላይ ባሳለፈችው ተሞኩሮ መሰረት መደበኛው የፍትህ ስርዓት በሚፈለገው ደረጃ አብዛኛውን የማህበረሰብ ክፍል ዘልቆ ሊገባ፣ የፍትህ ጥያቄ በተፈለገው ደረጃ ሊያሰፍን፣ አስቻይ የጋራ ማህበረሰባዊ እሴት ሊያዳብር፣ ቅቡልነት እንዲሁም ማህበራዊ ተስማሚነት ሊፈጥር እንዳልቻለ በሰፊው ይነገራል።[31]

[31] Alula Pankhurst and Getachew Assefa, Understanding Customary Dispute Resolution in Ethiopia in Alula Pankhurst and Getachew Assefa (eds.), Grassroots Justice in Ethiopia: The Contribution of

በሌላ መልኩ ባህላዊ የፍትህ ስርዓት ግለሰብን ዘርፈ ብዙ ከሆኑ የአንድ ማህበረሰብ የጋራ መስተጋብሮች ጋር በማጣጣም እና ከትውልድ ወደ ትውልድ በሚተላለፍ እና በረጅም ሂደት ውስጥ በሚደረጁ የጋራ እውነት፣ እሳቤ፣ እምነት፣ ትውፊት፣ ህግ እና ተሞኩሮ መሰረት የሚገነባ ነው። በተጨማሪም ከመደበኛው የፍትህ ስርዓት በተሻለ መልኩ ባህላዊ የፍትህ ስርዓቶች ማህበራዊ ቅቡልነት (legitimate) እና ተስማሚነት (compatability) ያለው እውነትን የማጥራት እና ተጠያቂነት የማስፈን አቅም አላቸው።

በዚህ ጽሁፍ እንዳየነው የከምባታ ብሔረ-ሰብ ባህላዊ የፍትህ እና የዳኝነት ስርዓት ለእውነት መቆም አስፈላጊነት እና እውነትን መካድ የሚያስከትለውን ተጠያቂነት በሚመለከት ጠንካራ ባህላዊ እና ማህበራዊ እሴት እንዳለው ነው። በግለሰብ መብት እና በተፃፈ ህግ እና ስርዓት ላይ ብቻ መሰረት ካደረገው መድበኛው የፍትህ ስርዓት በተቃራኒ ባህላዊ የፍትህ ስርዓቶች እውነትን በባህላዊ መግባባት፣ እምነት እና የሞራል ልዕልና ላይ የተመሰረተ የጋራ ማህበረሰባዊ እሴት አድርጎ ይገልፃል። በባህላዊ ፍትህ እሳቤ ምንጩ የጋራ ማህበረሰባዊ እሴት፣ አስተሳሰብ፣ ባህል፣ እምነት እና የማንነት መገለጫ ትውፊት ሲሆን፤ ይህም በዘመናት ውስጥ በቃላት ልውውጥ እና የቀን ተቀን ተሞኩሮ ከትውልድ ወደ ትውልድ የሚተላለፍ ነው። በመሆኑም ይህም ባህላዊ ህግ እና ስርዓት ጽንሰ-ሃሳባዊ ብቻ ሳይሆን ተፈጥሯዊ የሞራል ስርዓት እንደሆነ የከምባታ ብሔረ-ሰብ ትውፊታዊ ትርክቶች በምሳሌነት ያስረዳናል።

ከህጋዊ ብዝሃነት እና ከተፈጥሮ ህግ ንድፈ ሃሳብ በመነሳት የህግ ህጋዊነት ወይም ገዢ እውነትነት ከረጅም ጊዜ የቆዩ የጋራ ማህበረሰባዊ ድርጊቶች፣ እውቀቶች ወይም ተሞክሮዎች እንደሚደረጅ ያስረዳል። ስለሆነም እውነት ሊረጋገጥ የሚችል

Customary Dispute Resolution (Centre Français d'Études Éthiopiennes, Addis Ababa, 2008), pp. 1–76; Getachew Assefa, 'Towards Widening the Constitutional Space for Customary Justice Systems in Ethiopia', *Culture and Social Practice*, No. 43 (2020); Asafa Jalata, 'Gadaa System and Oromo Resistance' *Journal of Oromo Studies*, Vol. 19, No. 1 (2012); Abera Jembere, Legal History of Ethiopia. Hamburg and London: Lit Verlag (2000).

(proven truth) ብቻ ሳይሆን ማህበራዊ ሰላምና ማንነትን ለማስጠበቅ እንዲቻል የጋራ እውቅና ሊሰጠው የሚገባ (collectively acknowledged) መሆኑን አስረጂ ነው። ይህም የሚያንፀባርቀው የባህላዊ ፍትህ ስርዓቶች እውነትን እና ተጠያቂነትን የሚያሰፍን የፍትህ ማዕቀፍ እና ስርዓት ለመገንባት አስቻይ እሴቶቻችን እንዳላቸው እና የፍትህ አሳቤ ምንጮቻችን ሊሆኑ እንደሚገባ ነው።

እንደ ከምባታ ብሔረ-ሰብ ያሉ ባህላዊ የፍትህ ስርዓቶች በፍልስፍና፣ በሕግ ሥርዓቶች በተለይም በብዙ ማህበረሰቦች ውስጥ ፍትህን እንዴት እንደሚያሳድጉ በጥልቀት ሊመረመሩ፣ ያሉባቸው ክፍተቶች ሊታረቁ እና በፍትህ ስርዓታችን እና ሀገረ መንግስት ግንባት ሂደት ውስጥ በሰፊው ሊካተቱ እንደሚገባ ይነግሩናል። በዋናነት መሰል ባህላዊ የፍትህ ስርዓቶችን መርምረን መረዳት እና ማደርጀት፣ እውነት እና ተጠያቂነት ላይ ያለን እሳቤ እና የፍትህ ስርዓታችን ያለበትን ክፍትት ለመሙላት ማህበረሰቡ ከሚኖርበት እሴት እና እውቀት ጋር ማዋሃድ እና ማደርጀት ይገባናል።

ባህላዊ የፍትህ ስርዓቶቻችን ከማግለል ይልቅ ያላችውን ፋይዳ ለይተን የፍትህ ስርዓቱን ለማጠናከር ከዘመናዊው ስርዓት ጋር በመቀላቅል ወይም ጎን ለጎን ለመጠቀም የሚያስችል ስርዓት እና አሰራር ብናበጅላቸው የፍትህ ስርዓቱን ለማጎልበት፣ ማህበራዊ ትስስር እና ሀገር በቀል ህግጋትን ለማጠናከር ያስችላሉ። ነገር ግን ይህ እንዲሳካ ስለ ሕግ ያለን ንቃተ ህሊና ለውጥ ይሻል። ይህም በዋናነት ባህላዊ ፍትህ ስርዓቶቻችን በጥልቀት በመረዳት እና በዘመናዊ ሕግ እውቅና ለተሰጣቸው መሰረታዊ የሰው ልጅ ሰብዓዊ መብቶች እንቅፋት ሳይሆኑ ካለን ማህበራዊ እና ፖለቲካዊ ነባራዊ ሁኔታ አንፃር የተሻለ እና ዘላቂ ፋይዳ እንዳላቸው የሚገነዘብ እና የህግ እና ፍትህ ማሻሻያ የሚያመነጭ መሆን አለበት። ስለዚህ የከምባታ ብሔረ-ሰብ ልምድ የባህል ቅርስ ብቻ ሳይሆን እውነትን እንደ ማህበራዊ እርቅ እና ተጠያቂነትን እንደ ግንኙነት ፈውስ ያማከለ የህግ ማጎልበቻ ተሞኩሮ ነው።

በመሆኑም መሰል ህይወት ያላቸውን ባህላዊ ፍትህ ስርዓቶቻችንን፣ ማህበራዊ ተሞኩሮዎቻችንን እና እውቀቶቻችንን በማደርጀት እውነትን እና ተጠያቂነትን ለማስፈን በፍትህ ስርዓታችን ውስጥ አገልግሎት ላይ ማዋል ይጠበቅብናል። እንዲህ ያሉ ባህላዊ የፍትህ ስርዓቶች የተለያዩ ማህበረሰቦች በረጅም ታሪካዊ ሂደት፣ ትስስር፣ እምነት እና የዳበረ ልምድ መሠረት የደረጁ እውቀቶች ሲሆኑ፤ ለዘመናዊ ህግ ስርአታችን መሠረት ካልሆነም ጎን ለጎን አጋዥ ሊሆኑ ይገባል። ፍትህን ከእውነት እና ተጠያቂነት ስርዓት ጋር አጣምረው የያዙ ሲሆን ሀቅ እና ተጠያቂነት እጦት እክል ውስጥ ለወደቀው ዘመናዊ ፍትህ ስርዓታችን ትልቅ ስንቅ ነው። በዋናነት የባህላዊ ዳኝነት ስርዓቱ ተቀባይነት ያለዉ፣ በፍቃደኝነት እና በእኩልነት ላይ የተመሰረት እዉነትን የሚመረምሩ እና ፍትህ የሚሰጡ የባህላዊ ዳኞችን ለተከሰቱ ጉዳዮች እንደየነባራዊ ሁኔታ እንዲቋቋሙ እድል ይሰጣል። ይህም ቀልጣፍ የፍትህ ተደራሽነትን በማስፈን፣ በተከራካሪዎች መኃል በእኩልነት ላይ የተመሰረተ በዳኝነት ስርዓቱ ላይ ተሳትፎ እንዲኖራቸው በማድረግ እንዲሁም ቅቡል እና ተገማች የማህበራዊ ፍትህ ስርዓት እንዲኖር አስቻይ ስርዓት በመፍጠር ከግል ክርክሮች እና ውዝግቦች እስከ በቡድን መሃከል ለሚፈጠሩ የድንበር፣ የመሬት እና ተፈጥሮ ሃብት እና መሰል ግጭቶችን በቅጣታዊ እርምጃ (punitive) ሳይሆን ዘላቂ ማህበራዊ ሰላም እና ግንኙነት የሚመልስ ፍትህ ስርዓት (restorative justice) ለመገንባት ያግዛሉ።

Conflict of Interest

The author, who is Editor-in-Chief of HUJL, declares that the peer-review process of this contribution followed a special procedure to prevent conflicts of interest, as per article 27 of HUJL's Editorial Policy, ensuring double-blind peer review under the control of the Managing Editor and Editorial Board members of the journal.

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Imperialism, Sovereignty and the Making of International Law by Antony Anghie

Cambridge University Press, New York, 2005. ISBN-13: 978-0521549476

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1. Introduction

Antony Anghie's *Imperialism, Sovereignty and the Making of International Law* offers a critical reexamination of the origins and development of international law, challenging the conventional understanding that presents it as a neutral and universal system of rules. Instead, Anghie argues that international law is deeply entangled with the history of imperialism, with its principles and doctrines having been shaped by the European colonial project. The book provides a powerful critique of how the legal concepts of sovereignty, universalism, and development have been employed to justify and perpetuate global inequalities.

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This book review explores Anghie's key arguments, critically engages with his analysis, and discusses the broader implications of his work for the field of international law. The reviewer also considers the strengths, weaknesses, and broader academic contributions of the book in understanding the complex interplay between imperialism, sovereignty, and the making of international law. By evaluating these aspects, the review aims to provide a comprehensive assessment of how Anghie's work reshapes the study of international law and its historical and contemporary relevance.

2. Key Arguments of the Book

One of the central arguments in Anghie's book is that international law's origins are closely tied to the colonial encounter between European powers and the non-European world. He traces the development of international legal doctrines back to the 16th century, when European colonial powers, such as Spain and Portugal, were expanding their empires into the Americas, Africa, and Asia. The need to regulate and legitimise these colonial ventures led to the creation of legal concepts that continue to influence international law today. For instance, the concept of *terra nullius*, which establishes a legal principle on lands that haven't been inhabited by people could be claimed by European powers, was instrumental in the dispossession of indigenous peoples.[1]

Anghie further explores the concept of sovereignty, arguing that it was employed as a tool of imperialism. European powers claimed sovereignty over their colonies on the grounds that the indigenous populations were not sufficiently "civilised" to exercise sovereignty themselves. This created a legal framework that justified the subjugation and exploitation of non-European societies, while simultaneously

[1] Anghie, Antony. *Imperialism, sovereignty and the making of international law*, Cambridge University Press, 2005

excluding them from the international legal order.[2] The notion of a "standard of civilisation" was thus central to the formation of international law, with European states defining the criteria for inclusion in the community of nations.

The process of decolonisation, which began in the mid-20th century, did not bring an end to the imperial structures embedded in international law. Instead, Anghie argues that decolonisation transformed imperialism into new forms. The newly independent states were integrated into an international legal order that continued to reflect the interests of the former colonial powers. This is evident in the economic and political structures that disadvantage former colonies, such as the global financial system and the rules governing international trade.[3] Anghie's analysis highlights the continuity of imperialism in the post-colonial world, challenging the narrative that decolonisation marked a break with the past.

Specifically, Anghie's book unpacks several critical analyses, which this review highlights hereafter:

Primarily, Anghie's critique of the universalism of international law is one of the most compelling aspects of the book. He argues that the claim of universality often masks how international law serves the interests of powerful states, particularly in its application to weaker, formerly colonised nations. This critique is rooted in the historical analysis of how international law was used to justify European colonial expansion and the subjugation of non-European peoples. By revealing the imperial origins of international law, Anghie challenges the idea that it is a neutral and objective system of rules.

Besides, Anghie's work is foundational to the Third World Approaches to International Law (TWAIL) movement, which seeks to challenge the Eurocentric bias in international law. TWAIL scholars argue that international law has been

[2] *Ibid*
[3] *Ibid*

complicit in the marginalisation and exploitation of the Global South and that it continues to perpetuate global inequalities. Anghie's analysis of the colonial origins of international law provides a historical foundation for this critique, showing how the legal doctrines developed during the colonial period continue to shape the international legal order today.[4]

Anghie's book is also highly relevant to contemporary international legal issues, mainly state sovereignty. His analysis of the concept of sovereignty has important implications for debates on humanitarian intervention and the responsibility to protect (R2P). Anghie's work suggests that these doctrines, while often framed in terms of universal principles, can be seen as continuations of the imperial project, with powerful states using the language of human rights and humanitarianism to justify interventions in the Global South. Similarly, his critique of the global economic order resonates with current debates on global inequality and the role of international financial institutions, such as the International Monetary Fund (IMF) and the World Bank, in perpetuating economic dependency and underdevelopment in the Global South.

Further, Anghie's critical call for the reconceptualisation of international law has significant insights to deconstruct the hegemony of imperial discourses. He argues that international law needs to be rethought in a way that acknowledges its imperialist roots and seeks to create a more just and equitable global order.[5] This involves rethinking key concepts, such as sovereignty, development, and human rights, from the perspective of those who have been historically marginalised by the international legal system. Anghie's work thus provides a powerful critique of the

[4] *Ibid*
[5] Anghie, Antony. *Imperialism, sovereignty and the making of international law*. Vol. 37. Cambridge University Press, 2005

existing international legal order and offers a vision for a more inclusive and equitable system.

3. The Relevance of the Book for Ethiopia and the Global South

Antony Anghie's book, *Imperialism, Sovereignty and the Making of International Law*, presents a critical examination of the historical interplay between imperialism and international law, emphasising its implications for the Global South, particularly Ethiopia. Anghie argues that the foundations of international law were significantly shaped by colonial encounters, where the concept of sovereignty was crafted to justify the domination of non-European societies under the guise of civilising missions. This perspective is particularly relevant for Ethiopia, a nation with a rich history of resistance against colonialism and a unique position as one of the few African countries to maintain its sovereignty during the Scramble for Africa.

The relevance of Anghie's work lies in its challenge to conventional narratives that often marginalize colonial histories in discussions of international law. By foregrounding the colonial roots of legal doctrines, Anghie illuminates how these structures perpetuate forms of neo-colonialism even after formal independence. For Ethiopia, this reflection is crucial as it navigates contemporary international relations and legal frameworks that may still reflect imperial legacies. The book compels Ethiopian scholars and policymakers to critically assess how historical injustices shape current legal standings and diplomatic engagements on the global stage.

Moreover, Anghie's analysis highlights the ongoing struggles faced by countries in the Global South against systems that continue to favour former colonial powers. Ethiopia's experience with international institutions, such as the United Nations and various economic agreements, often reveals a tension between its aspirations for autonomy and the constraints imposed by global governance structures that echo colonial hierarchies. This context underscores the importance of Anghie's work in fostering a deeper understanding of how international law can be both a tool for empowerment and a mechanism for continued subjugation. By critically engaging

with Anghie's insights, Ethiopia can better articulate its position within global legal frameworks while advocating for reforms that acknowledge and rectify historical injustices. This engagement is essential not only for Ethiopia's national interests but also for contributing to broader discourses on justice and equity in international relations.

4. Strengths and Weaknesses of the Book

Antony Anghie's book, *Imperialism, Sovereignty and the Making of International Law*, presents a groundbreaking analysis of the colonial roots of international law, challenging the traditional Eurocentric narrative that portrays it as a neutral product of diplomacy among sovereign equals. Anghie argues that colonial encounters have fundamentally shaped international law, which has historically intertwined legal principles with imperialism. This perspective is particularly significant as it highlights how the development of international law has often marginalised non-European societies and perpetuated global inequalities.

Anghie employs a diverse range of sources, including legal texts and historical documents, to provide a nuanced understanding of international law's evolution. His work is foundational for the Third World Approaches to International Law (TWAIL) movement, which critiques the Eurocentric bias in legal frameworks and emphasises the experiences of the Global South. In addition, the book offers a critical analysis of sovereignty, arguing that it was selectively granted by European powers based on a "standard of civilisation." This notion justified colonial domination and raises questions about the legitimacy and implications of sovereignty in contemporary global politics. Anghie also argues that imperial structures persist even after decolonisation, as seen in institutions like those established at Bretton Woods. This continuity challenges scholars to examine how these structures affect newly independent states and contribute to ongoing global economic disparities. Moreover,

despite its complex subject matter, Anghie's writing is clear and coherent, making it accessible to both legal scholars and readers from other disciplines. The author ability to distil complex ideas into compelling arguments enhances the book's impact.

Despite these strong sides, Anghie's book has some limitations and raises important questions about the possibilities for reforming international law. Can a system that is so deeply rooted in imperialism be transformed into a tool for justice and equity? Or does Anghie's analysis suggest that international law is irredeemably compromised by its imperial origins? These are questions that Anghie's book leaves open, and they are crucial for scholars and practitioners of international law to consider as they seek to address the challenges of global inequality and injustice.

In addition, Anghie's focus on colonial dominance could be critiqued for underrepresenting the agency of non-European states in shaping international law. While he acknowledges their contributions, his analysis might risk portraying the Global South primarily as victims rather than active participants in the legal order. In addition, although Anghie calls for a reconceptualisation of international law, he provides little guidance on how this might be achieved practically. A more detailed exploration of strategies for reforming entrenched legal structures would strengthen his argument. Besides, Anghie's critique raises important questions about achieving a truly universal system of international law free from imperial influences. Further exploration of alternative conceptions of universality could offer a more comprehensive vision for future international law that promotes global justice

5. Conclusion

In *Imperialism, Sovereignty and the Making of International Law*, Antony Anghie provides a profound critique of the history and development of international law, revealing its deep entanglement with the history of imperialism. His analysis challenges the conventional understanding of international law as a neutral and universal system of rules, showing how it has been used to justify and perpetuate

global inequalities. Anghie's work is foundational to the TWAIL movement and has important implications for contemporary debates on international law, particularly in relation to issues of sovereignty, humanitarian intervention, and global economic justice.

The book's call for a reconceptualization of international law is both timely and necessary, as it challenges scholars and practitioners to rethink the fundamental principles of the international legal order. However, the question of whether international law can be reformed to address its imperialist roots remains open. Anghie's work thus serves as a starting point for further research and debate on the possibilities and limitations of international law as a tool for justice and equity in the global order.

Overall, Anghie's work is pivotal in redefining the relationship between law, power, and imperialism within international law. By exposing its colonial roots and advocating for more inclusive approaches, he has laid important groundwork for future scholarship and policy discussions aimed at addressing historical injustices in global governance. However, the book's critiques regarding agency, practical application, and universalism suggest areas for further exploration within this critical discourse.

Conflict of Interest

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