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In This Issue

Articles

Notes

በዚህ ዕትም

ጥናታዊ ጽሑፎች

ሐተታ

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MESSAGE FROM THE EDITORIAL BOARD

The Editorial Board is delighted to bring Vol. 15. No. 2 of Bahir Dar University Journal of Law. The Journal is meant to serve as a forum for the scholarly analysis of Ethiopian law and beyond. It is dedicated to engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country in general.

The Editorial Board extends its gratitude to manuscript contributors, reviewers, and others who participated in different capacities. The Editorial Board appeals to all members of the legal profession, both in academia and practitioners, to contribute scholarly manuscripts.

Address

Bahir Dar University Journal of Law
School of Law, Bahir Dar University
P. O. Box- 5001
Tel- +251588209851
E-mail- bdujol@yahoo.com
Bahir Dar, Ethiopia

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Contents

Articles

Realization of the Right to Food in Drought Affected Areas of Pastoralist Communities: The Case of Borana Zone, Ethiopia

Bulcha Neguse Wakjira[§]

Abstract

The right to food is a fundamental human right recognized under various international and regional human rights instruments. It is also implicitly recognized in the FDRE Constitution. At its core, this right ensures individuals can feed themselves with dignity. However, during exceptional circumstances, governments are obligated to provide food to those who are unable to meet their food needs for reasons beyond their control. This study examined the realization of this right in Ethiopia, with a focus on drought-affected pastoralist communities of Borana Zone. The study highlights how recurrent drought and socio-economic and other challenges have undermined the ability of these communities to feed themselves with dignity, leading to widespread hunger and malnutrition. It further evaluated Ethiopia's compliance with its obligations under international human rights law, assessed the legal framework in place, and identified barriers hindering the fulfillment of this right. A blend of doctrinal and qualitative tools including interview, focus group discussions, and field observation were employed to attain these ends. The findings revealed the government's failure to fulfill the minimum core obligation of the right to food, as evidenced by the prevalence of malnutrition and a hunger crisis in the study area. Further, results showed that Ethiopia has not met its duty to ensure protection of citizens against hunger, as evidenced in the case of

§ Human Rights officer, Ethiopian Human Rights Commission, Department of Internally Displaced Persons, Refugee and Migrants bulchaneguse60@gmail.com

drought affected pastoralist communities. Recommendations include amendment of constitution, adoption and ratification of OP-CESCR, strengthening policy coherence, enhancing institutional capacity, and implementing targeted interventions to realize the right to food in disaster-prone areas.

Keywords: Right to food, Freedom from hunger, Climate change, Pastoralist, Ethiopia

1. Introduction

The human right to food, fundamental to the right to life,[1] is one of the core subjects of legal and policy debate at domestic and global levels. The sets of rights under this ambit are directly or indirectly recognized by international human right instruments.[2] Despite this, the right to food is widely violated, leaving millions continue to suffer from hunger. The frequency, duration, and intensity of droughts have generally increased worldwide, posing a constant threat to world food security.[3] Climate change and its resulting effect is pushing pastoralist communities to the brink. In the study area, Borena zone in Ethiopia, the drought exacerbated the already scarce water availability and causes death of millions of livestock which are the lifelines of such communities.[4]

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[1] Schieck Valente et al., *Human Rights and the Struggle Against Hunger: Laws, Institutions, and Instruments in the Fight to Realize the Right to Adequate Food*, 13 Yale Hum. Rts. and Dev. L.J. 436 (2010).

[2] FAO, *the Most Violated Human Right Worldwide: The Right to Food*, World Food Day (2018). Available at: https://www.csm4cfs.org/violated-human-right-worldwide-right-food/.

[3] Assoumana B.T. et al., *Comparative Assessment of Local Farmers' Perceptions of Meteorological Events and Adaptation Strategies: Two Case Studies in Niger Republic*, 9 *J. Sustainable Dev*. 118, 118–135 (2016).

[4] https://www.unicef.org/ethiopia/stories/drought-and-climate-change-pushing-communities-brink. Last accessed on Sep, 2025.

The right to food is so critical with a close connection to the mother right, the right to life. Yet it receives little attention in the human rights discourse.[5] Hunger is a denial of the basic right of citizens, i.e. to exist as a human being in dignity and to have unrestricted access to adequate food.[6] As it is stipulated under international human rights treaties, the state is the principal duty bearer for the realization of human rights, including the right to food.[7] However, drought affected people are often unable to access adequate food, which amounts to the denial of their human right to food. Therefore, denial of the human right to food is a denial of their dignity as human being and a danger to their existence.

This article explores the level of recognition accorded to this right under international and regional human rights instruments as well as domestic legal frameworks. Also, it assesses the degree of success and challenges limiting the realization of the ideals underlying this right. A blend of doctrinal and empirical legal research methodology with qualitative research design has been employed to attain these ends. Intensive analysis was conducted on pertinent international, regional human rights instruments and domestic legal frameworks. Besides, primary data has been collected and analyzed through semi structured interview, focus group discussion, and personal observation.

The contents of the article are organized in seven sections. The first section, following this backdrop, briefly describes the study setting. This is followed by conceptualization of the right to food in the relevant

[5] FAO, the Most Violated Human Right Worldwide: The Right to Food, World Food Day (2018). Available at: https://www.csm4cfs.org/violated-human-right-worldwide-right-food/.

[6] George Kent, The Human Right to Food and Dignity: The Global Hunger for Food and Justice, 37 *Human Rights***.** 3 (2010).

[7] International Covenant on Economic, Social and Cultural Rights, art. 2, Dec. 16, 1966, 993 U.N.T.S. 3. Available at: https://www.ohchr.org/sites/default/files/cescr.pdf.

literature. The third section addresses the status of this right under international human right instruments. Section 4 addresses the right to food under African Human Rights System. The fifth section examines the domestic legislative and policy space on the set of rights coming under this umbrella. Section 6 thoroughly investigates the realization of the laws, principles and ideals pertaining to the right to food in the study area. Finally, the article concludes with a summary of major findings and recommendations of legislative and policy actions for better protection and realization of the right to food.

2. Study Setting

Borana Zone, previously one of the 23 administrative zones within the Oromia National Regional State, has recently been restructured into two zones: East Borana Zone and Borana Zone. At the time of data collection for this study, the area was still under a single administrative unit. The zone is characterized by lowland terrain with an average elevation below 1,500 meters, and a predominantly warm (hot), semi-arid to arid climate with severely limited rainfall. These environmental conditions have made the region highly susceptible to droughts, which in turn pose serious threats to food security.

Out of the thirteen districts that constituted the former Borana Zone, six were purposively selected for this study based on the level of vulnerability to drought, significance of impact on food production and access to markets, and, most importantly, based on the rate of livestock deaths—livestock being the primary source of food and livelihood for the predominantly pastoralist communities.

The data for the study was generated from this area with critical status in the three four dimensions. The employs triangulated data collection methods, including Focus Group Discussions (FGDs) with community members, and key informant interviews with representatives from non-governmental organizations (NGOs) and government bodies operating in the region. The data from such sources are thematized across the relevant sections.

3. Definition of the Right to Food

The legal status of the right to food is a complex and multifaceted issue that intersects with various aspects of international human rights law, domestic legal frameworks, and policy considerations.[8] It involves not only the recognition of the right in binding and non-binding instruments but also questions of justiciability, implementation, and accountability at both international and national levels. Part of this complexity stems from the frequent blend of the right to food with the broader concept of food security, which, while related, operates within different normative and legal frameworks. Food security is a concept based on needs, which sets a goal to be achieved through policies and programs. However, the right to food is a legal concept involving rights-holders and duty-bearers.[9] To fully understand the legal status of the right to food, it is essential to consider the definition given by different bodies including treaty-based committees.

[8] Ebenezer Durojaye & Enoch MacDonnell Chilemba, *the Judicialisation of the Right to Adequate Food: A Comparative Study of India and South Africa*, 31 *S. Afr. J. on Human Rights* at 255 (2018).

[9] The Right to Food within the International Framework of Human Rights and Country Constitutions, the Right to Food Handbooks, at 9.

Committee on Economic, Social and Cultural Rights under its general Comment No. 12 on the right to food provides states:

> *The right to food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.*[10]

Looking into this definition, one could see that this committee equates the right to food as the physical and economic access to sufficient food and, in doing so; it takes the scope of legal interpretation beyond the right to basic nutrients.

With strong alignment with this definition, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[11] in one of its provisions stipulates that freedom from hunger is the right that have been qualified as fundamental in the Covenant. As such under this covenant, the right to be free from hunger has been defined as the right "to have access to the minimum essential food which is sufficient and adequate to ensure everyone is free from hunger and physical deterioration that would lead to death."[12] Freedom from hunger is therefore considered an absolute, which cannot be restricted or limited - a minimum level that must be secured for all people, regardless of any form of discrimination.

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[10] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11), 6, E/C.12/1999/5 (May 12, 1999).

[11] ICESCR, supra note 7, article 2 (1) and 11 (2).

[12] C. Golay, *the Right to Food and Access to Justice: Examples at the National, Regional and International Levels* 14 (2009), FAO Right to Food Publications.

A closer look into these definitions shows that states owe core obligation of taking necessary action to mitigate and alleviate hunger even in times of natural or other disasters.[13] Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.

The first UN Special Rapporteur on the right to food defined the right as:

> *…. the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear*.[14]

Differing from General Comment No. 12, the Special Rapporteur's definition introduces the notion of human dignity, a central aspect of any human rights based approach.

3.1 The Right to Food under United Nations Human Rights Instruments

The right to adequate food is firmly rooted in international human rights law and has been progressively recognized and elaborated through a range of global and regional instruments. While initially framed within the broader context of the right to an adequate standard of living, it has since evolved into a distinct and enforceable human right. This section

[13] Ibid.

[14] J. Ziegler, United Nations Commission on Human Rights, Report by the Special Rapporteur on the Right to Food, Doc. U.N. E/CN.4/2001/53, 14 (7 February 2001).

examines the normative content and legal status of the right to food under key international treaties and declarations.

These instruments outline state obligations and highlight the special protections accorded to vulnerable groups such as children, women, and persons with disabilities. Also, they consider the role of soft law instruments and voluntary guidelines in reinforcing the right to food and guiding its practical realization. Generally, these legal instruments form the foundation for understanding and assessing the implementation of the right to food at national including in contexts such as drought-prone regions like Borana.

The Universal Declaration on Human Rights (UDHR) recognizes the right to food as an integral component of the right to a suitable standard of living. Evidencing this, Article 25 of the instrument proclaims:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*[15]

The declaration, which is one of the widely acclaimed customary international law, imposes duty on member states to grant their citizens the right to food in any circumstances. As such states have the obligation to ensure the standard of living, even when citizens are not

[15] Universal Declaration of Human Rights Art. 25; GA Res. 217A (III), UNGAOR, 3rd Sess. Supp. No. 13, U.N. Doc. A/810 at 71 (1948).

able to feed themselves in circumstances beyond their control. The importance of the UDHR lies in its high status accepted today by all countries though it is a non-binding document.

This recognition was further expanded upon in the ICESCR, which provides a more comprehensive framework for understanding the right to food. Article 11 of the ICESCR explicitly recognizes the right to an adequate standard of living, including the right to adequate food, and obligates states to take measures to ensure food security for all individuals, especially those in vulnerable situations.

Committee on Economic, Social and Cultural Rights on its General Comment 12 explains the core contents of the right to food, clearly elucidating the intents of the document.[16] To this effect, 'availability' refers to the existence of sufficient quantities of food for individuals, either through production, distribution, or procurement. The key parameters considered under this component include local agricultural and livestock production levels, availability of food items in local markets, functionality of food distribution mechanisms. 'Accessibility' the second core content in the document, comprises both 'economic and physical' access to food. Largely associated with economic accessibility, this parameter is assessed by examining household income levels, food prices, and the proportion of income spent on food, with particular attention to whether households must forgo other basic needs to afford sufficient food. These economic activities may entail food production based on access to natural productive resources (land, water, forests, pastures, fishing grounds, etc.) and other resources and means of production. Economic activities may also include work as a self-employed or wage-employed person. 'Physical accessibility' involves

[16] General Comment No 12, *supra* note 10, at 7-13.

analyzing geographic distance to markets or food sources, infrastructure (such as roads), and barriers caused by insecurity or mobility constraints (especially relevant for pastoralist communities). Finally, 'adequacy' relates to the nutritional value, safety, and cultural acceptability of food. The assessment parameters include: nutritional content and dietary diversity of household food consumption with mix of nutrients for "physical and mental growth, development and maintenance,"[17] depending on one's occupation, gender, or age. Measures may thus be necessary to preserve, enhance, or modify dietary diversity and appropriate consumption and feeding practices including breastfeeding to ensure that any shifts in food availability and accessibility do not, at the very least, adversely impact the nutritional composition and overall dietary intake. Food also must be free from adverse substances. Adverse substances encompass those arising from contamination or adulteration within the food chain, as well as toxins that occur naturally. Given that food holds profound cultural significance in shaping and sustaining community identity, thus, Cultural or consumer acceptability implies the need also to take into account, as far as possible, perceived the 'non-nutritional' dimensions of food**,** including the symbolic, cultural, and ethical values associated with its consumption, alongside informed.[18]

The ICESCR outlines the obligations of states in ensuring the progressive realization of the right to food. This includes taking measures to improve methods of production, conservation, and distribution of food. Accordingly, State is obliged "to ensure for everyone under its

[17] Ibid.
[18] Ibid.

jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."[19]

State failure to satisfy this minimum level would lead to a *prima facie* violation of its obligations under the ICESCR. If a state argues that failure to meet such obligations is due to resource constraints, it must show that "every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations."[20] The specific nature of state obligations is also clarified by General Comment No. 12.[21]

I. Obligation to Respect: The right to food requires states to restrain their hands in any way from taking any measures that would result in preventing individuals from having access to food. This negative obligation imposes limitations on state conduct that may threaten the right to food. Under this obligation, states cannot suspend legislation or policies that provide people with access to food, unless fully justified.[22]

II. Obligation to Protect: states have a positive obligation to safeguard enjoyment of the right to food against interference by third parties (such as private individuals and/or other entities). This obligation involves regulating the conduct of such non-state actors by the state.[23]

III. Obligation to Fulfill: It is made up of both an obligation to facilitate and an obligation to provide. The obligation to facilitate means

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19 General Comment No. 12, *supra* note 10, at 14.
20 Id. at 17.
21 Id. at17. See also *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000).
22 General Comment No 12, *supra* note 10, at 19.
23 Id. at 28.

that states must engage in activities intended to strengthen people's ability to access means and resources to secure their livelihood. Whenever an individual or group is unable to enjoy the right to adequate food by the means at their disposal, for reasons beyond their control, falls under states obligation to provide.[24] A state would fail to comply with the obligation to fulfill if it allowed people to starve when they were in need and had no way of providing for themselves.[25]

In 2008, the UN General Assembly adopted the Optional Protocol to the ICESCR (OP-ICESCR), to which unfortunately, Ethiopia is not yet a member.[26] The OP-ICESCR provides additional remedies for violations of rights enshrined in the ICESCR. The Optional Protocol grants individuals, or groups of individuals under the jurisdiction of a state party, the right to submit communications about alleged violations of any economic, social or cultural rights, after exhausting domestic channels, to the Committee on CESCR (art. 2).[27] Victim Citizens of states, who signed and ratified the OP-ICESCR, would gain access to an international mechanism for redress for socio-economic rights violations. The Protocol also allows for interim measures to prevent irreparable harm in exceptional cases (Article 5). However, Ethiopia has not yet ratified the OP-ICESCR, leaving complaints unaddressed under this mechanism.

[24] Id. at 15.
[25] Id. at 29.
[26] Access on 20 August 2024, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en
[27] The development of a communication process encompassing all economic, social and cultural rights represents an innovative approach to ensuring remedy for victims of violations.

Vulnerable groups including children, women, and persons with disabilities occupy a central place in international human rights law concerning the right to adequate food and an adequate standard of living. The Convention on the Rights of the Child (CRC) underscores states' obligations to combat disease and malnutrition through primary health care, adequate nutrition, and social protection systems that mitigate poverty and inequality. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) highlights women's right to adequate nutrition, particularly during pregnancy and lactation and mandates equal access to resources, land, and agricultural opportunities for rural women. In parallel, the Convention on the Rights of Persons with Disabilities (CRPD), under Article 28, affirms the right of persons with disabilities to an adequate standard of living, encompassing food, housing, and clothing, and obliges states to safeguard these rights during emergencies and disasters. Generally, these international instruments emphasize that achieving the right to adequate food for vulnerable groups requires targeted, inclusive, and sustained policy measures that address systemic discrimination, ensure accessibility, and promote human dignity.

The Convention on the Rights of the Child (CRC), emphasizes children's rights to health and an adequate standard of living. Article 24 recognizes the child's right to the highest attainable standard of health, requiring states to combat disease and malnutrition, particularly through primary health care measures, the use of available technologies, and the provision of adequate and nutritious food. Similarly, Article 27 affirms the child's right to a standard of living adequate for their physical, mental, spiritual, moral, and social development, specifically addressing state obligations regarding nutrition, clothing, and housing. It urges state parties to ensure accessibility of fundamental knowledge on child health

and nutrition, particularly the benefits of breastfeeding.[28] It urges state parties to take measures to combat disease and malnutrition and prioritize and execute strategies that guarantee access to nutritious food for all children.[29] Furthermore, governments are obligated to allocate resources towards social protection initiatives that reduce poverty and tackle disparities, as these elements greatly influence a child's ability to access food. [30]

Environmental harm poses a particularly severe threat to children living in areas most affected by disasters and climate change. The Committee on the Rights of the Child, in its General Comment No 26 on children's rights and the environment with a special focus on climate change (2023), recognizes that climate change and environmental degradation have disproportionate impacts on children, undermining their rights to life, health, development and an adequate standard of living.[31] Accordingly, when States adopt and implement environmental policies, they must take special care to ensure that such measures do not negatively affect children's enjoyment of their rights, including the right to adequate food.[32]

General Comment No 26 situates the right to a clean, healthy and sustainable environment as essential for the realization of other rights

[28] The Convention on the Rights of the Child (CRC), Art. 24, Nov. 20, 1989, 1577 U.N.T.S.3. Available at: https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/crc.pdf

[29] United Nations Committee on the Rights of the Child, 'General Comment No 26 on Children's Rights and the Environment with a Special Focus on Climate Change' (2023) UN Doc CRC/C/GC/26, 9.

[30] Ibid.

[31] Committee on the Rights of the Child, *General Comment No 26 on Children's Rights and the Environment with a Special Focus on Climate Change* (22 August 2023) UN Doc CRC/C/GC/26, paras 2–3.

[32] Id. para 13.

enshrined in the Convention particularly the rights to health (Article 24) and to an adequate standard of living (Article 27).[33] It further obliges States to transform agricultural and food systems towards sustainable models that prevent malnutrition and promote children's growth and development.[34] To achieve these aims, States are required to adopt environmental and child-rights impact assessments, including mechanisms for monitoring and evaluation, to identify and remedy policies or practices that impede children's access to adequate nutrition.[35] Continuous assessment of children's access to safe food, clean water, and decent housing is therefore integral to the effective implementation of the right to food, ensuring early identification of deprivations and enabling responsive, rights-based action. In this way, the CRC's protection of the right to food interpreted through General Comment No.26 demands ongoing evaluation of availability, accessibility, adequacy and quality, thereby fostering the well-being and development of all children.[36]

Meanwhile, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) a comprehensive legal document on the rights of women requires state parties to provide adequate nutrition during pregnancy and lactation.[37] This document sets out relevant stipulations, particularly under Articles 12 and 14.

Article 12 states: *...States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal*

[33] Id. paras 20–21, 63–64.
[34] Id. para 65(c).
[35] Id. paras 18–19, 70–72.
[36] Id. paras 63–67, 74.
[37] Convention on the Elimination of All Forms of Discrimination against Women**,** opened for signature 18 December 1979, GA Res 34/180, UN GAOR, 34th session, UN Doc A/34/46, entered into force 3 September 1981, in accordance with art 27(1), Art. 12

period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 14(2) provides:

> *States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: [...] to enjoy adequate living conditions.*

These two provisions of CEDAW clearly impose duty on states to protect the right to food in dealing with two particular situations where women's vulnerability is high: pregnancy and lactation and rural livelihoods. Together with the rest of the norms condemning discrimination throughout the Convention, these two provisions can be seen as providing a solid structure for the protection of women's right to food.

In the CEDAW context, the right to adequate food is closely associated with gender equity and women's empowerment. Women frequently encounter unequal obstacles in obtaining food because of societal, economic, and cultural influences. As a result, the CEDAW framework stresses the importance of tackling these unique challenges and guaranteeing that women can fully exercise their right to nutritious food without facing discrimination.[38] Article 14 requires state parties to ensure the accessibility of key components of the right, inter alia, equal

[38] Id. Art 12.

treatment in land and agrarian reform and agricultural credit. To achieve this, the Convention calls on State parties to take measures that create an enabling environment for women to enjoy the right to food.[39]

A key development under CEDAW is General Recommendation No. 34 (2016) on the Rights of Rural Women,[40] which is the first instrument under the Convention to explicitly recognize the human right to adequate food and nutrition of rural women within the framework of food sovereignty.[41] This General Recommendation urges States to pay particular attention to the nutritional needs of rural women especially pregnant and lactating women and to adopt policies ensuring that rural women have access to adequate food and nutrition.[42] GR 34 also emphasizes that discrimination in access to productive resources (land, credit, agricultural inputs) and services (extension, markets) undermines women's right to food, and calls for positive measures to remedy such discrimination.[43] General Recommendation No. 37 (2018) on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change[44] similarly points out that climate change, disasters, land degradation and resource scarcity disproportionately harm women's access to food, land and water. It specifically addresses food security as part of the "adequate standard of living" right, and requires

[39] Id. Art. 14 (g)

[40] Committee on the Elimination of Discrimination against Women, General Recommendation No. 34 on the Rights of Rural Women (4 March 2016) UN Doc CEDAW/C/GC/34.

[41] CEDAW, General Recommendation No. 34 on the Rights of Rural Women (2016) UN Doc CEDAW/C/GC/34.

[42] Id, paras on nutritional needs of rural women, and on food & nutrition – GR 34.

[43] Id, especially in sections addressing access to productive resources, agricultural services, and markets for rural women.

[44] Committee on the Elimination of Discrimination against Women, General Recommendation No 37 on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change (7 February 2018) UN Doc CEDAW/C/GC/37.

States to take positive, gender-responsive measures to protect women's and girls' access to food and other resources in disaster contexts.

The Working Group on the Issue of Discrimination against Women in Law and in Practice, in its 2014 report to the Human Rights Council, underscored that women's unequal access to land, credit, employment, and productive resources constitutes a structural barrier to the enjoyment of economic and social rights, including the right to adequate food.[45] The report emphasized that discrimination in economic and social life exacerbated by austerity measures, reduced public services, and economic crises has a disproportionate impact on women, often undermining their food security and nutritional well-being.[46] It therefore called upon States to integrate a gender perspective into all economic and social policies, including those related to food and agriculture, and to adopt targeted measures that address women's specific vulnerabilities and empower them to claim equal access to resources and entitlements necessary for adequate nutrition.[47] By situating food security within the broader context of substantive equality, the Working Group's analysis reinforces that under the CEDAW framework; States must not only eliminate formal discrimination but also transform the underlying socio-economic structures that impede women's full realization of the right to food.[48]

Furthermore, Article 28 the Convention on the Rights of Persons with Disabilities (CRPD) covers the right of persons with disabilities to an

[45] Human Rights Council, Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice (14 April 2014) UN Doc A/HRC/26/39, paras. 12–20.
[46] Id. paras 34–36.
[47] Id. paras 70–73.
[48] Id. Para 75.

adequate standard of living, which includes adequate food, clothing, and housing, as well as the continuous improvement of living conditions.[49] Article 11 of CRPD indicated that, it is the duty of States Parties to ensure that individuals with disabilities are protected and safe in risky situations, such as humanitarian emergencies, and natural disasters, by adhering to international law. Persons with disabilities face disproportionate barriers in accessing food, stemming from discrimination, limited mobility, and socio-economic exclusion. In many cases, these barriers result in higher rates of malnutrition and food insecurity within this population. To address these challenges, governments must implement policies and programs that provide accessible food distribution systems, financial assistance, and tailored nutritional support.[50]

The CRPD Committee has issued General Comments to interpret the provisions of the Convention. For instance, General Comment No. 6 emphasizes the importance of accessibility and non-discrimination, which can be applied to the right to food. Ensuring that food distribution systems are accessible to persons with disabilities aligns with the principles outlined in the CRPD.[51] In practice, the right to food for persons with disabilities is often addressed through national policies and programs. These may include accessible food distribution systems, financial assistance, and tailored nutritional support. The implementation of these measures need for consistent and

[49] Convention on the Rights of Persons with Disabilities, opened for signature Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008), Art. 28.

[50] FAO, the State of Food and Agriculture: Leveraging Food Systems for Inclusive Rural Transformation (2017).

[51] Committee on the Rights of Persons with Disabilities, General Comment No. 6: Equality and Non-Discrimination, CRPD/C/GC/6 (9 March 2018)

comprehensive approaches to ensure that persons with disabilities can fully enjoy their right to food.

Access to food as a human right has also been recognized and repeatedly reaffirmed in soft law instruments, usually adopted unanimously by members of the international community. The 1974 Universal Declaration on the Eradication of Hunger and Malnutrition affirms the inalienable right of everyone to be free from hunger and malnutrition.[52] The 1984 World Food Security Compact affirms the 'fundamental right of everyone to be free from hunger'.[53] These earlier declarations refer to 'the right to be free from hunger'. Succeeding instruments, however, encompass the broader right to adequate food. The Rome Declaration on World Food Security, for instance, adopted during the 1996 World Food Summit, is explicit in affirming the right to safe and nutritious food, 'consistent with the right to adequate food and the fundamental right of everyone to be free from hunger'.[54] The 2002 Johannesburg Declaration on Sustainable Development underscores the importance of increasing access to food and other basic requirements, and reaffirms the States' commitments to fight against chronic hunger and malnutrition and other threats to sustainable development.[55]

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[52] World Food Conference, Universal Declaration on the Eradication of Hunger and Malnutrition, 1 (1974).

[53] World Food Security Compact (1985), para. 169.

[54] FAO, Rome Declaration on World Food Security (1996). A detailed Plan of Action of the World Food Summit, dubbed as the 'first coherent plan of action intended to make the right to food a reality' (Ziegler, *supra* note 39, at. 24) was also adopted during the summit. The Plan of Action explicitly grounds the concept of the right to food on Art. 11 of the ICESCR (FAO, 1996).

[55] United Nations, Johannesburg Declaration on Sustainable Development, 18–19 (2002).

Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food[56] stresses the significance of guaranteeing that all individuals have both physical and economic means to obtain sufficient, safe, and nutritious food.[57] While voluntary, the Guidelines 'have strong recommendatory force for States that are already bound by provisions of international law'.[58] The Guidelines were adopted unanimously by FAO Member States, and governments have reiterated their commitments in many formal settings over the years.[59]

In general, these documents form the legal foundation for the recognition and protection of the right to adequate food, set forth principles and obligations that guide states in fulfilling their responsibilities. The recognition of this right in all these human rights instruments reflects the global consensus on the significance of ensuring the right to food as a fundamental human right, laying the groundwork for continued efforts to secure this right for all individuals.

3.2 The Right to Food under African Human Rights System

Alongside international treaty laws, developed chiefly within the framework of the United Nations, there are also regional treaty laws.

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[56] FAO, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (2005), adopted by the 127th Session of the FAO Council (Nov. 2004)

[57] Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Report of the 30th Session of the Committee on World Food Security (CFS), Supplement, FAO Doc. CL 127/10-Sup.1, Annex 1 (2004).

[58] Food and Agriculture Organization of the United Nations, Guide on Legislating for the Right to Food 98 (Rome 2009).

[59] The Right to Food Guidelines have been reaffirmed in various resolutions, including: G.A. Res. 60/165, U.N. Doc. A/RES/60/165, 22 (Mar. 2, 2006); G.A. Res. 61/163, U.N. Doc. A/RES/61/163, 26 (Feb. 21, 2007); G.A. Res. 25/14, U.N. Doc. A/HRC/RES/25/14 (Apr. 15, 2014); Human Rights Council, Resolution 7/14, the Right to Food, U.N. Doc. A/HRC/RES/7/14, 33 (Mar. 27, 2008) ; Human Rights Council, Resolution 10/12, the Right to Food, 10th Sess., U.N. Doc. A/HRC/RES/10/12, 34 (Mar. 26, 2009).

These instruments also play a significant role in recognizing and safeguarding the right to food. These treaties contribute to the legal framework for the protection of the right to food at regional levels, complementing the standards set by international instruments.

In Africa, the right to food is enshrined in several treaties. The African Charter on Human and People's Rights,[60] doesn't explicitly recognize the right to food; however, several other rights, such as the rights to life and dignity (Art. 5), to health (Art. 16) and to development (Art. 22 and Art. 24), which are implicitly related to the right to food and can be interpreted as protecting the right to food.

African Commission on Human and Peoples' Rights is entrusted with the responsibility of monitoring and promoting the implementation of the African Charter. It has power, for instance, to receive and adjudicate complaints alleging violations of human rights by States. Thus far, the Commission has entertained and decided a wide range of individual complaints involving interpretations of various provisions of the Charter. Recent jurisprudence of the Commission establishes a growing commitment by this body to interpret the Charter progressively. For instance, in the landmark case of Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) vs. Nigeria (SERAC),[61] the African Commission on Human and Peoples' Rights found Nigeria in violation of the right to food. The Commission held that the Nigerian government had failed to respect, protect, and fulfill its obligations under the African Charter on Human

[60] African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights (1981).
[61] Social and Economic Rights Action Centre (SERAC) and Another vs. Nigeria (2001), AHRLR 60 at 64.

and Peoples' Rights, particularly regarding the exploitation of oil in the Ogoni region, which led to environmental degradation, destruction of farmlands, and contamination of water sources. These actions severely impaired the ability of the local population to access adequate food and a livelihood, undermining their health, nutrition, and overall well-being.

Although the right to food is not explicitly mentioned in the African Charter, the Commission interpreted it as implicitly guaranteed through the rights to life (Article 4) and to health (Article 16), emphasizing that access to adequate food is essential for human dignity and the enjoyment of other fundamental rights, including health, education, and development. The Commission has emphasized that the right to food is fundamental to human dignity and is intrinsically connected to the realization of other rights, including health and education.[62] The case is one of the most progressive decisions rendered by the Commission.[63] The right to food is arguably a most important right in the African context, where the majority of the people live in poverty. By holding that this right is implicitly protected, the Commission has cured one of the Charter's glaring weaknesses.

The African Charter on the Rights and Welfare of the Child, for its part, under Article 14 of the ACRWC states that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.[64] The Convention obliges state parties to ensure the provision of

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62 Ibid.

63 JC Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria' (2005) 1 African Journal of Legal Studies 129. See also; S Smis, 'Considering the SERAC Case from a Socio-Legal Perspective' (2021) 1 African Human Rights Law Journal 22

64 African Charter on the Rights and Welfare of the Child, Organization of African Unity

adequate nutrition and combat malnutrition. State parties are also required to be committed to taking, in accordance with the means at their disposal, all appropriate measures to assist parents or other persons responsible for the child and to providing material assistance, and support through the application of appropriate technology, notably as regards nutrition.[65]

Particularly targeting access to food, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[66] explicitly recognizes the right of all women to food in Article 15 stating that: "States Parties shall ensure that women have the right to nutritious and adequate food and calls for measures to eliminate discrimination against women in access to resources like land, credit, and technology necessary for food production".[67] The Protocol emphasizes the need for equitable resource allocation and development initiatives targeting women's vulnerabilities to food insecurity. Therefore, African Human Rights Instruments paid considerable attention and this could play to solidify the legal framework for the right to food. In sum, these rich legal frameworks provide a basis for continued advocacy, monitoring, and accountability in ensuring the realization of the right to adequate food for all individuals.

(1999) Art. 14(2) (c)–(d).

[65] SV Mello, Consciousness of the World: The United Nations Faced with the Irrational in History (Geneva, 2000); See also, African Charter on the Rights and Welfare of the Child, Organization of African Unity, 1999, art 14(2) (c), (d).

[66] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, CAB/LEG/66.6, entered into force 25 November 2005.

[67] Ibid.

4. Domestic Legal Framework on the Right to Food in Ethiopia

States are obligated as well as encouraged, as much as they could, to incorporate laws protecting and promoting social and economic rights such as the right to food. Particularly, seeking to include express provision of the right to food in a country's constitution is one of the most fundamental and enduring legislative actions that can be taken at the national level to comply with international obligations. Given its hierarchical placement in the legislative order, the Constitution can bestow the highest level of recognition of its guarantee. Further, it is recommended to be stated explicitly as a means ease interpretation and eventual amendments, facilitate comprehensibility to the public at large, raise awareness and promotion of that right nationally.[68] When the right to food is established in the bill of rights of a constitution, it gives rise to administrative and public law rights such as the right to judicial review of any law which is inconsistent with it.[69] It would thus, entail the right to a remedy for those whose rights have been breached.

The right to food is recognized explicitly, as a self-standing right, at least in 30 countries,[70] South Africa[71] and Kenya are the best example in Africa. However, Ethiopian constitution recognizes the right to food only implicitly. Article 41 and 43, the relevant provisions under the FDRE constitution, respectively provide:

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[68] Food and Agriculture Organization. The Right to Food in National Constitutions (2024).

[69] Knuth, Lidija & Vidar, Margret. Constitutional and Legal Protection of the Right to Food around the World. FAO, 2011. See also Ziegler, Jean. The Right to Food: Report by the Special Rapporteur on the Right to Food, submitted in accordance with Commission on Human Rights resolution 2000/10. United Nations Economic and Social Council, E/CN.4/2001/53, 7 February 2001.

[70] L Knuth and M Vidar, Constitutional and Legal Protection of the Right to Food around the World (2011)

[71] Constitution of the Republic of South Africa, 1996, Section 28.

Article 41(*4): The state has the obligation to allocate an ever-increasing resource to provide to the public health, education and other social services.*

Article 43(1) *The Peoples of Ethiopia as a whole…. have the right to improved standards of living and to sustainable development....*

Looking into these stipulations, one could find broad phrasings such as "other social services" under Article 41(4) of the FDRE Constitution. Yet, this may reasonably be interpreted to encompass rights such as access to social security, safe and potable water, and food. This interpretation is supported by the principle of systemic integration, whereby constitutional provisions are read in harmony with one another and with Ethiopia's international human rights obligations. This interpretation aligns with the approach of the UN Committee on Economic, Social and Cultural Rights in General Comment No. 12, which emphasizes that the right to adequate food is integral to the right to an adequate standard of living and that state obligations extend to resource allocation, policy measures, and progressive realization. The Ethiopian constitutional framework thus implicitly recognizes the right to food by embedding it within enforceable duties to promote citizens' welfare and living standards, rather than as a discrete enumerated right. Academic analysis, such as Sisay A. Yeshanew's work on Ethiopia's hybrid protection of economic, social, and cultural rights,[72] confirms that this combination of directive principles and enforceable obligations

[72] S A Yeshanew, 'Ethiopia's Hybrid Constitutional Protection of Economic, Social and Cultural Rights' in C Heyns and F Viljoen (eds), The African Human Rights System: International and Domestic Law Perspectives (2nd edn, Cambridge University Press 2019) at 225–248.

provides a normative foundation to infer recognition of the right to food, even in the absence of explicit legislation. This reading demonstrates how the Constitution's broad provisions concretely connect state duties with the fulfillment of food as a human right.

Furthermore, the Constitution in Article 13(2) directs that the fundamental rights and freedoms be interpreted in conformity with international human rights instruments adopted by Ethiopia, reinforcing this broader, rights-based reading of "social services."[73] On the other hand, 43(1) worded in ways similar to article 11(1) of the CESCR as part of a human right to an adequate standard of living.[74] Accordingly, in these two specific provisions what we can infer is the Ethiopian constitution recognizes the right to food as a human right implicitly.

In addition, directive principle is another perspective to be considered in the interpretations of such constitutional provisions. Directive principles in a constitution can be described as "the values to which a society aspires."[75] When read alongside enforceable rights such as the right to life (Article 14 and 15), Economic, Social and Cultural Rights (Article 41), and the right to development (Article 43) these Directive Principles strengthen the normative foundation for recognizing the right to food under the Constitution. By instructing the state to "endeavor to protect and promote…living standards" and provide access to food, the Directive Principles implicitly highlight the essential role of adequate nutrition in safeguarding human dignity and realizing other fundamental

[73] Liliane Mujinga Nyabirungu, The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives, at 423–46 (Cambridge Univ. Press 2016).

[74] U.N. Declaration on the Right to Development, proclaimed in 1986 by U.N. General Assembly Res. 41/128.

[75] L Knuth and M Vidar, Constitutional and Legal Protection of the Right to Food Around the World 18-20 (2011).

rights. Accordingly, one could discern such spaces under Articles 89 and 90 of the FDRE constitution which respectively read:

Article 89(3):

Government shall take measures to avert any natural and man-made disasters, and in the event of disaster, to provide timely assistance to the victims.

Article 89(8):

Government shall endeavor to protect and promote the health, welfare and living standards of the working population of the country.

Article 90(1):

To the extent the country's resource permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security.

A close reading of these provisions shows that the peoples and nationalities of Ethiopia aspires protection and promotion of wider arrays of economic and social rights with a clear relevance to the right to food. Of course, the stipulations do not directly name these set of rights and made them judicable at a court of law. Yet they have reasonable room for directive principle.

Such directive principles of interpretations are widely practiced in different jurisdictions in the world. For instance, the Indian Supreme Court held in *Olga Tellis vs. Bombay Municipal Corporation,* "that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country."[76] In subsequent case law, the court interpreted the right to life with human

[76] Olga Tellis vs. Bombay Municipal Corporation, (1985) 2 Supp. S.C.R. 51.

dignity and the directive principle instructing the government to raise the level of nutrition of its people as enforcing the right to food.[77]

While undoubtedly important, Constitutional provisions nor the gross policy on eradication of hunger[78] alone enough to guarantee food and nutrition security According to the Special Rapporteur, constitutional Socio-economic rights provisions often need to be developed further in specific implementing legislation "that set out in more detail mechanisms for implementation, assign specific responsibilities, and provide for redress mechanisms in the event of violations."[79]

Ethiopia has not enacted a specific comprehensive law dedicated solely to the right to food. However, the right to food is recognized indirectly through various laws. Proclamation No. 1263/2021 established Ministry of Irrigation and Lowland which is mandated, inter alia, to initiate policies and strategies with respect to irrigation development including drought prone areas.[80] To ensure food security, the ministry is obliged to facilitate the utilization of ground and surface water resources and to enable pastoralist and semi pastoralist to become beneficiaries of social and economic development.[81] This legislation emphasizes sustainable irrigation practices and supports smallholder farmers, aiming to enhance agricultural productivity in lowland areas. By integrating food security with water resource management, the proclamation seeks to address the

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77 M.J. McDermott, "Constitutionalizing an Enforceable Right to Food: A Tool for Combating Hunger," 35(2) *B.C. Int'l & Comp. L. Rev.* 543 (2012).

78 O. De Schutter, A Rights Revolution: Implementing the Right to Food in Latin America and the Caribbean, Briefing Note 6, U.N. Special Rapporteur on the Right to Food, at 4 (2012).

79 Ibid.

80 Available at: http://www.efda.gov.et/wp-content/uploads/2023/06/Definition-of-Powers-and-Duties-of-the-Executive-Organs-Proclamation-No.-1263-2021.pdf.

81 Proclamation No. 1263/2021, Definition of Powers and Duties of the Executive Organs Proclamation, 28th Year No. 4 (Fed. Dem. Rep. Eth.), Jan. 25, 2022. Article 33 (a) (b) (p)

challenges posed by climate variability. However, effective implementation and coordination across sectors remain crucial for achieving the ultimate goal of sustainable food access for all Ethiopians. Rural Lands Administration and Use Proclamation aims to improve the livelihood of farmers, semi-pastoralists, and pastoralists at the level of the Country's socio-economic development and to sustainably conserve and develop natural resources and transfer them to the coming generation through the preparation and implementation of a sustainable rural land use planning with a sound consideration of the different agro-ecological zones of the country.[82] The proclamation recognizes the right to freely access rural land where one has been engaged or prefer to engage in agricultural activities for a living.[83] The proclamation aims to ensure that rural communities have secure access to land, which is fundamental for farming and food production. Secure land tenure encourages investment in agricultural practices, leading to increased food availability. It also emphasizes sustainable land management practices, promoting environmental stewardship, which is essential for long-term agricultural productivity. This aligns with the right to food by ensuring that land remains viable for future generations. The proclamation encourages community participation in land management, fostering a sense of ownership and responsibility, which can enhance food security at the local level.[84]

Proclamation No. 1112/2019 titled Food and Medicine Administration Proclamation[85] regulates food, medicine, and healthcare services in

[82] Proclamation No. 1324/2024 Rural Land Administration and Use Proclamation, Preamble.
[83] Id. Article 4.
[84] Id. Article 30 and 31.
[85] Proclamation No. 1112/2019, Food and Medicine Administration Proclamation, 25th Year No. 39 (Fed. Dem. Rep. Eth.), Feb. 28, 2019.

Ethiopia to ensure public health and safety. It sets standards for the production, distribution, and consumption of food and medicine, emphasizing consumer protection and the quality control of these essential goods. The right to food under this proclamation can be understood in the context of public health and safety. While the proclamation primarily deals with regulating and ensuring the quality, safety, and efficacy of food and medicine, it indirectly supports the right to food by ensuring that food consumed in Ethiopia is safe, free from harmful substances, and nutritious.[86] This law places responsibilities on various stakeholders, including manufacturers, distributors, and regulatory bodies, to ensure that food meet safety and quality standards. While this law doesn't directly spell out a "right to food" in the sense of a legal entitlement, it plays a vital role in upholding food safety and public health, which are essential components of fulfilling the broader right to food as outlined in international human rights frameworks such as ICESCR, to which Ethiopia is a party. These legal documents, though, they don't explicitly recognize the right to food, are part of Ethiopia's broader efforts to ensure access to safe, sufficient, and nutritious food for its people.

4.1. Policy Framework on the Right to Food in Ethiopia

The international covenant on Economic, social and cultural rights clearly requires state parties to take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to food.[87] This, in turn, requires the adoption of a national policies and strategies to ensure food security for all with

[86] Id. Preamble, Article 4, 7, 15
[87] General comment 12, *supra* note 9.

human rights approach. It also needs identifying the resources available to meet the objectives and the most cost-effective way of using them.[88]

Even though, not fully realized yet, Ethiopia has long been focused on addressing food insecurity, malnutrition, and hunger accordingly, implemented a variety of policies, strategies, and programs aimed at fulfilling the right to food.[89] Ethiopia has faced serious challenges of malnutrition.[90] In response, Ethiopia's Food and Nutrition Policy[91] was adopted to tackle chronic malnutrition and improve nutritional outcomes across the country. The Policy indicates state responsibility to ensure citizens are food and nutrition secure, which is central to the country's efforts to address food security and nutrition. It explicitly outlines that access to adequate, safe, high quality and nutritious food is a human right.[92] This policy, among others, seeks to: ensure the availability and accessibility of adequate food to all Ethiopians at all times, improve accessibility, and quality of nutrition and nutrition smart health services at all stages of the life span in an equitable manner, improve food and nutrition emergency risk management, preparedness and resilience systems are the cardinal one.[93] Further, the policy upholds key values in all endeavors of its implementation, inter alia, narrowing vulnerability, inequalities and ensuring timely and positive responses for food and nutrition demands of the community and build resilience capacity for

88 Ibid.

89 Ethiopian Ministry of Health, Food and Nutrition Policy of Ethiopia (2018); See also Isabelle Tsakok, 'The National Food Security Program in Ethiopia' Policy Brief (Policy Center for the New South, 2025), See also; Ethiopian Government, Productive Safety Net Programme (PSNP, 2005), See also; World Food Programme, 'Ethiopia Country Page' (WFP, 2025).

90 Adithya Madduri, World Food Prize: Malnutrition in Ethiopia.

91 Federal Democratic Republic of Ethiopia, Food and Nutrition Policy (Nov. 2018).

92 Id. at 10.

93 Id. at 6.

food shortage and vulnerability.[94] Needs of vulnerable by promoting climate-resilient agriculture and livestock production systems is a central element, recognizing that pastoralists are highly vulnerable to climate-related shocks. The policy also encourages livelihood diversification, including the introduction of drought-tolerant crops and alternative livelihoods for pastoralists to reduce dependency on livestock.[95]

As an execution tool, the Ethiopian government adopted Food Security Strategy (FSS) in 1996 (updated in 2002 and 2009). The strategy[96] is founded on three basic pillars: the need to increase the availability of food through increased domestic production, ensure access to food for food deficit households and strengthen emergency response capabilities.[97] The strategy clearly indicates fund chronic food insecure households are predominantly found in drought prone, moisture deficit areas and peripheral pastoral areas.[98] Accordingly, it justifies the necessity for focusing on the long-term improvement of agriculture and Off-farm income generating activities.[99] To improve food security in drought -prone areas, the strategy focuses on the development of livestock,[100] irrigation[101] and natural resource management as integral means to the pursuit of food security in order to reduce dependency on

94 Id. at 9.
95 Id. at 11 and 12.
96 Federal Democratic Republic of Ethiopia, Food Security Strategy, prepared for the Consultative Group Meeting of December 10-12, 1996, Addis Ababa (1996). see also, Federal Democratic Republic of Ethiopia, Food Security Strategy (Mar. 2002), Addis Ababa.; See also, Federal Democratic Republic of Ethiopia, Food Security Programme 2010-2014, Ministry of Agriculture and Rural Development (Aug. 2009).
97 Federal Democratic Republic of Ethiopia, Food Security Strategy, prepared for the Consultative Group Meeting of December 10-12, 1996, Addis Ababa para 20, (1996).
98 Id. at 22.
99 Id. at 25.
100 Id. at 32
101 Id. at 30

rain-fed agricultural conditions and thereby increase the opportunities for year round agricultural production.[102]

The Productive Safety Net Program (PSNP), launched in 2005, is a key policy move in Ethiopia that directly impacts the realization of the right to food. The objective of the PSNP is to assist chronically food-insecure individuals through the provision of food, cash, or a combination of both. This support aims to help them survive periods of food deficits and prevent the depletion of their productive assets while meeting their basic needs.[103]

The Pathway to Prosperity Ten Years Perspective Development Plan (2021 – 2030)[104] is a strategic blueprint that lays a long-term vision of making Ethiopia an "African Beacon of Prosperity". Prosperity in the Plan is defined in terms of the overall human and institutional capability that is created over the long-term whose development outcomes can be expressed, inter alia, as basic economic and social services such as food, clean water, shelter, health, education, and other basic services should be accessible to every citizen regardless of their economic status. The plan, seeks to transform Ethiopia into a middle-income country by 2030.

Seqota Declaration (SD) is another policy moves made by the Ethiopia government. This is a high-level commitment of the Government of Ethiopia to end stunting in children less than two years by 2030.[105] The

[102] Ibid.
[103] Amdissa Teshome, Agriculture, Growth and Poverty Reduction in Ethiopia: Policy Processes around the New PRSP (PASDEP), Research Paper No. 004, at 16–18 (2006).
[104] Federal Democratic Republic of Ethiopia, Ethiopia 2030: The Pathway to Prosperity Ten-Year Perspective Development Plan (2021–2030).
[105] Federal Democratic Republic of Ethiopia, Sekota Declaration: Roadmap for Expansion and Scale-Up Phase 2021–2030, at 11 (Sept. 2021).

SD was launched in 2015 by aspiring to see Ethiopia's children free from under nutrition and has a 15 year roadmap builds on and accelerates implementation of National Food and Nutrition Policy.[106] The declaration is a multi-sectoral effort to address the root causes of child under nutrition by bringing together ministries and agencies to create synergies between sectors to fight malnutrition, engaging local communities in nutrition-sensitive interventions and empowering them to take control of their food security.[107]

The Climate Resilient Green Economy (CRGE) Strategy, the third policy package, aims to build a green and climate-resilient economy while achieving food security. This policy, launched in 2011, sets out a goal to achieve this in a way that makes the county's economy to be resilient to the negative impacts of climate change and does not result in net greenhouse gas emission.[108] The strategy includes promoting climate-smart agriculture to cope with climate change, ensuring that food production systems are resilient to shocks.

The fourth policy move comes under the 'National School Health and Nutrition Strategy' that seeks to address the health and nutrition needs of schoolchildren, recognizing the importance of health and nutrition in achieving educational goals.[109] It is mainly meant to mitigate short-term food insecurity, contribute to long-term educational outcomes, and promote literacy, health, nutrition, and capacity building towards attaining relevant goals.

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106 National food Policy, *supra* note 73, at 6.

107 Seqota declaration, *supra* note 87, at 11.

108 Federal Democratic Republic of Ethiopia, Ethiopia's Climate Resilient Green Economy: Climate Resilience Strategy, Agriculture and Forestry, at 5 (2015).

109 Federal Democratic Republic of Ethiopia, National School Health and Nutrition Strategy, Ministry of Education, October 2012.

Looking into the policies outlined in this section, one could see that the Ethiopian government takes attaining food security, with a direct link to protection of the right to food, as national policy agenda indifferent packages. While these policies, strategies, and programs are fundamental to implementing the right to food, they are not sufficient on their own. Their effectiveness depends on several factors, including institutional capacity, governance, resource allocation, and the ability to adapt to challenges such as climate change.

5. Realization of the Right to Food in the Study Area

Pastoralist Borana community heavily relies on livestock for their food, income, and cultural identity.[110] However, recurrent droughts, which have intensified in recent years due to climate change, have severely disrupted food security. Accordingly, key components of the right to food; availability, accessibility and adequacy are used as a tool to determine whether or not the human right to food has been realized in the study area. Consequently, they provide the base to hold the state accountable with regard to its obligations to realize the right to food. These components, when applied to Borana Zone, illustrate how the right to food is impacted and various elements interact in this specific context.

5.1 Availability of Food

The availability of food in the context of the study area is dependent on the health and productivity of livestock. However, recurrent droughts significantly reduced livestock populations, leading to a scarcity of food.

[110] Borana Zone, Overview of the Drought Situation, December 14, 2022

Data collected from Government Offices, FGD participants and NGOs working in the study area indicates that the community and had not receive the expected amount of rainfall for agricultural production for the consecutive five rainy seasons, and can barely feed themselves, nor can they protect their dignity.[111]

Describing the availability of food, a participant, who has been living in IDP camp, stated that "due to persistent drought for the past consecutive five rainy seasons, we have lost direct access to productive land and our precious livestock and we are now unable to afford meals for our daily diet."[112]

To ensure the availability of agricultural inputs, i.e., technology and the required skill and knowledge is an indispensable to increase farmers' food production and to realize the right to food.[113] Though, in the study area the community was ready to feed themselves by cultivating their land, FGD revealed, "the existence of serious shortage of labor animals (oxen) to plough land for agricultural production become a major stumble." This is mainly due to death and/or very poor condition of the oxen. This, in turn, leaves them to the option of renting tractors for tillage which they could barely afford."[114]

Pastoralists mostly rely heavily on their herds for meat, milk, and income; however, participants mentioned that the drought causes

[111] The drought situation reports from each district, 2023.
[112] Focus Group Discussion with Participants in Dubluk District, June 2024.
[113] Debela, N. McNeil, D, Bridle, K, and Mohammed, C, Adaptation to Climate Change in the Pastoral and Agro pastoral Systems of Borana, South Ethiopia: Options and Barriers, 8 Am. J. Climate Change 1 (2019).
[114] Focus Group Discussion with Participants in all Districts, June 2024.

massive livestock deaths,[115] shortage of water, causes displacement and mobility; all this affected the availability of food.[116] As the traditional diet in Borana is heavily dependent on animal products, during droughts, the availability of alternative food sources is limited. There is often a lack of diversification in the local food system, making it harder for people to maintain a balanced diet when their primary food sources depleted. To fill the gap in food availability, humanitarian organizations were providing food aid.[117] However, the timing and scale of these interventions was problematic. Participants in the study reported that an FGD food aid is often insufficient and arrives too late, especially in remote areas, further exacerbating food shortages during critical periods.[118]

5.2 Accessibility of Food

Drought is a huge factor affecting the main asset base of Borana pastoral households.[119] When drought strikes and livestock die or lose value, families experience a significant loss of income, making it difficult to purchase food. Even when food is available in the market, many pastoralists cannot afford it because they lack sufficient cash income.[120]

Report indicates the total population of the livestock was 7.3 million in October 2012.[121] However, in the prolonged Drought, pastoralists in the study area have lost46% of their livestock's, which causes catastrophic

[115] Borana Zone Rapid Assessment Report has indicated that 46% of the animals were dead.
[116] Focus Group Discussion with Participants in Gomole District, 3rd May 2024.
[117] The Zonal Office Established under Proclamation to Determine the Busa Gonofa System of the Oromia Region, Proclamation No. 244/2022, 2022.
[118] Focus Group Discussion with Participants in Teltelle District May 2024.
[119] Duba Malicha Guyo. Factors Affecting Pastoral Sustainable Livelihood: The Case of Borana, Southern Ethiopia. *Int'l J. Dev. Research*, 11, pp.46936–44 (May 2021).
[120] Focus Group Discussion Participant, from Arero District, July 2024.
[121] Borana Zone Rapid Assessment Report, supra note 97.

reduction in food availability and financial stability. This affects both immediate access to food and long-term resilience, as livestock forms the backbone of Borana Communities' economy and sustenance. Making things worse, this was compounded with the rise in the price of items at national level, seriously affecting the communities' access to food.[122]

Physical accessibility is also problematic as Borana communities live in remote and dispersed locations. Many pastoralists live in hard-to-reach areas, making it difficult for both markets and food aid to reach them timely. Poor road infrastructure and limited access to transportation further hinder the ability of communities to access food when it is available.[123]

NGOs working in the study area were unable to fully ensure accessibility of food for all affected areas due to inadequacy of budget.[124] In sum, while government initiatives and aid programs exist, their accessibility and effectiveness remain inadequate, leaving the most marginalized communities vulnerable to hunger and malnutrition.

5.3 Adequacy of Food

Ministry of Health under its Food-Based Dietary Guidelines Booklet recommends that an individual has to have a diverse diet with at least 4

[122] Ibid. Focus Group Discussion Participant FGD in almost all Woredas, May-August, 2024.

[123] Interview with key-informant from Care ETHIOPIA, Borana field office and Zonal Busaa Gonofaa Office Expert, May- June 28, 2024.

[124] Interview with key-informant from GOAL Ethiopia, Borana Field office, June 2024.

food groups in every meal and 6 different food groups every day.[125] A varied diet should provide the required amount of nutrients necessary for good health.[126] Food with the required quantity and quality- in terms of amount and diversity has not, often times, been accessible to the majority of the pastoralist community in drought times. Consequently, households, besides compromising the amount of the daily meals, have also been forced to eat once or twice a day.

The data found in the FGD revealed that the pastoralist communities of the study area during drought time used to eat the same diet monotonously on a daily basis.[127] Furthermore, according to the report found from NGOs working in the area, about 90 percent of the people do not have sustainable access to 'adequate' food.[128] As a result, these people were identified as victims of severe and moderate under-nutrition reflecting long-term impact of food insecurity.[129] Similarly, the report from local gov't Office revealed that among Pregnant and Lactating Women, 50.65% in the study area were in state of Moderate Acute Malnutrition;45.3% of Elders in the study area were in a state of Moderate Acute Malnutrition and again;11.86% of the elder population were in a Severe Acute Malnutrition.[130] Thus, the data revealed inadequacy of food in the study area, which lead malnutrition among

[125] Federal Democratic Republic of Ethiopia Ministry of Health, Ethiopian Public Health Institute in Collaboration with Ministry of Agriculture and Ministry of Education, Ethiopia: Food-Based Dietary Guidelines–2022 (Mar. 2022)

[126] Ministry of Health, Ethiopia: Food-Based Dietary Guidelines Booklet–2022.

[127] Focus Group Discussion Participant, Dubluk District, June 30th, 2024.

[128] Interview with key-informant from Care Ethiopia and Goal, Borana Field office, May 2024.

[129] Interview with key-informant from Borana Zone Health office, July, 2024.

[130] Borana Zone Mass Nutritional Screen and Micro Nutrient Supplementation Program Report, January 2023.

vulnerable groups, including pregnant women, lactating mothers, and the elderly.

5.4 Challenges against the Realization of the Right to Food in the Study Area

Despite existing legal and policy frameworks, the realization of the right to food in the study area remains severely constrained by multiple interrelated challenges. These include environmental shocks such as climate change and recurring droughts, systemic governance failures, limited public awareness of legal entitlements, lack of access to remedies, inadequate infrastructure, and the short-term focus of emergency relief efforts. The following subsections detail these barriers as identified through field data, including focus group discussions and key informant interviews.

5.4.1 Climate Change and Recurring Droughts

The droughts lead to a sharp reduction in food and water availability, undermining the ability of pastoralists to sustain their traditional livelihoods. Livestock, which constitutes the primary source of food for pastoralists, becomes severely depleted, leaving communities without the means to obtain adequate food.

5.4.2 Governance and Corruption

Controlling corruption is necessary to achieve sustainable development outcomes.[131] Governance and corruption significantly hinder the

[131] Caitlin Maslen, the Interplay between Corruption, Poverty, and Food Insecurity (2024).

effective implementation of the right to food for drought-affected pastoralist communities in Borana Zone. A government office expert highlighted systemic inefficiencies, explaining,

"*While policies and programs exist to address food insecurity, corruption and poor governance often derail their implementation. Resources meant for relief efforts are often mismanaged or failed to reach the most vulnerable communities*."[132] Further, evidences from interview of other informants revealed that lack of transparency and accountability in resource distribution exacerbates the suffering of pastoralists, leaving many without access to critical support.[133] Complementing this, the data found from Borana Zone Public Prosecution Office revealed the prevalence of severe cases of corruption in which food assistance intended for a drought-affected community was misappropriated for personal benefit. For instance, the matter of misappropriation of food assistance under the caption of corruption was brought before the Borana Zone High Court in *Akaalnash Isheetuu v. Abbaa Alangaa Godina Boranaa*, *Case No. 15619*. The court found the accused guilty of corruption .Several other related cases are pending and under investigation by Borana Zone Public Prosecution Office.[134] Thus, corruption and poor governance profoundly undermine the right to food

Available at: https://www.u4.no/publications/the-interplay-between-corruption-poverty-and-food-insecurity.pdf accessed on Nov, 2024.

132 Key informant from government office (Zonal Administration), June 2024.

133 Ibid.

134 Roobaa Boruu Halakee & Dhakkii Mallicha Dooyyoo vs. Abbaa Alangaa Godina Boranaa**,** Appropriation of Food Aid (Corruption), Case No. 17544 (Borana Zone Ct. [2023).; see also, DooyyooBoruu and four other persons Vs. AbbaaAlangaaGodinaBoranaa, Misapproprtiation of Food Aid (Corruption), Case No. 17276 (Borana Zone Ct. [2023); See also; GodaanaaHuqqaa, DiidaWaariyoo and DiqqaaHalakee Vs. AbbaaAlangaaGodinaBoranaa, approprtiation of Food Aid (Corruption) case No. 17285 (Borana Zone Ct. [2023).

for drought-affected pastoralist communities in study area, deepening hunger and malnutrition.

5.4.3 Awareness on the Right to Food

As some study indicated, due to lack of explicit recognition of the right to food in the constitution and other binding national legal documents, the knowledge of the mass public on the right to food and the legal status in Ethiopia has been tainted with vagueness and ambiguity.[135] In this regard, participants in all FGD, lacks knowledge that the right to food is a constitutionally protected and judicially enforceable right.[136] The lack of explicit legal recognition and public awareness about this right hinders efforts.

5.4.4. Access to Remedy for the Violation of the Right to Food

Providing effective redress to victims of violations of human rights is one of the obligations of the state, including the human right to food.[137] Under Ethiopian law, victims of violations of the right to food can seek both judicial and non-judicial remedies, although the explicit recognition of the right to food is limited. Judicial remedies are primarily accessible through the civil and administrative courts, where individuals may file claims based on violations of rights recognized in FDRE Constitution including the right to food.[138] On the other hand,

[135] Yeshewas Ebabu, The Human Right to Food and the Post-1991 Ethiopian State's Obligation: A Case Study on Simada Woreda and Gulele Sub-City (unpublished research paper, Centre for Human Rights, Coll. of L. & Governance Stud., Addis Ababa Univ, Nov. 2019) (on file with author), at 11.

[136] Both men and women who participated in focus groups agreed that the state has not adequately upheld and safeguarded the human right to food, if it even exists. Since the state and its officials are completely negligent, a large number of people in their area are regularly forced to go hungry.

[137] Tura, Husen Ahmed, the Right to Food and Its Justiciability in Developing Countries, 7 HLR (2018).

[138] Federal Democratic Republic of Ethiopia, Constitution of the Federal Democratic Republic

Ethiopia has a mechanism for the non-judicial remedies including complaints to the Ethiopian Human Rights Commission, which has the mandate to investigate human rights violations, including socio-economic rights, and recommend corrective measures to the government.[139] Despite these avenues, however, it was reported in FGD and during key informant interviews with legal professional working in study area that, due to weak understanding, effective judicial or quasi-judicial remedy for the victims has not been available.[140] As such, there is no move to directly invoke judiciable legal grounds of claiming the right to food as human right. The data collected from the community revealed that nearly all participants were unaware of the government's obligation to ensure the right to food. Moreover, they did not know that if the government fails to realize this right, they are entitled to seek remedies for its violation.

5.4.5 Inadequate Infrastructure

Inadequate infrastructure poses a significant barrier to realizing the right to food in the study area. Lack of proper roads and storage facilities hinders the timely delivery of aid and other essential resources. Inadequacy of water infrastructure for production and consumption[141] exacerbated the impacts of drought, further straining the resilience of these communities. One participant shared, "We are cut off from markets and food aid because there are no good roads. Even when we try to sell livestock we have left, buyers won't come because it's too

of Ethiopia (1994), Art 35

[139] Federal Democratic Republic of Ethiopia, Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 (as amended by Proclamation No. 1224/2020)

[140] Interview with Mr. Caalaa Chachabsaa, Oromia Regional High Court Judge at Borana Zone High Court, May 19th 2023.

[141] Interview with key-informant from Borana Zone Busaa Gonofaa Office, July 2024.

hard to reach us."[142] Women in FGD particularly highlighted the burden of walking long distances to fetch water and to buy food, often under harsh conditions.[143]

5.4.6 Emergency Relief Efforts

Emergency programs tend to focus on short-term food distribution rather than addressing the underlying vulnerabilities of pastoralist communities. Without integrating resilience-building measures, such as sustainable water systems and livelihood diversification, relief efforts fail to create lasting solutions. Moreover, participants stressed that aid often does not prioritize the most vulnerable groups, including women and children, due to insufficient data and planning. To ensure the right to food, relief efforts must address systemic inefficiencies while integrating resilience-building measures for long-term sustainability.

6 Conclusion

The right to food is a fundamental human right, essential for human dignity and the realization of other socio-economic rights recognized under international and regional human rights instruments. In Ethiopia, FDRE Constitution provides implicit recognition of the right to food under Articles 41, 43, 89, and 90. However, the lack of explicit and standalone provision of the right to food has created a lacuna on its Justiciability. Although explicit recognition is absent, the government has enacted legislation, Policies and strategies, which reflect the government's commitment to address food insecurity. Despite these efforts, the research findings revealed significant gaps in the practical implementation of the right to food. Particularly, the finding revealed

142 Focus Group Discussion Participant in Miyo, August 2023.
143 Focus Group Discussion Participant in Dubluk District, June-July 2024.

the existence of corruption in food aid distribution, which is often mismanaged or diverted for personal gain. This substantially erodes trust, delays aid delivery, and disproportionately affects vulnerable groups such as women and children.[144] Despite some investments in water infrastructure, inadequate infrastructure compounds with accessibility challenges. Poor road networks and insufficient transport systems delay the timely delivery of food aid, while limited market access prevents pastoralists from selling livestock or purchasing alternative food sources. An emergency relief program faces logistical bottlenecks, insufficient resources, and poor coordination, leading to delayed and inequitable food distribution. Additionally, resilience-building measures, such as sustainable water systems and livelihood diversification, are largely missing in relief initiatives. This shortfall leaves pastoralist communities trapped in a cycle of dependency and food insecurity. Lack of awareness over existence of the right to food as human right among affected communities exacerbates the problem.

The ICESCR establishes the principle of progressive realization for socio-economic rights, recognizing that full realization may require time and resources. However, the right to be free from hunger under Article 11(2) is non-derogable and demands immediate action, regardless of resource constraints. This entails taking concrete and deliberate measures to prevent hunger including enacting explicit constitutional recognition of the right to food and aligning national efforts with international human rights standards. This effort further requires prioritizing the most vulnerable populations during crises, strengthening institutional coordination and ensuring accountability, integrating

[144] Interview with key-informant NGOs, May-August 2024.

climate-resilient agricultural practices and fostering international cooperation.

Therefore, state's failure to realize the right to food in drought-affected pastoralist communities in the study area has caused a wide spread hunger and malnutrition, which is due to lack of fulfilling obligations imposed by international human rights instruments which Ethiopia has signed and ratified. Particularly failure to ensure food availability, accessibility, and adequacy that makes the communities in study area vulnerable to hunger and malnutrition reflects the state's failure to meet, at a minimum, the essential obligations necessary to ensure protection against hunger.

7 Recommendations

To advance the realization of the right to food in Ethiopia, particularly in drought-prone regions like the Borana Zone, several key actions are recommended. First, the FDRE Constitution should be amended to explicitly recognize the right to food as a standalone human right. This must be complemented by the enactment of comprehensive legislation that frames the right to food within a human rights-based approach. Ethiopia should also adopt and ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), thereby enhancing justiciability and international accountability. In the meantime, proper implementation of existing laws, policies, and strategies especially those related to disaster risk management and early warning systems must be prioritized.

Moreover, the government should increase budgetary allocations for food security initiatives, giving special attention to vulnerable communities such as those in the Borana Zone. Strengthening and

expanding social protection programs like the Productive Safety Net Program (PSNP) is essential to ensure immediate support and resilience in the face of recurrent droughts. Public awareness over the right to food must also be raised through sustained educational campaigns and community engagement. Importantly, interventions should transition from reactive, post-drought emergency relief to proactive measures that empower pastoralist communities to feed themselves with dignity. Finally, investment in research to develop innovative solutions for food production, storage, and distribution will be crucial to ensure long-term food security and sustainability.

Towards a Level Playing Field: Legal Mechanisms for Managing Foreign Bank Entry and State-Owned Bank Influence in Ethiopia: A Domestic Private Bank Perspective

Saleamlak Yemane[§]

Abstract

Ethiopia's decision to open the banking sector to foreign banks is a significant restructuring with extensive consequences on market efficiency and competition. However, as a result of state aid, the dominance of state-owned banks (SOBs) risks distorting the market, possibly undermining the potential gains of liberalization. This article explores alignment of key Ethiopian economic laws with the doctrine of competition neutrality, particularly in light of the prospective entry of foreign banks. Adopting a doctrinal legal research methodology, this study is based on relevant laws, policy documents, and academic literature including the OECD Guidelines on Competitive Neutrality. Thus, it finds that basic legal regimes like the Business Income Tax Law, Value Added Tax (VAT) Law, Excise Tax Law, Customs Proclamation, Bankruptcy, and Procurement Laws which have generally been revised or interpreted in ways aligned with competition neutrality and thus do not pose major legal entry and operational barriers. However, it continues to face legal and practical challenges. The continued imposition of VAT withholding directives and the existence of implicit or de facto support such as preferential access to services undermine competition neutrality. These are considered against the backdrop of recent experiences of domestic private banks,

§ LL.B, LL.M, Lecturer of Law, School of Law, Wollo University. saleamlaky86@gmail.com

which reflect significant handicaps arising from structural and regulatory favors accorded to SOBs. This paper finally recommends the continued application of pro-competitive laws and the gradual removal of anti-competitive rules and practices. A level playing field has to be established in order to achieve the full benefits of foreign bank entry and render financial sector reforms.

Key Words: State owned banks (SOBs), foreign banks, OECD, competition neutrality, Domestic Private Banks, Economic laws

Introduction

Under the Ethiopian financial sectors there are different business activities. The first broad sub sector is the banking business apart from insurance and micro finance institutions.[1] To date Ethiopia has a banking regulatory law that intends to create a playing field for traders engaged in the banking sectors.[2] In this regard the banking proclamation does not have a limit on the number of banks that have to be licensed. This is basically intended to expand the provision of these services.[3] The only prohibition was related with ownership of banking business by foreign citizen and foreign undertakings. The government policy in the prohibition of foreigners from the banking system is backed by different ways despite it has its own demerit.[4] The common policy defense of the government was to protect the infant financial private enterprises and

[1] Solomon Abay, Financial market development, policy and regulation: the international experience and Ethiopia's need for further reform, University of Amsterdam, 2011,PhD thesis, unpublished, p.11

[2] Banking Business Proclamation No. 1360/2025, *Federal Negarit Gazeta*, Year 31, No.28, (Herein after, Banking Business Proclamation No. 1360/2025)

[3] Solomon Abay, Financial market development and regulation, *supra* note 1, p. 26

[4] Id*:* p.26-28

the weakness of regulatory scheme to control foreign banks.[5] However, recently this restriction is lifted. The government also enacts a law that recognizes the entry of foreign banks in Ethiopia. The banking business proclamation tried to pinpoint regulation like the legal form, initial capital, ownership spreading, organizational structure and business plan, capital adequacy, legal reserve and other grounds for license.[6] The banking business has its own regulatory body which supervised the overall transactions and process. To this end, the National Bank of Ethiopia (NBE) is established to regulate the banking activity in different manners.[7] Hence, NBE has different powers and functions like the supervision and licensing of banks, insurers and other financial institutions; establishing favorable conditions for the expansion of banking, insurance and other financial services etc.[8]

The legal framework to operate a banking business is recognized under article 2(5) of the banking proclamation and this provision states that a banking business can be operated by either through a share company or a bank controlled by the government or through foreign owned banks. This provision paves the existence of state and foreign owned banks in the Ethiopian banking sectors. The Ethiopian banking sector expanded steadily over recent years. In 2017/18, there were 18 banks (16 private and 2 government-owned), which increased to 25 banks in 2022/23 (23 private and 2 government-owned).By the end of the third quarter of 2023/24, the number of banks in Ethiopia reached 32, of which 30 were

5 Ibid

6 Solomon Abay, Financial market development and regulation, *supra* note *1,p24-74*

7 FDRE, 2025, The National Bank of Ethiopia Establishment Proclamation No. 1359/2025, *Federal Negarit Gazeta*, Year 31, No. 14, Addis Ababa, 4 February 2025. [Here in after, National Bank of Ethiopia Establishment Proclamation No. 1359/2025]

8 Id*;* Article 6

private and 2 state owned Banks.[9] The total capital of the banking system reached ETB 290.6 billion of which private banks accounted for 67.4 percent and state-owned banks (Commercial Bank of Ethiopia and Development Bank of Ethiopia) 32.6 percent.[10] These may trigger questions as to market competition in the Ethiopian banking business. At this banking sector, the House of Peoples' Representatives recently approved a new banking business proclamation No. 1360/2025that allows foreign banks to operate within the Ethiopian market. The Ethiopian banking sector has faced criticism due to the unfair dominance of state-owned banks, which is largely attributed to preferential regulatory treatment by the government, a situation that is considered wholly unacceptable for foreign banks, and makes the entry of foreign banks fruitless.

This article examines the legal mechanisms to ensure competition neutrality and alleviate market distortions from State-Owned Banks especially following the entry of foreign banks. The contents of this article are organized into four sections. The first section revisits and discusses the challenges and opportunities of the entry of foreign banks in the Ethiopian banking sector. The next section examines the conceptual foundation of competition neutrality framework and basic parameters of competition neutrality framework. This is followed by an exploration of the major area of competition neutrality and legal and institutional frameworks that applies for banks. This part is mainly devoted to anti-competitive practices of state-owned bank that becomes a fear for perfect competition. Finally, this article presents concluding

[9] The National Bank of Ethiopia Third Quarter 2023/2024 Report Available at https://nbe.gov.et/wp-content/uploads/2024/12/2023-24-Third-Quarter-Report.pdf Accessed on May 31, 2025.

[10] Ibid

remarks and suggests the legal mechanism to ensure competition neutrality taking the case of domestic private banks.

1. The Entry of Foreign Banks in to Ethiopian Banking Sector: Potential Gains and Structural Hurdles in Bird's-Eye View

The liberalization of the banking sector has different benefits, including stiff competition, improved financial services, encouraging foreign direct investment (FDI), knowledge transfer and integrating the banking sector into global financial system.[11] However, it also presents challenges such as regulatory complexities, potential destabilization of the local banking sector, unequal playing fields, and the risk of financial shocks.[12] In this part, the author examined the potential gains and possible hurdles of the entry of foreign banks.

1.1 Opportunities Presented by Foreign Bank Entry in the Ethiopian Banking Sector

As a result of the entry of foreign banks in the Ethiopian banking sector, there are immense opportunities from competition and economic perspectives. The first one is the enhancement of market competition.[13] The present Ethiopian banking sector lacks market competition, which

[11] Alemayehu Gonfa Jabessa, Liberalizing banking sector for foreign investors: in Ethiopian case, Oromia Law Journal [Vol.13, No.1, 2024], p.179-181 Available at https://www.ajol.info/index.php/olj/article/view/274325/258975. Last accessed on June 10,2025 [here in after , Alemayehu Gonfa Jabessa, Liberalizing banking sector for foreign investors]

[12] Id*;* p.179

[13] Gebeyehu Raba, Prospects and Challenges of Foreign Bank Entry in Ethiopia, International Journal of Business & Management, Vol. 5 Issue 1, (2017), P30. 12 Available at https://www.internationaljournalcorner.com/index.php/theijbm/article/view/123379. Last accessed on June 10,2025

has a valuable contribution for actors to innovate and for consumers to choose.[14] One of the most notable gaps is the absence of foreign bank participation, which has historically been restricted, thereby sequestering domestic banks from international standards, capital, and innovation.[15] Price competition is also limited, as interest rates are often influenced by directives from the National Bank of Ethiopia, reducing banks' flexibility to attract customers through competitive lending or deposit rates.[16] Furthermore, product differentiation remains minimal, with most banks offering similar services without tailoring financial products to specific market segments like rural communities, or youth. Technological competition is weak, with uneven adoption of digital banking and financial technologies, resulting in limited customer convenience and innovation.[17] Studies show that, the entry of foreign banks enhances competitive market environment.[18] Secondly, it becomes an asset for improved financial services. This is from the perspective of technological transfer and expertise as well as for diverse and specialized financial products.[19] This is again the drawback of the existing banking sector in Ethiopia. Thirdly, the entry of foreign banks will build foreign reserves for the national economy.[20] As it is clear, a foreign reserve has a pivotal role for financial stability and a buffer zone for economic shocks. The entry of foreign bank allows and facilitates FDI (Foreign Direct Investment) which are closely linked with foreign

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14 Ibid

15 Alemayehu Gonfa Jabessa, Liberalizing banking sector for foreign investors, *supra* note *11*, p.197-200

16 National Bank of Ethiopia Establishment Proclamation No. 1359/2025, Art. 6

17 Alemayehu Gonfa Jabessa, Liberalizing banking sector for foreign investors, *supra* note *11*, p.197

18 Id*;* p.193

19 Id*,* p.194-195

20 Gebeyehu Raba, Prospects and Challenges of Foreign Bank Entry in Ethiopia, *supra* note 13, p.127-128

currency.[21] Ethiopia has faced the foreign currency problem which restricts the high import demand of traders. Apart from the current economic and financial reform, the entry of foreign banks becomes an additional asset.

The entry of foreign banks has also an opportunity for training and up-skilling of local bank professionals and enhances knowledge transfer as well as human capital development.[22] The entry of foreign banks upholds knowledge sharing about new banking technologies. It is not only knowledge sharing, but also the foreign bank entry integrates the present financial system to the global financial system which is better for international transaction and it enhances the credibility of Ethiopia's financial system.[23] Integrating the sector to the global financial system needs strong regulator that minimizes risk of financial crisis.

1.2. Challenges of Foreign Bank Entry in the Ethiopian Banking Sector

The entry of foreign banks has its own diversified challenges. The Ethiopian banking sector has been criticized as a collection of infant and national domestic banks. This by default creates a market concentration and leads foreign banks to exclude other domestic private banks from the market. The Foreign Banks has a chance of capturing urban or high end clients. This directly or indirectly reduces market competition between foreign and domestic banks and at the end it may create monopoly in the banking sector. Furthermore, the existing banking sector lacks strong regulatory bodies and limited experiences in

[21] Ibid
[22] Alemayehu Gonfa Jabessa, Liberalizing banking sector for foreign investors, *supra* note 11, p.197
[23] Ibid

supervising multinational banks.[24] The entry of foreign banks pose a challenge from the viewpoint of institutional preparedness and this finally leads macro-economic risks like currency instability, inflation and interest rate volatility.[25] Unregulated foreign bank leads to financial as well as economic crisis. Another big challenge the author concern is related with unequal playing field and the implicit government supports to the state-owned bank especially the challenges that private banks had faced.[26] The existence of anti-competitive practices in the market will minimize the positive competition outcomes and narrow down the market size of foreign banks. In the next section this article explores the competition neutrality perspectives and the entry of foreign banks from the practical lesson of private banks.

2. Competition Neutrality and Major Priority Areas

2.1 The Concept of Competition Neutrality

Understanding the concept of Competitive Neutrality Frame work (CNF) is vital in order to consider and define government actions as either market distorting or not. The concept of competition neutrality and its regulatory framework was first proposed and implemented in Australia in the 1990s; competitive neutrality has become a widespread

[24] Alemayehu Gonfa Jabessa, *supra* note 13, p.194-196

[25] Mekonen Hurisa, Potential effects of opening the Ethiopian banking sector to foreign banks, May 2017 Addis Ababa University MBA thesis Available at (https://etd.aau.edu.et/server/api/core/bitstreams/2894858b-54db-464b-8e7f-f0a0a111d377/content. Last Accessed on June 10,2025

[26] Saleamlak Yeman Birhan ,Ethiopian Public Enterprises in light of Competition Neutrality; The case in Banking Sector, LL.M thesis, Bahir Dar University, 2019 Available at (https://www.etelsa.org/pages/thesis_view.php?guid=fd7c0a80-3fcd-11ed-8a53-0a0027000027&school_guid=7db43938-3fc7-11ed-8a53-0a0027000027. Last Accessed on October10,2025

phrase in today's world.[27] To date, most OECD countries adopt such market framework under their national competition policy. The summary document of the OECD's 2009 roundtable on State Owned Enterprises and Competitive Neutrality define competition neutrality as:[28]

> *Competitive neutrality can be understood as a regulatory framework (i) within which public and private enterprises face the same set of rules and (ii) where no contact with the state brings competitive advantage to any market participant.*

It is clear that the State should treat State Owned Enterprises (SOEs) and private enterprises including foreign banks in terms of market competition. Moreover, the framework of the government is required to be fair both in de jure and de facto. It is intended to solve unfair competitive advantages enjoyed by SOEs because of state ownership or the state's special treatment in different grounds.[29] Competition neutrality is important, although it is insufficient, for ensuring an economy-wide application of competition law and for successful implementation of competition policy.[30] But where government businesses are significant market participants, appropriate actions for competitive neutrality become important for the development of competition and achievement of developmental goals.[31] In a nutshell, the economic rationale behind competitive neutrality measures is to

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[27] Pin-guang Ying, Competitive Neutrality and SOEs Reform: Recent Development and China's Practice, p.1 Available at https://www.unescap.org/sites. <Last accessed in 25 may 2025>

[28] OCED, State Owned Enterprises and the Principle of Competitive Neutrality (2009) 9 available at https://www.oecd.org/competition/competitive-neutralitBanks<last accessed 12 April 2025

[29] Pin-guang Ying, *supra* note 27, p.1-2

[30] Mark Pearson,Competitive Neutrality – Discussion Paper 8th Seoul Competition Forum, p.2 available at (https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf)

[31] Ibid.

allow private and government-owned businesses to compete on an equal footing.[32] It follows from the OECD definition that competitive neutrality may have an impact on many policy areas. Apart from the field of competition policy and competition law, the competitive neutrality principle also plays a key role in areas such as public procurement, taxation, bankruptcy, government subsidies, and related areas.[33] With the same fashion, different countries defined Competition neutrality framework under their national law. As an instance, the Australian Competition and Consumer Commission (ACCC) define Competition Neutrality as a framework that government businesses should not enjoy any net competitive advantage simply because of their government ownership.[34] Moreover, China's State Council has endorsed "competitive neutrality", defining it as treating all types of enterprise ownership like state-owned, private, or foreign equally in market competition.[35] This means no special advantages simply because of ownership. The Major Priority Areas of Competitive Neutrality Framework

CNF is all about one governmental market policy. Some countries clearly recognized it under their competition law[36], a few exceptions apply, where the competitive position of public undertakings is

[32] Directorate for financial and Enterprise affairs of competition Committee (EU), 2015 Roundtable on competitive Neutrality, June 2015, p.2-3

[33] Ibid.

[34] Matthew Rennie, Fiona Lindsay : Competitive Neutrality and State-Owned Enterprises in Australia: Review of Practices and their Relevance for Other Countries; p.5 Available at (https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/08/competitive-neutrality-and-state-owned-enterprises-in-australia_g17a2017/5kg54cxkmx36-en.pdf.) Last accessed on 10 0ctober 2025

[35] Ibid

[36] The Secretary-General of the OECD (2012), National Practice of Competitive Neutrality Framework,p.16 Available at https://one.oecd.org/document/DAF/COMP(2015)5/en/pdf. Last accessed on 10 October 2025

addressed under the constitution (Brazil, Chile, Mexico, Hungary and Russia) or countries like Slovenia recognize in legislation that concerns the activities of public undertakings.[37] Other countries tried to adapt such grand principle in procurement laws, in clear policy statements, commercial law and other specific acts.[38] In all such stipulations, the major competitive neutrality priority areas are strongly linked with the following components:[39]

1. The treatment of SOEs under the taxation regime
2. The scope of competition law and its enforcement on SOEs
3. Procurement rules and practices
4. Applicability of bankruptcy rules
5. Monopoly power and exclusive rights
6. Controlling of direct and indirect subsidies to SOEs

2.1.1 The Treatment of SOEs under the Taxation Legal Regime

There are three main contrasting views about taxation of SOEs. The first view is considering taxation of SOEs as unnecessary. It states that, especially in case where the enterprises are wholly owned by the government, taxing such firms becomes superfluous[40] since SOE taxation merely becomes transferring money from one pocket of the government to another.[41] Therefore, the taxation of SOEs is a deal that

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37 Ibid.

38 Ibid.

39 OECD National Practices, *supra* note 36, p.10 and OECD Principle of Competition Neutrality, *supra* note 28, p.35

40 Wei Cui, "Taxing State-Owned Enterprises: Understanding a Basic Institution of State Capitalism" (2016). Osgood Legal Studies Research Paper Series. 124. http://digitalcommons.osgoode.yorku.ca/olsrps/124, p.1-2

41 Wei Cui, "Taxation of State-Owned Enterprises: A Review of Empirical Evidence from China" (2015) in Benjamin L Liebman and Curtis J Milhaupt, (Eds,) Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism (New York: Oxford

one should see through as being fundamentally different from taxing private enterprises.[42] The special circumstances that justify taxation of SOEs in case of partially SOEs (non-taxation of such firms would provide unwarranted favorable treatment of private investors in the enterprise).[43]

The second view is considering taxation of SOEs as a significant tool to enhance market neutrality.[44] Treating SOEs differently especially by applying lower income tax rates or exemptions would give them unfair privilege.[45] This second view appears to have wide influence in both advanced and developed economies, and to be reflected in the policies and laws of many countries.[46] The third view is the forced distribution theory of SOEs taxation.[47] According to this perspective, taxation of SOEs is not mere symbolic from the beginning and not solely for enhancement of competitive neutrality; rather, it has its own institutional response.[48] It holds that the problem of corporate governance, chiefly at wholly-stated-owned firms, makes securing adequate dividend distributions a systematic challenge, and that SOE taxation should be viewed as an institutional response to this challenge.[49]

In summary, the foregoing discussion suggests that taxation neutrality between private and public enterprise is one fundamental area of CNF. Hence, not only by statutory recognition, but also it needs strong

University Press, (2015), p.4-5

42 Wei Cui taxing SOEs, *supra* note 40,p.3

43 Wei Cui empirical evidence of SOEs taxation, *supra* note 41, p.3

44 Ibid.

45 Wei Cui taxing SOEs, *supra* note 40, p.14

46 Wei Cui empirical evidence of SOEs taxation, *supra* note 41, p.5

47 Wei Cui taxing SOEs, *supra* note 40, p.29

48 Id, p.29-30

49 Id,.p.29

enforcement free from any exemptions. Even taxation of SOEs will fit with equality principle of tax. According to the principle of equality of taxation, "the principle of equal treatment under the law applies not only to taxation, but also to all laws. It can be viewed as an application of the concept of legality, under which the law must be applied without exception to all those in the same circumstances."[50] This means that no one may receive either preferential or partial treatment in the application of the tax law by different status regardless of the type of tax, i.e., whether it is direct or indirect tax. Moreover, this principle still admits that, those who are not in the same circumstances can be treated differently.[51]

2.1.2 The Scope of Competition Law and its Enforcement on SOEs

Competitive neutrality approaches can address concerns through the implementation of either *ex ante* or *ex post* competitive neutrality frameworks.[52] *Ex ante* neutrality frameworks is all about neutrality issues through different laws aimed at reducing the ability of SOEs to act anti-competitively.[53] *Ex post* competitive neutrality frameworks generally employ competition law as a tool for addressing neutrality issues.[54] Nevertheless, to date, subjecting SOEs under the competition law and enforcement become one target areas of creating level playing field between private and public enterprises. Most OECD countries do

[50] Victor Thuronyi, Tax Law Design and Drafting, Volume 1; International Monetary Fund: 1996, chapter two, p.5

[51] Ibid.

[52] Jason Aproskie, Morné Hendriksz et al, State-Owned Enterprises and Competition: Exception to the rule?", 2014, p.1 Available at http://www.compcom.co.za.wp-content p.5<Last accessed on 10 May 2025

[53] Ibid

[54] Ibid

not exclude public sector businesses from competition law.[55] Beyond defining the scope in such general manner, it is also necessary to regulate the interaction of the government with its enterprises. There are different possibilities by which government harms market competition especially in strong linkage with SOEs.[56]

Hence, such governmental deal should get due attention under the competition legal regime. Commonly, the very subjects of competition law are anti-competitive agreements, abuse of dominance, anti-competitive merger and unfair competition.[57] In this regard the CNF requires two important points from the competition law and enforcement. Firstly, such four subject matters of the competition law should equally apply and enforced for all enterprises irrespective of ownership. CNF also requires regulatory rules that govern the conduct of the government in the market.[58] Because the four subject matters most of the time governs unfair commercial conducts of business men or undertakings. And currently government harms the competition law by itself via subsidizing its SOEs, including subsidized loans, export credits, debt forgiveness, and other preferential advantages.[59] Thus, the competition law and enforcement should respond for state aid so as to make the market competitive. Not only regulating under the competition law, but also the concerned authority should strongly supervise and enforce any infringements made by SOEs. Even if competition law

[55] OECD Principle of Competition Neutrality, *supra* note 28, p.44

[56] Elizabeth J. Drake, Chinese State-Owned and State-Controlled Enterprises: Policy Options for Addressing Chinese State-Owned Enterprises: Testimony before the U.S.– China Economic and Security Review Commission, Partner, Law Offices of Stewart and Stewart February 15, 2012, p.1

[57] Harka Haroye, 'Competition Policy and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law.'(2008), *2(1), MZLR*, p.33

[58] OECD Principle of Competition Neutrality, *supra* note 28, p.44

[59] Elizabeth J, *supra* note 56, p.1

generally applies to both private firms and SOEs, competition authorities may face different challenges when enforcing it against SOEs.[60] One of the challenges is related with institutional enforcement power and OECD expresses this challenge in this way;[61]

> *While the vast majority of competition authorities are impartial in their investigations, it is nevertheless theoretically conceivable that, in some instances, they could be exposed to the risk of undue government influence. Also, competition authorities may often lack sufficient statutory power over the SOE, in particular, with respect to industries that are subject to oversight by sect oral regulatory agencies.*

Under CNF, the government is duty bound to enforce the competition law against SOEs conduct equally with private undertaking including foreign banks activity.[62] Even if the government considered different policy for some of its enterprises exempted from competition law and enforcement, it should clearly provide under the law.[63] Thus, SOEs by nature are often compelled to act in accordance with public interest mandates and at a minimum to be accountable to the people of that country. This suggests that there may be some instances where by anti-competitive behavior might be justified.[64]

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60 OECD Principle of Competition Neutrality, *Supra* note 28,p.10
61 Ibid
62 Ibid
63 Jason Aproskie, Morné Hendriksz et al, State-Owned Enterprises and Competition: *Supra* note 52, p.1
64 Ibid

2.1.3. The Proper Application of Procurement Rules and Procedures

Procurement is the purchase of goods and services by public and private enterprises which constitutes a substantial fraction of economic activity.[65] Efficient procurement involves choosing the supplier who can supply the desired goods or services at the lowest price (or, more generally, the best "value for money").[66] Practices such as collusion, bid-rigging, fraud and corruption prevent efficient procurement. For these reasons, both public and private procurement processes may be subject to the problems of bid-rigging and corruption.[67] Hence, the subject of competitive neutrality in this regard becomes equal applicability of the procurement rules both to SOEs and private enterprises. Furthermore, in the process of procurement the government should abstain its hands from giving preferential advantages to its enterprise in case when the government becomes a buyer of goods and service for public purposes.[68] Thus, one of the pillars of competitive neutrality framework is the equal applicability of the procurement rules and the tendering process irrespective of the undertaking either it is private or SOEs.[69] Procurement rules can sometimes lead to government businesses being put at a disadvantage compared to private sector competitors.

As alternative, there has been different substantial consideration given to the circumstances whereby the government business is actually

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65 OECD Policy Round Table, Competition Policy and Procurement Markets, 1998, (DAFFE/CLP (99) 3/FINAL), p.7

66 Ibid

67 Ibid

68 OECD National Practices, *supra* note 36, p.8

69 Mark Pearson, *supra* note 30, p.8

advantaged in procurement rules and processes due to its ownership and associated links.[70] Generally, anti-competitive practices including discriminations can often be overcome through stronger and enforceable rules and regulations based on transparent processes of procurement.[71] These are vital so as to create truly equal playing field between SOEs and private undertaking from procurement perspectives. Competition authorities should be also active in follow up of diversified anti-competitive practice in the procurement process irrespective of the enterprise that committed the act; and, duty bound to create competitive procurement environment as well.[72] In OECD countries, competition law extends to cover up horizontal agreements and abuse of dominance in the situation of procurement, and this law is enforced by the national competition authority.[73]

2.1.4. The Scope of the Bankruptcy Laws and Proceedings

Another privilege which is often enjoyed by SOEs is exemption from bankruptcy rules. This is against CNF because it paves a way by which SOEs can generate losses for a long period of time without fear of going bankrupt.[74] This lack of a bankruptcy constraint provides SOEs with a significant competitive advantage over their privately-owned competitors. In particular, the fact that SOEs are not subject to bankruptcy rules rather it will create incentives to become involved in competitive ventures on favorable terms and therefore compete unfairly and inefficiently with privately-owned companies.[75] Hence, CNF

70 Ibid
71 Ibid
72 OECD Competition Policy and Procurement Markets, *supra* note *65*, p.9
73 Ibid.
74 OECD Principle of Competition Neutrality, *supra* note 28, p.36
75 Ibid.

obliged states to apply the bankruptcy rules and proceeding equally irrespective of the owner of the undertaking.

2.1.5 Monopoly Power and Exclusive Rights

In many cases, governments entrust SOEs with exclusive or monopoly rights over some of the activities that the SOE is mandated to pursue.[76] Monopoly power and exclusive rights are different. In case of monopoly power, business of SOEs is closed for any other private undertakings. This is a common practice in different state by which the government exclusively gives some sectors/services to be operated by SOEs alone.[77] This can be seen, for example, in the United States where the federal government grants the US postal service exclusive monopoly over both the delivery of letters and the use of customers' mailboxes.[78] In case of exclusive rights, the specific sector may not be monopolized, but the government may clearly reserve exclusive rights for a certain specific service (business activity) to be operated by its SOEs. Hence, customers will not have any right to transact with other private undertaking even if the same service is rendered in both undertaking; it is indirectly given preference to its enterprise.[79] This is also known as captive market. A captive market is one where the potential buyers have very limited choice.[80] In other words, unless they buy from just one or two suppliers

[76] Id; p.35
[77] Ibid.
[78] Capobianco, A. and H. Christiansen (2011), "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options", OECD Corporate Governance Working Papers, No. 1, OECD Publishing. Available at http://dx.doi.org/10.1787/5kg9xfgjdhg6-en<Last Accessed on 10 June 2025
[79] OECD Principle of Competition Neutrality, *supra* note 28, p.37
[80] Saleamlak Yeman ,Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26, p.26

they have no other option because of different reasons. It is the result of either by the acts of the government or by other factors.[81]

2.1.6. Controlling of Direct and Indirect Subsidies to State Owned Enterprises

Basically, all the above-mentioned areas of CNF in one way or another are clearly linked with the government support to its enterprise. But all of the preferential treatment becomes either the result of the loopholes of the law or the clear exemption of SOEs from legal framework. However, in case of subsidies, government clearly supports SOEs by different means and modalities irrespective of market conditions of private undertaking.[82] Direct subsidy is all about government financial assistance to SOEs commercial operations.[83] For example, in the United States, as of 2002, Amtrak had received over $44 billion in direct federal subsidies since it began its operations. Such government intervention lowers the SOE's operating costs and provides it with a significant competitive advantage over its privately-owned rivals.[84]

However, indirect subsidy is a broad term, covering any form of subsidy that does not involve a direct money transfer, for example, the favorable tax regimes or exemptions from certain tax liabilities.[85] Moreover, SOEs may have access to favorable credit rates or benefit from government-provided credit guarantees which finally reduce their cost of borrowing and enhance their competitiveness *vis-à-vis* their privately-owned

81 Ibid
82 OECD Principle of Competition Neutrality, *supra* note 28, p. 6
83 Id., p.5
84 Id; p.35
85 Ibid

enterprises.[86] Competitive neutrality also prohibits other government privileges to SOEs which have the impact of market distortion. For instance, SOEs may also benefit from information asymmetries. "Information asymmetries occur when SOEs have access to data and information which are not available to their private competitors or only available to a limited extent."[87]

3. Market Distortion Practices of State-Owned Banks in Ethiopia and its Effect on the Entry of Foreign Banks

The position of the Ethiopian government regarding competitive neutrality is contradictory. In some points the government set a horizontal rules and treatments for both SOEs and private undertaking. While in other conditions the government bent eyes towards its own enterprise preferential conditions that are against the competitive neutrality stance. The following sections explore the general set of rules and practice by the government which is for and against competitive neutrality to all SOEs in different sectors. There are also sectors specific anti-competitive neutrality rules and practice. To be feasible, the study under the following part analyzed the banking business practices. The parameters of competitive neutrality framework are the points under the preceding section. i.e., taxation neutrality, the scope of bankruptcy laws and proceeding, absence of exclusive advantages to SOEs, the prohibitions of direct or indirect subsidies, coverage of SOEs under the competition law and enforcement, and the scope and process of public procurements.[88]

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86 Ibid

87 Ibid

88 OECD National Practices, *supra* note 36, p.10, OECD Principle of Competition Neutrality, *supra* note 28, p.35-47

3.1 Ethiopian State-Owned Enterprises in Light of Taxation Neutrality; The case of State-Owned Banks

Taxation neutrality is a fundamental aspect of competition neutrality framework. The very tenet of taxation neutrality is the government sets equal rules on tax for both SOEs and private enterprises in different process of taxations. Taxation of state-owned enterprises in Ethiopia is clearly recognized pursuant to article 30(1) of proclamation number 25/1992.It stipulated the imposition of tax against public enterprise by concerned law. Basically, it provides the exceptional grounds of tax preferential treatment to SOEs.[89] However, this proclamation has at least the recognitions of tax liability on SOEs like that of any private undertaking. The policy objectives of Ethiopian government in the imposition of tax against its enterprise are not mentioned in its legal documents. However, under the preamble of public enterprise proclamation (25/92), there is a slight indication though it will not be a conclusive point. Accordingly, one of the aims of the public enterprise law, "enables them to be efficient, productive and profitable as well as to strengthen their capability to operate by competing with private enterprises."[90]

Moreover, there are different arguments as to the imposition of tax against public enterprise.[91] Countries like china impose tax considering its role in shaping the behavior of the undertaking as one means of controlling SOEs from abusive practices. Other countries in the European Union for instance impose tax on SOEs since it has a contribution not only from the perspective of control but also in creating

89 Public Enterprises Proclamation 25/1992, Article 30(2)
90 Public Enterprises Proclamation 25/1992, See the preamble
91 Wei Cui taxing SOEs, *supra* note 40,p.2

market competition with private undertaking. There are also countries like Saudi Arabia that totally disregard the value of taxing SOEs by considering it as superfluous.[92] In this regard, the Ethiopian government needs to have a clear policy stand as regards the imposition of tax against SOEs. In addition to, creating level playing field with private undertaking, taxing SOEs in Ethiopia will have a significant contribution to control the corrupted practices therein. Since one of the typical features of Ethiopian SOEs is the prevalent of corrupted practices because of absence of information disclosure and transparency.[93] Thus, at least, the government collects some amount of money in the form of tax before being corrupted. Furthermore, the enterprise become at least efficient so as to cover both the expected dividends and required tax liability to the government.

3.1.1 Ethiopian Business Income Tax in Light of Competitive Neutrality Perspective

Ethiopia has different types of tax impositions at different commercial activities. The first is linked with business income taxation. SOEs in general and state-owned banks in particular engaged in commercial activities are taxed equally with corresponding private undertaking including the coming foreign banks. The rate, assessment and payment, grievances procedure, exemptions and deductions are according to the taxation neutrality principle. The income tax proclamation stipulated a

[92] Ibid

[93] Nebiat Lemenih, The legal and Institutional Governance framework of state-owned Enterprise in Ethiopia, LLM thesis, BDU school of law, 2017, [unpublished available at law library], p.87

flat rate of 30% business income tax on bodies.[94] Basically, the proclamation failed to define what body implies. The inclusion or otherwise of SOEs under body is not clear despite SOEs operates a commercial activity. However, the tax administration proclamation tried to clarify the implication of bodies from income tax perspective. Accordingly, it stipulated as;[95]

> *[Body] means a company, partnership, public enterprise or public financial agency, or other body of persons whether formed in Ethiopia or elsewhere.* [Emphasis added]

Hence, public enterprises (state owned enterprises) are considered as body like that of other company or partnership and the law subjects them to pay a business income tax with equal ranges. Not only in the case of the tax rate, but also the income tax proclamation doesn't grant any preferential treatments related to deductions of expenditures. The whole entitlement or duties that apply for other private undertaking will simultaneously apply to SOEs.[96] Thus, all SOEs including the Ethiopian commercial bank are required to pay business income tax to the government. The income tax proclamation tried to put both private and public enterprises with equal footing. Thus, the Ethiopian income tax law is one step ahead in light of competitive neutrality framework.

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[94] Income Tax Proclamation, 2016, *Federal Negarit Gazeta* Proc. No. 979, 22 year, No.104,Art.19 and House of Peoples' Representatives (2025, July 17), Income Tax (Amendment) Proclamation No. 1395/2025

[95] Tax administration Proclamation, 2016 *Federal Negarit Gazeta*, Proc. No. 983, 22 year, No.103, Art.2 (5)

[96] Saleamlak Yeman ,Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26, p.34

Moreover, the practical follow-up and enforcement is also based on taxation neutrality principles. All public enterprises including the state owned banks conform to their duty of tax to like conditions to private banks as the law prescribed.[97] This is because the law has no any exception for state owned enterprises as regards the tax rate, assessment mechanisms, grievance procedures, deductible and nondeductible expenses.[98] Even in case of windfall income, all banks including state owned banks in Ethiopia are required to pay tax to the tax authority.[99] There is no preferential treatment given for commercial Bank of Ethiopia that relived from such collected sudden amounts of profit. This becomes a competitive environment for foreign banks too.

3.1.2 Ethiopian State-Owned Banks from the Perspective of Value Added Tax

The other stream of tax imposition under the Ethiopian law is Value Added Tax (VAT), a general consumption tax assessed on the value added to goods and services.[100] VAT is a general tax that applies, in principle, to all commercial activities that engaged in the production and distribution of goods and the provision of services.[101] SOBs are required to pay VAT under the law. Unlike the repealed VAT proclamation which clearly defined "body" as a tax payer including public enterprises[102] the new VAT proclamation is silent about the definition

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97 Ibid
98 Ibid
99 Ministry of Finance and Economic Development Wind Fall Income Directive No.29/2003
100 Bekure Herouy, the VAT Regime under Ethiopian Law with Special Emphasis on Tax Exemption: The Ethiopian and International Experience, March 2004 Available at http://www.crdaethiopia.org/ Last accessed 25 May 2024
101 Ibid
102 Value Added Tax proclamation, 2002 *Federal Negarit Gazeta*, Proc. No 285, 8th year, No. 33, Art.2(5)

of body, but the taxable person includes anybody engaged in taxable activities including SOBs since they are not exempted differently under the law.[103] Without any distinctions with private undertaking, SOEs faced for the general consumption tax in Ethiopia. The rule of exemptions applies for all irrespective of the ownership of the undertaking. Meanwhile, VAT always required to be paid by consumers (buyers) of certain goods and services to the seller (supplier). But, in case when the purchaser of goods and services become a SOBs they have the right to withhold the amounts of VAT that should be paid to the seller.[104] Hence, one area that reflects asymmetry is the practice of VAT withholding.

According to article 2(4) of directive No.27/2002 SOEs are considered as withholding agents to save the amounts of VAT that would be paid to the seller. It is not all about VAT exemptions rather considering SOEs as an agent of the government to collect VAT and to deliver the retained VAT to the tax authority in the next month.[105] One thing that should be clear here is such kind of exception is not applied for private undertaking (private banks) in the same market. The issue that first comes into picture is whether such directives creates unequal playing field or not. Practically, different private undertaking including banks challenge such directives.[106] Since it gives one-month period for state owned banks to mobilize and used the retained VAT amounts for other commercial transactions.[107] The government tried to justify the purpose

[103] Value Added Tax Proclamation, 2024 *Federal Negarit Gazeta*, Proc. No. 1341, 30th year, No. 61, Art.2 (56), 3, 7, and 8
[104] The Ministry of Finance and Economic Development VAT withholding Directives No. 27/2002
[105] Ibid
[106] Saleamlak Yeman, Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26
[107] Ibid

of this directive under the preamble. It intended to protect abusive third-party practices that failed to deliver the amounts of tax they collected from state owned enterprises and government institutions to the authority.[108] Thus, to control government revenue from such mal practices, the directive considered SOEs as withholding agents of VAT. This justification is not plausible because the government should have strengthened its enforcement and controlling mechanisms for abusive suppliers. Especially this rational may not hold fact under this modern legal regime which includes digital invoicing, tax payer identifications and improved enforcement. Furthermore, the revenue that faced for abusive third party's supplier is not only sourced from state owned enterprises but private undertaking is also required to pay VAT. Hence, if the government is in doubt about its capacity to protect abusive supplier who failed to report the collected VAT to the authority, it should at the same time gives withholding power to private undertaking. If this is not the case, it will become one way of government preferential advantages since SOEs mobilize the retained monthly collected VAT to other profit-oriented activity. Thus, it is anti-competitive neutrality rules since neither had it applied to private undertaking nor does it have a sound justification for its exceptions.

3.1.3 Ethiopian Excise Tax and Custom Proclamation in Light of Competitive Neutrality

The earlier excise tax proclamation no.307/2002 was replaced by the new proclamation no.1186/2020, which introduced a modern excise tax principles and goals.[109] Like the repealed proclamation, the new excise

[108] VAT withholding Directives No. 27/2002, See the Preamble

[109] Excise Tax proclamation, 2020 *Federal Negarit Gazeta*, Proc. No. 1186, 26th year, No. 25, Art.44 (1)

tax proclamation applies uniformly to SOEs and private undertakings (foreign banks) without any preferential arrangements. Hence, state owned enterprises are defined as "body" for the purpose of excise tax though the new excise tax law defines through cross reference.[110] The excise tax proclamation hardly left any preferential treatment and exemptions to SOEs. In this regard, our excise tax proclamation is consistent with competition neutrality. Logically, state owned banks are not typically excise tax payer, as excise tax targets specific goods and services. However, when SOBs either import or supply excisable goods, they are subject to the same rate and compliance rules and requirements as private banks. Hence, there is no exemption at all for SOBs in excise taxation. The custom proclamation and its amendment also have a general scope of application without giving any exclusive advantage to SOEs.[111] All private and public undertaking including the banking business is required to be abided by the rules and procedures stated in the custom proclamation. Irrespective of ownership, the law applies equally to all importers.[112] Practically, private banks have complained on duty free privileges given for CBE. Unlike for private banks, CBE, a state-owned bank, imported different goods like cars duty free to give it as an award for depositors.[113] There are no directives (custom or tax laws) that clearly privileged duty-free importation of capital goods to commercial bank of Ethiopia (CBE); however, in exceptional and special cases the investment commission writes different circulars that

[110] Ibid*;* Art.2 (33) and see the Excise Tax proclamation, 2002 *Federal Negarit Gazeta*, Proc. No 307, 9th year, No. 20, Art.2 (3)

[111] Custom proclamation, 2014 *Federal Negarit Gazeta*, Proc. No 859,20th year, No.82 and Custom amendment proclamation, 2019 *Federal Negarit Gazeta*, Proc. No1160,25th year, No.92

[112] Custom Proclamation No.859/2014, Art.2 (56) and Art 3

[113] Saleamlak Yeman, Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26, p.37

favored CBE to import capital goods with duty free.[114]

3.2 The Scope of Ethiopian Bankruptcy Laws and Proceeding in Light of Competition Neutrality

The other major area of competitive neutrality framework is the equal treatments of SOEs and private undertaking from the perspective of bankruptcy rules and proceeding. The government is prohibited to shield its enterprise from bankruptcy proceeding since it gives a chance to unfairly compete with private firms in the same market despite they are bankrupt. The 2021 commercial code replaced the 1960 code and modernized the Ethiopia's insolvency regime under book III of the code.[115] It governs bankruptcy, preventive restructuring, reorganization, and liquation. Accordingly, article 589(1) in principle stipulates that, the rule of bankruptcy applies to all types of business organizations including SOEs unless there is a special scheme of arrangement for SOEs and banks.[116] It is not only this rule, there are additional legal basis for applying bankruptcy laws to SOEs including state owned banks. This is for instance the public enterprise proclamation that explicitly cross refers book four (V) of the old commercial code (it means book III of the new code) that has no exclusion clauses unlike the clear exemption of joint ventures.[117] In line with the international practices, bankruptcy proceedings for banks are governed by the special banking proclamation. Ethiopia is not an exception for this special rule. The Ethiopian banking business proclamation tried to recognize special

[114] Id*;* p.37-38
[115] The Commercial Code of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazette*, Proclamation No. 1243/2021, Art.588
[116] Id*;* Art.591(2)
[117] Id*;*Art.589(1)

rules of bankruptcy proceeding.[118] From the general bankruptcy law outlook, the banking proclamation demonstrates two sector specific deviations. The first sector specific deviation is "the date of commencement to be used to determine whether a bank is insolvent differs from the test for insolvency adopted in the Commercial Code."[119] Furthermore, the power given for the determination, the existence, or otherwise of insolvency is mandated to the National Bank of Ethiopia (NBE) unlike the commercial code that recognized judicial pronouncement.[120] It sounds to conclude that the process is administrative rather than judicial. In Ethiopian banking law, there are different consequences on the bank which declared insolvent/bankrupt by NBE.[121] Nevertheless, both the general and special banking sector bankruptcy law applies for all irrespective of ownership. There is no specific exemptions' for state owned bank to relive from bankruptcy proceeding in Ethiopia. Thus, the author finds that Ethiopian bankruptcy law fit with what competitive neutrality proposed and should not be a treat for foreign entry.

3.3 Exclusive Advantages and Subsidies to State Owned Banks in Ethiopia

In the Ethiopian case, some of the State-owned Enterprises like the Ethiopian Airlines are monopolized by the government. There are no private undertakings alongside with such kinds of monopolized entity in the market. Normally, competitive neutrality doctrine giving similar set

[118] Tewodros Meheret 'An appraisal of the Ethiopian bankruptcy regime'2017, p.4 *De Jure* 111-13 Available at http://dx.doi.org/10.17159/2225-7160/2017/v50n1a7<Last accessed on 10 July 2025>

[119] Ibid

[120] Ibid

[121] Tsion Getachew, Legal regime Bankruptcy of Bank under Ethiopia Law, LLB thesis, St' Mary University College Faculty OF Law, 2009, p.29

of rules is so broad even to the extent of opposing monopolized markets. The market that SOEs engaged in should also be given to private entity with equal opportunity. However, as a result of different public reasons and government policy not only in developing countries even the developed one controlled some sectors of the economy in monopolized manner.[122] Recently, there is a move towards opening of such sectors or adapting privatizations policy to avoid barrier to international trade. In the Ethiopian market, apart from monopolized entities, government enterprises in different sectors of the economy received preferential advantages in different ways.[123] Especially in the banking sector, some of the exclusive benefits are based on directives/contracts/ or based on common trend without any specific laws or contract for that fact.[124] In the banking sectors, the Ethiopian government owns two banks only, the Commercial Bank of Ethiopia (CBE) and Developmental Bank of Ethiopia. The later state-owned bank is only reserved to do certain developmental activities. All preferential treatments to CBE are considered as subsidy despite it has distinct forms. At this juncture, it is vital to asses financial subsidies either directly given to the CBE or indirectly. Regarding, direct subsidy the Ethiopian government doesn't financial assist the CBE. Even the NBE is a last lender for all commercial banks irrespective of ownership and hence no direct financial support given for banks till now.[125] SOEs have done different activities that have big ranges of value for national development. In the

[122] Saleamlak Yeman ,Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26, p.39

[123] Moges Kibre,'Policy-Induced Barriers to Competition in Ethiopia,' CUTS International, Jaipur, India, 2008

[124] Yismaw Zemene, 'The Need to Ensure Fair Competition in the Ethiopian Banking Business: An Appraisal of Legal Framework and Practice; *International Journals of Ethiopian Legal studies,* 2015, *Vol. 1,No.1*, pp.58-60

[125] Ibid

banking sector, for instance, most of the activity of the nation sector runs via CBE.[126] If there is no preferential advantage in different context, the government indirectly affects areas like the manufacturing, construction, agricultural sectors of the country which fully depend on CBE.[127] Protecting fiscal revenues is considered a ground to justify the exclusive SOEs entitlement. Some SOEs provide consistently large profits (or in some cases revenues) on which the national treasury comes to depend. This makes countries like Ethiopia to exempt enterprises from the framework of competition neutrality despite it is unjust.[128] However, there are different exclusive benefits that have the impact of indirect subsidies to the CBE in the Ethiopian banking sector. Such indirect financial subsidies are clearly against the interest of private banks.

3.3.1 Civil Servants' Salary Payment Restrictions

Private Banks in Ethiopia complained about the captive market of CBE from the perspective of Civil Servants' Salary Payment.[129] Basically this was practiced based on the Ministry of Economy's directive.[130] Hence, it is vital to explore such directives from competition neutrality points of views. The cash management directives stipulated that the government institutions obliged to pay employee salary through banks.[131] This is irrespective of the ownership of the bank. The directives have no any preferential set of rules to CBE.

[126] Saleamlak Yeman , Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26, p.40
[127] Id*;* p.40-41
[128] Ibid
[129] Ibid
[130] Democratic Republic of Ethiopia Federal Government Cash Management Directive, Art.12 (No.4/2011)
[131] Ibid

Pursuant to article 12(4) of directive no. 4/2011 the government institutions are duty bound to made salary payment in two optional ways. Firstly, an agreement with banks proximate to the employee, or, secondly, a contract with banks by which the bank account of the institution is opened. Practically, different government institutions disregard the first optional way of payment since the institutions' bank account is first opened in CBE. As a result of this fact, private banks are excluded to make civil servant salary payments. This will affect private banks in different ways. First, it becomes a barrier to get new customers since they will have strong attachment with the bank that the salary is paid through.[132] Secondly, private banks become barred from receiving service charges and to the maximum it affects from loosing market shares in anti-competitive ways.[133]

3.3.2 The Exclusive Rights of Commercial Bank of Ethiopia to Process Letter of Credit

There is a cash management directive that exclusively gives processing of letter of credit to CBE.[134] Firstly, Ministry of Economy is duty bound to open a letter of credit for pooled account to all government institutions in CBE.[135] It is clear that this ministry has no power to open pooled letter of credit in other private banks apart from CBE. Secondly, each and every government institution has the power to apply to have letter of credit in CBE.[136] Again each specific government institutions have no any freedom to choose other banks

[132] Saleamlak Yeman, Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26, p.43
[133] Yismaw Zemene, *Supra* note 124 ,p.70
[134] Cash Management Directive No. 4/2011, Art 24-25
[135] Id, Art.25(1)
[136] Id,Art.25(2)

for the processing of letter of credit. For all such service the CBE has received different payments. These are commission for opening the letter of credit, service charge for one period and for one period assurance commission.[137] Hence, all such kinds of payments are preferentially given for CBE and private banks are legally prohibited to have such service payments despite there is no efficiency problems.

3.3.2 Practical Restrictions to Open Branches in Industrial Parks and Public Universities

There is no directive that restricts the right of private banks to open branch in different parts of the country. Practically, however, private banks prohibited from opening branch business in industrial parks and in public universities.[138] In fact, currently, private banks delivered services to customer in those areas via Automatic Teller Machines (ATMs).[139] Each university and industrial park administrators are not willing for the entry of private banks.[140] De facto, such business areas are only reserved for CBE. In this regard, NBE is unable to challenge such kinds of de facto prohibitions of those specific organizations.[141] But the NBE is responsible to create favorable conditions for the expansion of banking business. To these kinds of restrictions, the Ethiopian Banker Association and the competition authority were also inactive apart from NBE.[142]

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137 Id, Art.27

138 Saleamlak Yeman ,Ethiopian Public Enterprises in light of Competition Neutrality, *supra* note 26, p.43

139 Ibid

140 Ibid

141 Ibid

142 Ibid

3.4 Ethiopian Public Procurement Law from Competition Neutrality Viewpoint

One of the priority areas of competition neutrality is equal treatment of SOEs and private undertaking in the legal and practical process of government procurement. With the adoption of the new procurement proclamation no.1333/2024, which replaced *the old Procurement and Property administration Proclamation No.649/2009,* has included detailed and clear changes relevant to competition neutrality in procurement procedures.[143] One of the major rational of the new law is the expansions of the procurement law's application to SOEs.[144] This has its own implication from different point of views. Firstly, the law regulates procurement carried out by federally owned enterprises like the state-owned Bank and brings them under the oversight of the federal procurement legal and institutional regime.[145] Secondly, it implies that SOEs will fall under the oversight of the public procurement and property authority.[146]

The scope of the repealed procurement laws applies only to the federal government budget and it does not cover procurement by SOEs and other public bodies, financed under separate budgets.[147] Thus, there were no special procurement rules for private undertaking and state-owned enterprises in purchasing goods and services. The only room

[143] The Federal public Procurement and Property Administration Proclamation, 2024, *Federal Negarit Gazeta*, Proc. No. 1333, 30thyear, No.66

[144] Federal public procurement proclamation No. 1333/2024, See the preamble under paragraph two

[145] Id. Art.2(9)

[146] Id. Art.12

[147] Yirga Tesfahun, Public Procurement Reforms in Ethiopia: Policy and Institutional Challenges and Prospects, MA thesis, Addis Ababa University School of Graduate Studies, 2009.

for the applicability of the procurement laws in private undertaking was in case of public private partnership.[148] However, after the coming effect of the new proclamation, SOEs are brought into the procurement regime. From competitive neutrality perspective, the Ethiopian federal procurement law does not grant preferential treatments to SOEs both in place of purchaser and supplier.

Practically, there are different anti-competitive neutrality conducts in the procurement process. Different federal public bodies made SOEs as their first preferred supplier of goods and services. In the presence of SOEs as a supplier they are not willing for procurement with other private undertaking.[149] The authority tried to review the grievance submitted by other procuring agencies or by the supplier. However, there is no compliant till submitted by private banks against any government bodies.[150] Procurement is the most prone areas of corruption specially by distorting competition. In a number of countries, antitrust authorities have a crucial role to play in procurement processes. For example, in Denmark, all procurement is under the authority of the antitrust agency.[151] There are different grand principles for fair competition in procurement. Equal opportunities for participation of bidders through a competitive procedure, and the provision of consistent information to all bidders on the procurement opportunity can be mentioned.[152] However, practically, bidder or candidate in government procurement always

148 The Ethiopian Federal Government Procurement and Property Administration Proclamation, 2009. *Federal Negarit Gazeta*, Proc. No. 649, 16th year No.60, Art. 2(27)
149 Saleamlak Yeman , Ethiopian Public Enterprises in light of Competition Neutrality, *Supra* note 26, pp.54-57
150 Ibid
151 OECD Competition Policy and Procurement Markets, *Supra* note 140, p.28
152 Yirga Tesfahun, Public procurement reform, *Supra* note 147, p. 49

questioned the legality of private bank's Cash payment order (CPO)[153] since it is rejected by different organizations.[154] Particularly, when the purchasers of goods and services are public enterprises like Ethio telecom and Ethiopian Electric Power Authority they only accepted CPO which are certified by CBE.[155] As a result of this, customers of private banks shift their deposit to CBE at least to have an accepted CPO and to participate in government procurement.[156] This is anti-competition neutrality practices still subsist in the current procurement situation.

Concluding Remarks and Recommendations

Competitive neutrality is a fundamental principle of modern competition policy, ensuring that private undertakings and state-owned banks (SOBs) operate under an equivalent set of rules. While SOEs often pursue profit and public-interest objectives, these objectives should never justify market distortions or unfair advantages over private sectors, particularly as Ethiopia opens its financial sector to foreign banks. This article shows that Ethiopia meets several OECD competitive-neutrality benchmarks in areas such as business income tax, excise tax, customs law, bankruptcy rules, and the expanded procurement framework following Proclamation No. 1333/2024. These legal regimes generally apply equally across ownership forms and therefore support a level competitive playing field for foreign bank entry.

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153 Saleamlak Yeman ,Ethiopian Public Enterprises in light of Competition Neutrality, *Supra* note 26, p.57

154 Ibid

155 Ibid.

156 Ibid.

However, Ethiopia's practical implementation reveals several persistent neutrality concerns. These include preferential VAT withholding arrangements for SOEs, informal or unauthorized duty-free privileges for state-owned banks, exclusive rights granted to the Commercial Bank of Ethiopia (CBE) for processing Letters of Credit, restrictions on civil-servant salary payments, and informal preferential treatment in public procurement. Such practices undermine market contestability, inhibit private-sector growth, and risk discouraging foreign bank participation. Additionally, captive markets such as universities and industrial parks remain shielded from competitive banking services. Addressing these issues is essential for Ethiopia's financial liberalization and the creation of a fair, predictable competitive environment.

To advance competitive neutrality in Ethiopia's financial sector, several reforms must be addressed in an integrated manner. First, legal and regulatory neutrality should be preserved by ensuring that core tax, customs, and insolvency frameworks continue to apply uniformly across state-owned, private, and incoming foreign banks. Ethiopia's business income tax, excise tax, customs rules, and the bankruptcy regime under the Commercial Code Proclamation No. 1243/2021 already reflect OECD-aligned neutrality in their legal design; however, this neutrality must be matched by consistent enforcement. Maintaining equal treatment in these foundational areas will prevent discriminatory exemptions, uphold predictable market rules, and reinforce the country's commitment to a level playing field as market liberalization progresses.

A second major recommendation involves eliminating preferential operational practices that advantage state-owned banks in day-to-day market competition. This includes abolishing preferential VAT withholding arrangements for SOEs, ending informal or unauthorized

duty-free privileges for state-owned banks, and ensuring that all institutions comply with the same customs and tax procedures. Likewise, Ethiopia should dismantle structural market privileges, such as the Commercial Bank of Ethiopia's exclusive right to process Letters of Credit and the mandate requiring civil servants to be paid through specific state-owned banks. Removing these distortions will enhance market contestability, stimulate private-sector innovation, and increase confidence among prospective foreign bank entry.

Finally, improving neutrality within procurement and market access is essential for a fair competitive environment. Although the Public Procurement Proclamation No. 1333/2024 has expanded oversight over SOEs, practical procurement neutrality must be strengthened through active monitoring and sanctions against implicit favoritism toward state-owned banks. In parallel, Ethiopia should open currently captive markets such as universities, industrial parks, and other public institutions for competition, allowing private and future foreign banks to compete on equal terms. Addressing these issues holistically will support a more transparent, efficient, and competitive financial sector capable of attracting sustainable foreign investment.

The Interplay of Court Contempt and Freedom of Media in Ethiopia: A Quest for Regulation

Mohammed Seid[*]

Abstract

Court contempt involves actions or publication of information that interfere with the fair administration of justice in ongoing cases. On the other hand, freedom of expression encompasses the rights to disseminate and access information as recognized by national and international human rights instruments. Media often shares information about pending cases especially those of a sensitive or political nature. Such pre-trial publicity may jeopardize the impartiality of judges and the fair trial rights of suspects, thereby constituting court contempt. This paper examines the tension between court contempt and freedom of expression and the existing legislative gaps in Ethiopia. Utilizing qualitative doctrinal legal research Methodology, the study argues that media coverage of ongoing cases significantly undermines judicial independence, the right to fair trial, and public confidence in the justice system. Ethiopia has not enacted a stand-alone court contempt law that strikes balance with in these competing interests. The author concludes that Freedom of expression is subject to restriction only when it satisfies the three part test: the principles of legality, legitimacy, and proportionality. Thus, pre-trial publicity should be restricted as a form of court contempt, to curb its adverse impacts on the administration of justice and the right to a fair trial. This position is substantiated by the application of the three-part test, anchored in the principles of legality,

[*] LL.B, LL.M in Criminal Justice and Human Rights, Lecturer at Wollo University School of Law, Attorney and Consultant at Law. The author can be reached at, mdsdmd203@gmail.com. The author is great full to anonymous reviewers for their scholarly insights and constructive comments on an earlier draft of this work. Any error remains my responsibility.

legitimacy, and proportionality, which necessitates the enactment of precise and balanced regulatory measures to preserve judicial integrity in the face of potentially prejudicial media dissemination.

Key words: Court Contempt, freedom of expression, Media, Ethiopia

Introduction

Freedom of expression is one of the subjects taking the center stage in legal policy debate and jurisprudence over the ages across societies. In contemporary societies, it has become a global concern as it helps to discover truth, foster democracy, and pursues individual self-development.[1] Cognizant of this fact, the UDHR enshrined freedom of expression as a fundamental and inherent right of citizens.[2] In similar fashion, the independence and impartiality of courts is a fundamental principle crystalized under international, regional and national legislative instruments.[3] Citizens have the right to be tried before an independent, impartial, and competent court of law. As the main guardian of human rights and freedoms, courts should be free from any kind of interferences that affect their impartiality and independence.[4] Some nations enacted court contempt law with the view to control unlawful interferences that hinder independence and impartiality of courts. [5]

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[1] The United Nations Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, 12 September 2011, Par.2

[2] Universal Declaration of Human Rights (UDHR) Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Art. 19

[3] Ibid.

[4] Vyas, Yash, "The Independence of the Judiciary: A Third World Perspective," *Third World Legal Studies*, (1992) *Vol. 11*, Article 6.pp. 131-144.
Available at, http://scholar.valpo.edu/twls/vol11/iss1/6

[5] Countries like India enacted Contempt of Courts Act in 1971 and Kenya also enacted

In the contemporary digital world, the media is a major player causing interplay between Freedom of expression and other institutional and individual rights. One of such instances is where the media disseminates information concerning judicial proceedings on a case under trial or to be tried. Particularly, where such court case is of political stuff with strong gravity, it inherently captures public attention and is susceptible to wide media coverage.

Consequently, the independence and impartiality of the judiciary on one hand and the right to freedom of expression on the other come into conflict. Some jurisdictions have an independent court contempt law which limits media freedoms in order to facilitate the impartial administration of justice.[6] On the contrary, proponents of freedom of expression argue that media are free to report on court proceedings for two stronger reasons. Firstly, they are free to disseminate ideas of all kind to the public, and secondly, to ensure public trial as guaranteed under international laws.[7]

This article explores the dilemma of these competing interests and some legal gaps under the Ethiopian laws in connection with court contempt and freedom of expression. Also, it looks into the subject from international and national law perspectives. The contents of the paper are organized in four sections. The first section gives an overview on the

similar legislation in 2016.

[6] Golder Vs. the United Kingdom, European Court of Human Rights, Appl. no. 4451/70, Judgment of 21February 1975, Para. 35. See also, Lingens Vs. Austria, European Court of Human Rights, Appl. no. 9815/82, Judgment of 8 July 1986, Para. 42. As per these decision, maintaining the authority and impartiality of the judiciary" a legitimate ground for limiting the right to freedom of expression.

[7] International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 16 Dec. 1966, art.19, see also, UDHR, Art. 19.

conceptualization of court contempt and freedom of expression. The second sections explore these competing interests from national and International law perspectives. Thirdly, the paper examines the legal gaps noticeable under Ethiopian legal system. Finally, it concludes based on the finding of this study.

1. The Notion of Court Contempt: an Overview

Court contempt is a generic term that describes an act or omission in a particular proceeding, which undermines the judicial system or destabilizes citizens from accessing justice.[8] It also refers to '[*an] act or state of despising, the condition of being despised, or a conduct that defies the authority or dignity of a court or legislator.'*[9] Any act that is unlawful, or that intentionally disrupts, obstructs, or interferes with the proceedings of the court, constitutes contempt of court. Apart from this definition, Court contempt is

> *[…] intentionally violating the dignity, reputation or authority of a judicial body or judicial officer in his judicial capacity; or publishing information or comment concerning a pending judicial proceeding which has the tendency to influence the outcome of the proceeding or to interfere with the administration of justice in that proceeding.*[10]

[8] Harshita Tomar and Nayan Jain, "Contempt of Court: A Challenge To Rule Of Law – A Critical Analysis," *Journal on Contemporary Issues of Law (JCIL), Vol. 2*, Issue 7, 2020, p.5

[9] Black's Law Dictionary, (8th ed. 2004), p.956

[10] Dawit G. Negusse, Contempt of Court: A comparative Study between South Africa and Ethiopia, *Open society law Review*, 2013, p. 4

According to this definition, any acts that have a direct or indirect tendency to affect the dignity, reputation or authority of a judicial body constitute court contempt. This act may take on the form of publishing or commenting the merit of pending cases (pretrial publicity).

In the contemporary digital world, due to the advancement of technologies media are disseminating and commenting on pending cases. In some instances, the media move to do the role of the judge by commenting and disclosing facts on a pending case particularly where the alleged case is sensitive and has political intent.[11] Such moves may result in adverse pre-trial publicity to the effect of undermining the proper administration of justice. [12]

Implying such impacts, court contempt is also defined by others as interferences, pre-trial discussions, or '*Sub-judice* comments which might influence those involved in forthcoming and/or ongoing proceedings'.[13] Court contempt law is designed to protect the independence and impartiality of the judiciary from any '*comments or publications which might scandalize the court*.'[14] M., Shukriah summed up the feature of such media related actions as '*any act done, or writing published with the view to obstruct or interfere with the due course of justice or the lawful process of the Court is a contempt of court*.'[15]

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[11] Shawn Marvin Flowers, Pre-Trial Publicity: Free Speech Versus Fair Trial, Magister Legum thesis, University of the Western Cape, South Africa, faculty of law, June 2017, at p.23

[12] Id. p.24

[13] Mohd-Sheriff, Shukriah, the Contempt Power: A Sword or a Shield? A Study of the Law and Practice of Contempt of Court in Malaysia, Durham Theses, Durham University. Available At Durham E-Theses, (2010), p.48 Online: Http://Etheses.Dur.Ac.Uk/536/

[14] Ibid.

[15] Id. p.51

1.1. Civil Court Contempt and Criminal Court Contempt

Of the act done, court contempt may be divided into civil and criminal contempt. Civil contempt is an act of willful disobedience to any judgment, decree, direction, order, writ or other process of a.[16] The main purpose of regulating civil contempt is to enforce court orders, to take coercive measures and to build public confidence to the justice system.[17] The public would undermine the administration of justice unless the order of courts has been respected.

On the other hand, Criminal contempt refers to any interference made to the administration of criminal justice or on the independence and impartiality of the judiciary.[18] Any acts that, "*disrupt[s] court proceedings, publications of comments or other acts which risk prejudicing or interfering with legal proceedings, or conduct that scandalizes the court is criminal contempt."*[19] The very purpose of regulating Court Contempt is to '*protect the public interest in ensuring that the administration of justice is not impeded in any way.'*[20]

While the nature of the contempt acts in civil and criminal courts vary, both need a critical eye in terms of whether they constitute the essence of court contempt vi-a-vis the principle of the right to fail trail.[21] The right to fair trial is fundamental and central human rights of

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16 Id, p.54, See also Background Paper On Freedom of Expression and Contempt of Court, International Seminar on Promoting Freedom of Expression With the Three Specialized International Mandates, Hilton Hotel, London, United Kingdom 29-30 November 2000, p.2, see also, A. Mcronald, Contempt of Court In Kenya, A Critical Analysis Of The Contempt of Court Act No.46 Of 2016, University of Nairobi, LL.M thesis, unpublished, p.17.

17 Ibid.

18 Ibid, see also, M, Shukriah, *supra* note 13.

19 Ibid

20 Ibid

21 Indian, Contempt of Courts Act, 1971, module,

citizens. For effective realization of this right, it is a pre-request to have independent and impartial judicial system that determines as to whether the act obstructs or had any objective tendency to interfere with the administration of justice. Thus, court contempt law plays a pivotal role in ascertaining judicial independence, reputation of the court and to shield any interference there to. [22]

In contemporary digital world, media freedom and fair trial rights are in conflict and sometimes overlap with each other.[23] The press tries to disclose information about the judicial proceeding to the public under the ambit of freedom of expression. Accordingly, the press claims such disclosure as a right of discharging the obligation to impart information to the public. This is due to the fact that freedom of expression encompasses the right to access information from any sources. Having said this, the next section will address the interplay of court contempt and freedom of the press at greater depth. Principles of fair trial on its part dictates that citizens have the right to be tried with space of responding to claims of the other party and defending the accusations thereof. To enjoy this right, the proceeding of the cases - the pretrial, while-trial and post trail stages - need to be free of adverse effects widely such as 'trial by media than by court'.

1.2. Justifications to Regulate Court Contempt

The judiciary is the fundamental institution with the power to adjudicate and settle disputes within the community. Having such power, it needs special protection so as to render effective administration of justice and

[22] Ibid

[23] Contempt of Court – Judicial Proceedings and Media Freedom, SALC Litigation Manual Series, on Freedom of Expression: Litigating Cases of Limitations to the Exercise of Freedom of Speech and Opinion, 2016.

rule of law. To these ends, nations have been enacting court contempt legislation in order to safeguard the court from any influences or interferences.[24] Different justification has been given to regulate court contempt. Yet at the core of this justifications stands out one goal : to *maintain the dignity of the judiciary and to safeguard the proceedings of the court from external interference*.[25] All the justifications underline that courts and judges should be free from any interference in adjudicating cases. Accordingly, court contempt laws are designed to protect the dignity of the judges and to shield them from insult, disorder and other misbehavior.[26] Most importantly, the main justification of proceedings for contempt of court is to empower courts 'effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented, trampled on or trammeled upon.'[27]

From these analyses, one could see that any interferences on the independence and impartiality of courts or hinder the proper administration of justice is court contempt. The media and individuals may disseminate information about pending trials. Such information may have potential danger, on the honor of the court, individual rights to fair trial, and erodes public confidence over the justice system. Thus, it is justified and reasonable to limit such publication or disseminations through contempt laws for the sake of proper justice system.[28]

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[24] Article 19, Background Paper, on Freedom of Expression and Contempt of Court, International Seminar on Promoting Freedom of Expression with the Three Specialized International Mandates, United Kingdom, London, Hilton Hotel November 29-30/ 2000, p.4 and the following.

[25] HarshitaTomar & Nayan Jain, *supra* note 8

[26] Aruhanga Mcronald, Contempt Of Court In Kenya, A Critical Analysis Of The Contempt Of Court Act No.46 of 2016, LL.M thesis, University of Nirobi, unpublished, p.26

[27] Ibid, see also Morris Vs. Crown Office, [1970] 2 QB 114, 122 by Lord Denning, p. 128.

[28] Freedom of Expression and Contempt of Court, International Seminar on Promoting

To sum up, court contempt laws are not only designed to protect the honor of the judges and insult, but also, to protect the administration of justice, public rights to fair trial and obstruction of independence and impartiality of tribunals.

2. The Concept of Freedom of Expression: An Overview

Freedom of expression as a concept dates back to Ancient Greek civilization, encompassing freedom to hold opinions, to disseminate and receive information of any kind and regardless of frontiers.[29] As a fundamental right, the legal recognition of this right was evolved in 1946, while the UN General Assembly passed one resolution recognizing 'freedom of information', which implies freedom to gather, transmit and publish information from anywhere, everywhere and without restraints.[30]

As an attendant move to this Resolution, the UN General Assembly adopted the UDHR in 1948 and it recognizes freedom of expression in its Art 19. Most importantly, the UDHR also extends the scope of the right to hold, seek/receive and impart information of any source, regardless of media or territories.[31] Undoubtedly, freedom of expression is the most fundamental and widely accepted human rights under international human rights discourses. Thus, it constitutes a bundle of rights, including the right to access information, the right to hold opinion and the right to express ideas.[32] However, freedom of

Freedom of Expression With the Three Specialized International Mandates, Hilton Hotel London, United Kingdom 29-30 November 2000, p.7

[29] Arlene W. Saxon house, Free *Speech and Democracy in Ancient Athens,* Cambridge University Press, 2006, p. 1-2.

[30] UN General Assembly, *Calling of an International Conference on Freedom of Information* (1946), UNGA Res 59(1), UN Doc A/229, A/261 Preamble.

[31] UDHR, *supra* note 2 Art. 19

[32] ICCPR, *supra* note 7 Art.19

expression is not an absolute right; it is subjected to limitation up on some exceptional circumstances.

Meanwhile, a certain right is as many of scholarly discourses stressed; the recognition of Freedom of expression has three main objectives.[33] The first goal pertains to discovery of the truth.[34] For society to attain and discover truth of their social and political world, it has to advance the ability to argue or criticize one another without restraints.[35] Therefore, freedom of speech paves the opportunity to get the truth, which is not discovered yet, and discloses the partial knowledge of the truth.[36]

The second rational for recognition of freedom of expression is for self-rule and Democratic participation.[37] By virtue of this justification, freedom of speech is fundamental prerequisite to build democratic government.[38] Hence, democratic government flourishes, when the peoples were well informed, have a say on public interest and participate in their systems of governance through communication of their will.[39] The third justification of freedom of expression is individual autonomy and self-development. Free Speech is essential for autonomous personal

[33] Devrim Kabasakal Badamchi, "Justifications of Freedom of Speech: Towards a Double-Grounded Non Consequentialist Approach", Philosophy & Social Criticism Journal, Vol. 41, No. 9 (2015), see also, The United Nations Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, 12 September 2011, par.2, see also, Handyside vs. United Kingdom, European Court of Human Rights, App. No. 5493/72, Judgment of 7 December 1976, Series A No. 24

[34] Gedion Thimotheos 'Freedom of Expression in Ethiopia: A Jurisprudential Dearth' *4 Mizan L.Rev.* (2010), pp.202-204

[35] Ibid , see also, Mendel, T 'Study on International Standards Relating to Incitement to Genocide or Racial hatred for the UN Special Advisor on the Prevention of Genocide' (2006), p.9

[36] Gedion T. (2010), *supra* note 34

[37] Mendel (2006), *supra* note 34

[38] Gedion T. (2010), *supra* note 34

[39] Ibid

fulfillment by making individuals to grasp reasoning skills and a sense of "self".[40]

In legislative discourses, the question worth pondering is whether freedom of expression is an absolute right, and if not what conditions would limit such a fundamental right. The next sections explore the place of freedom of expression under human rights instrument and the limitations thereto.

2.1 Freedom of Expression under Human Rights Instruments

The international bill of rights, i.e. UDHR and ICCPR recognizes the right to freedom of expression. The UDHR in its Article 19 dictates that,

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."* [41]

In this provision, the right encapsulates the right to Hold opinion, seek/receive information and impart information of any sources.[42] In similar vein, the ICCPR does the same in its Article 19 somehow in more explicit terms. To this effect, the ICCPR Stipulates:

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[40] Parekh. B, 'Is There a Case for Banning Hate Speech?' in Michael Herz, M and Molnar, P (Eds) The Content and Context of Hate Speech: Rethinking Regulation and Responses (2012), p.43

[41] UDHR, *supra* note 1. Art. 19

[42] General Comment No. 34, *supra* note, 1, Para.9; According to this comment, the right to hold opinions include the right to change an opinion in any case for whatever reason. Thus, it includes all forms of opinion: political, scientific, historic, moral or religious. Further, this right is not subject to restriction except it infringes the legitimate grounds for restriction.

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, orally, either in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For respect of the rights or reputations of others;*

(b) *For the protection of national security or of public order (ordre public), or of public health or morals.*[43]

Unlike the UDHR, the ICCPR provides that the right to freedom of expression is not an absolute right and lays down the grounds of limitation in specific provisions. In effect, although everyone has the right to freedom of expression, up on the fulfillment of three conditions (*three part tests*) it is susceptible for limitations. These conditions are prior prohibition or prescription of the act by law, legitimate aim and proportionality requirements.

Coming to the African Charter on human and people's right (ACHPR)[44], it articulates freedom of expression in slightly less stronger tone compared to the UDHR and ICCPR. The charter under Art.9 recognizes

[43] ICCPR, *supra* note 7, Art. 19

[44] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev.5, 27 June 1981 Art 7(1)

freedom of expression as a right to receive information and right to express and disseminate opinion.[45] Accordingly, the charter fails to recognize the right to hold opinion as a component of freedom of expression, begging a critical eye in Academic discourse.

2.2 Limitations of Freedom of Expression

Indeed, freedom of expression is not unlimited right and it is susceptible to justified restrictions. Despite the existence of variations on the extent of limitations, all human right instruments impose limitation on exceptional and justified grounds. According to the international jurisprudence, 'three part tests' must cumulatively be met to limit the enjoyment of a right.[46] These tests or requirements are principle of legality, legitimate aim and proportionality requirements. Detail discussions will be made on these tests in subsequent sections.

3. The Interplay of Court Contempt and Freedom of Expression under Human Rights Law: An Overview

In the corpus of international legislative discourse - both the (UDHR) and the (ICCPR) - enshrine the right to freedom of expression under Article 19, affirming not only the inviolable right to expression of ideas but also the corollary freedom to seek, receive, hold and impart information and ideas irrespective of frontiers. In a similar vein, the right to a fair trial before an independent and impartial tribunal is expressly recognized in Article 10 of the UDHR and codified in Article 14 of the ICCPR, thereby underscoring the centrality of judicial

45 Ibid. Article. 9

46 Gedion T. *supra* note 34, see, also ICCPR *supra* note 7, Art. 19

independence and procedural fairness within the international human rights framework. .

However at times, the right to fair trial as fundamental principle of justice and freedom of expression becomes two competing interests. From the point of view of principles of democracy, media freedom stems from public right to be informed.[47] The media prepare story about a criminal, the accused profile, comment on the outcome of the case, which also constitutes trial by media. However, media outlets may cast serious doubt on the independence and impartiality of the judiciary, as excessive or prejudicial coverage has the potential to compromise judicial neutrality, erode public confidence in the judicial system, and imperil the fair trial rights of the accused. Therefore, in first glance, there is media freedom and public right to be informed; on the other hand there are court contempt laws which aimed to protect fair trial rights and administration of justice. This section addresses how international human rights instruments strike a balance between this two c competing issues.

3.1. Court Contempt and Freedom of Expression under ICCPR

As court contempt is any acts that, Prejudices, interferes, obstructs or scandalizes the due course of any judicial proceeding or the administration of justice. No international instrument explicitly regulates court contempt. Yet, one can infer from the legislative intent of stipulation, other fundamental rights such as the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[48] The ICCPR, under Article 14 explicitly guaranteed

[47] Manasvika S., A Critical Study on Trial by Media with Special Reference to Right to Fair Trial, Christ University, MA thesis, January 2017, p.23 unpublished.

[48] ICCPR, *supra* note 7, Art 14

the independence and impartiality of courts as a fundamental remedial institution of human rights. As such it, it states that, "*...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*[49]

Having such stipulation, The ICCPR general comment 32 makes the independence and impartiality of courts as an absolute right and free of expression.[50] As a fundamental value, impartiality requires that, judgments not to be influenced by personal bias or prejudice, not to harbor preconceptions about cases before them, not to act in manners that improperly promote the interests of one of the parties to the detriment of the other.'[51] Thus, any interferences, acts or influences that directly or indirectly affect the administration of justice or independence or impartiality of judges or tribunal is court contempt. [52] As such, the notion of court contempt constitutes, any acts that, Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding; or obstructs or tends to obstruct, the administration of justice in any other manner.[53]

Coming to the point of departure, the ICCPR in its Article 14(1) stipulates:

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[49] UN human rights committee general comment no. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 13

[50] Id. Paragraph 19

[51] Ibid.

[52] Anteneh Geremew Gemeda, Interpretative practice of Contempt of Court: The Interpretative Practice in East Gojjam Courts, *Elixir International Journal* Law 133 (2019) pp. 53529-53538

[53] USA Court Contempt Act.

> *"…the press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice… "*[54]

A closer look into this provision suggests that, although the press has the right/ duty to report on judicial proceedings, it is not an absolute privilege. The court is authorized to exclude the press, if it holds the conviction that, publicity has the danger in the administration of justice, public moral/ order or privacy of the parties. Thus, by virtue of this provision, court contempt can be a ground to limit freedom of the press.

3.2. Court Contempt and Freedom of Expression Under Regional Human Rights System

The African Charter on human and people's right also recognizes that, everyone has the right to a fair hearing by a competent, independent and impartial tribunal.[55] In addition to this, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, also guaranteed that:

> *"A judicial body shall base its decision only on objective evidence, arguments and facts presented before it. Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure,*

[54] ICCPR. *Supra* note 7, Art. 14(1)
[55] ACHPR. *Supra* note 44, Art.8(1)

> *threats or interference, direct or indirect, from any quarter or for any reason."*[56]

As implied in this provision, in African fair trial jurisprudence, the independence and impartiality of courts and judges has special concern. Because the guideline prohibits any external as well as internal influence or interferences that affects the judicial impartiality of judges. In addition, the UN basic principle on the Independence of the Judiciary, which is adopted in 1985, also lays down a benchmark to regulate ethical code of conduct of judges. This UN basic principle goes to states that,

> *A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.* [57]

Coming to the pivotal point in this legislative statement, independence of the judiciary is required to be autonomous to adjudicate cases by applying the law to the facts.[58] The judges should perform their tasks without interference from other organs of government or, they can be subordinate to the other branches of public Authority.[59] Thus, the

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[56] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples' Rights, Banjul, the Gambia, 2003, section A(5)(a)

[57] UN Basic Principles on the Independence of the Judiciary, UNHCR, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1

[58] Shewn Marvel. *Supra* note 10.

[59] Ibid.

judiciary must be independent as an institution and individual judges must enjoy personal independence within the judiciary and in relation to other institutions.[60]

To this effect, impartiality connotes the state of mind of a judge or tribunal towards a case and the parties to it, and requires judges not to harbor preconceptions about the matters brought before them, nor to act in ways that promote the interests of one of the parties.[61] It also refers to the absence of sympathy, hostility or bias to either of the parties to the case. The judges should be free from any preconceived ideas/ information over the cases and partisan to the parties, rather it should decide cases based on the law of presented facts. [62]

3.3. Limitation of Freedom of Expression and Court Contempt

As reiterated in other sections of this paper, the right to freedom of expression is limited in different international legal instruments. Article 19(30 of the ICCPR is one of such legislative provisions that provide for permissible restriction on this right. The underlining reason behind this limitations are to strike a balance between freedom of expression with the rights of others and public interests.[63] As such, the ICCPR recognizes restrictions on freedom of expression upon the fulfillment of three requirements which are widely known as the three part test. The next sections explore these tests at greater depth.

A. Limitations Must be Provided by Law

[60] International Commission of Jurists (ICJ), International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner Guide No. 1. Geneva: ICJ, 2007, p. 27.
[61] Ibid.
[62] Shewan M. *Supra* note 11, p.19
[63] Ibid

As it is evident from the term, '*provided by law'* the restriction should be promulgated in states pre-enacted law.[64] Any restriction must be in accordance with a law. This includes primary legislation, as well as regulations and other legally binding documents adopted pursuant to primary legislation. Under this test, the power to authorize restrictions on freedom of expression is essentially vested in the legislative branch of government. The issue here is, about what the law should fulfill. Regarding this question, the UN Special Rapporteur has states a number of criteria that the laws must fulfill.[65]

It is not enough simply to have a law. The law must meet certain standards of clarity and accessibility. If restrictions are unduly vague, or otherwise grant excessively discretionary powers of application to the authorities, they failed to meet the main purpose of this part of the test, namely to limit the power to restrict freedom of expression to the legislature. Unduly vague rules may also be interpreted in a manner that gives them a wide range of different meanings.[66] It would be inconsistent with the principles of democracy to give officials the power to make up the rules as they go and this would also not be fair to individuals, who should be given reasonable notice of exactly what is prohibited.

Despite the fact that freedom of expression is a fundamental right, it is subjected to legal limitation. States has the duty to take legislative measure to protect the rights of others. Unregulated speech on pending

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64 Ibid. See also Bresner, K 'Understanding the Right to Freedom of Expression' (2015), p.26 available at, https://www.jhr.ca/wp-content/uploads/2017/06/Understanding-Freedom-of-Expression-Primer-ENG-web.pdf accessed, December, 24/2021

65 Frank. R, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2010, A/HRC/14/23 Para. 79

66 Ibid, Para 79 (d-f)

cases poses danger on impartiality and independence of judges, fair trial rights and public confidence on the justice system.[67]

Therefore, the ICCPR, at least tacitly empowers states to enact court contempt laws and to restrict freedom of expression so as to protect the administration of justice. However, Court contempt laws must be construed exceptionally, that, should not totally limit Medias from expressing ideas on the judicial system.[68]

B. Pursuing a Legitimate Goal for Restriction

Justifications, values or possible rationale strongly requires the limitation of a right in question. As per Article 19(3) of the ICCPR, the restrictions on this right are mainly meant to ensure : respect for the rights and reputations of others, protection of national security, public order, and public health or morals. To this end, the UNHRC make clear that this list is exclusive, so that restrictions which do not serve one of the listed aims are not valid: Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[69] Furthermore, the restriction must be primarily directed at one of the legitimate aims and serves it in both purpose and effect. [70] At this juncture the general comment defines the term '…rights and reputation

67 Shewan. *Supra* note 11, p.56-58.
68 Frank.R, special reporter, *supra* note 65
69 General Comment No. 3. *Supra* note 1.
70 Ibid

of others' under Article 19(3) as *'human rights as recognized in the Covenant and more generally in international human rights law.*[71]

Coming to the regulation of Court contempt, it aims to protect fair trial rights, independence and impartiality of courts, and public confidence over the judicial system. From the wording of Article 14 of the ICCPR, one could see that all these fundamental principles were recognized, and states have the duty to enact court contempt acts to protect these rights. Now, therefore, expressions that, prejudice, interferes with, scandalize, obstruct the administration of justice or endanger public confidence should be restricted. Accordingly, court contempt laws enacted with the view to restrict such value are justified according to Article 19(3) (a) of the ICCPR.

C. Necessity and Proportionality

While restrictions are made, they must be necessary and proportionate for the protection of the legitimate aim. The UNHRC on General Comment No. 34 affirms the necessity and proportionality principles.[72] Necessity test requires serious standard that justify the interference. Justifying these grounds, the European court of human and peoples right (EHRC) states:

> *Freedom of expression, as enshrined in Article 10 of the European Convention on Human Rights is subject to a*

[71] Ibid. Para 28.

[72] Ibid para.9; See also, Bresner, K 'Understanding the Right to Freedom of Expression' (2015), p.26 available at http://ihrp.law.utoronto.ca/utfl_file/count/media/Understanding%20Freedom%20of%20Expression%20Primer%20ENG%20-%20web.pdf/ Last accessed, February 5, 2019

> *number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established."* [73]

Apparently, the court identifies four yardsticks that determines necessity test. First, there must be *a pressing or substantial need* for the restriction that; minor/ insignificant threats are not legitimate aims. Second, the method should comply with least intrusive manner of protecting the legitimate aim or in less intrusive ways which would accomplish the same goal. Thirdly, the limitation must impair the right as little and should not be 'overbroad'. Lastly, the limitation should be proportionate. It involves 'weighing the likely effect on freedom of expression against the benefits of the restriction in terms of the legitimate aim which is sought to be protected.'[74] In case the danger to freedom of expression outweighs the benefits, a restriction cannot be legitimate, believing that freedom of expression is a fundamental human right. Although the application of ECHR decision is limited only on European countries it is important for other countries as a reference for interpretation.

The UNHRC in general comment No. 27 observes that:

> *restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their*

[73] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art.10. See also, American Convention on Human Rights (1969), Art.13. ACHPR (1982), *supra n*ote 43, Art. 9 and 10

[74] Gelana Tolasa Sarbesa, Regulating Hate Speech In Ethiopia: A Human Rights Perspective, LLM thesis, Jimma university, college of law and governance, 2017, p.5, unpublished

> *protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.* [75]

The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. It notes that, When a State party invokes a legitimate ground for restriction of freedom of expression; it must specifically demonstrate the precise nature of the threat, the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

In general, we can conclude that the right to freedom of expression is restricted when the above three criteria (legality, legitimate aim and necessity/proportionality) has been fulfilled.

4. The Interplay of Court Contempt and Freedom of Expression under Foreign Jurisdictions.

The competing interests underlying freedom of expression and court contempt have been regulated by different jurisdiction in various manners. Some countries have enacted independent court contempt act and others regulated the issue as part of their criminal law. From the very outset, court contempt is a broad and widely practiced common law doctrine. [76] In this system, contempt of court may be committed before

[75] UN Human Rights Committee, General Comment No. 27, on Limitation and Restriction of Rights, 12 September 2004, CCPR/C/GC/27, paragraph 28.

[76] Background Paper on Freedom of Expression and Contempt of Court, International Seminar on Promoting Freedom of Expression With the Three Specialized International

the proceeding or outside of the court room. This section will examine the way foreign countries treat court contempt and freedom of expression.

I. England

As the main proponent of the Common law countries, England enacted its court contempt Act in 1981.[77] According to this act, '*conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.'*[78] This act recognizes a "strict liability rule" which prohibits publications, speeches, writings, or other communications in whatever form, which is addressed to the public at large or any section of the public on active cases.[79] In addition, the strict liability rule applies where the information in question has substantial risk that seriously impeded or prejudiced the course of justice in the proceedings. [80]

Nevertheless, the press has the right to publish or disclose information about judicial proceedings, so as to discharge its obligation to impart information about the justice system. Be this as it may, the right to public trial is a fundamental fair trial right that robes the public and the Medias to attend and to report the atmosphere of court proceedings.[81] Yet, this right is subject to limitations. The England law prohibits and impose strict liability rule against any publications, speeches, writings or others which tends to substantially affect the administration of justice or the rights of the parties as crime of Court contempt. In other words,

Mandates Hilton Hotel, London, United Kingdom, 29-30 November 2000.

77 England Contempt of Court Act 1981, Chapter 49, an Act to amend the law relating to contempt of court and related matters, 27th July 1981]

78 Id. Art.1

79 Id Art. 2(3)

80 Id Art 2(2)

81 ICCPR. *Supra* note 7, Art.14

although Medias has the right to express and share ideas, the content should not tend to contempt a court or obstruct the administration of justice.

II. India

From African jurisprudence, Kenya can be a model in legislating an independent court contempt Act. It enacts 'The Contempt of Court Act No. 46/2016' in 2016 that governs acts which constitutes criminal as well as civil contempt. This law is a verbatim copy of the Indian court contempt act of 1971; hence, it regulates the issue in similar fashion to what the Indians do. Accordingly, under the Kenyan law, any publications or information which obstructs, scandalize, interfere or prejudice the administration of justice is criminal court contempt.[82]

5. The Interplay of Court Contempt and Freedom of Expression under Ethiopian Law: an Overview

Ethiopia has not adopted specific and independent court Contempt law so far. Thus, to determine an act as court contempt or otherwise, one has to interpret pertinent provisions in the criminal code and the civil Procedure code. These legislative documents constitute a few scattered provisions that aimed to protect the honor and reputation of the court. [83]

[82] Republic of Kenya, The Contempt of Court Act No. 46/2016, 2016 article 4(b), Published by the National Council for Law Reporting with the Authority of the Attorney-General, www.kenyalaw.org

[83] Civil Procedure Code of the Empire of Ethiopia. Proclamation No. 52/1965. Negarit Gazeta, 25th Year, No. 3, Addis Ababa: 1965, Art. 480 & 481. See also, The Criminal Code of the Federal Democratic Republic of Ethiopia. Proclamation No. 414/2004. Federal Negarit Gazeta, 9th Year, No. 1, Addis Ababa, 2005, Art. 449 The criminal code Article 449 and the civil procedure code article 480 and 481.

This fact prompts the move to examine the position of the Ethiopian laws against the international instruments. Ethiopia is a party to major fundamental human rights instruments such as the UDHR, ICCPR, and ICCSER which are required to be integrated to the domestic laws of the land.[84] Once a state ratifies these instruments, it is duty bound to enforce and integrate the principles there to. In this part of the analysis in the paper, the regulation of court contempt and press freedom will be examined, from the view of Ethiopian laws.

5.1. The FDRE Constitution

Although the constitution fails to provide explicit provision as to what exactly constitutes court contempt, it recognizes the independence of the judiciary in general terms.[85] As per Article 79(2), it explicitly states that, Courts of any level shall be free from any interferences or influences of any governmental body, government official or from any other sources.[86] A closer look into this provision suggests that, any kinds of interferences or influences that jeopardize the administration of justice are outlawed by the constitution. Most importantly, the constitution provides the sources of interferences in illustrative manner. The phrase '… any other sources' refers private/public domains including the medias to abstain from interference. Accordingly, the press or the Medias are prohibited from disseminating information of such a nature that influences with the court, tends to contempt or jeopardize the outcome of the judgment.

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[84] UN Office of High Commission of human rights, Ratification Status of Ethiopia, available at, http://tbinternet.ohchr.org/-layouts/15/treatyBodyExternal/Treaty.aspx?countryID=59&Lang=EN

[85] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Article 79

[86] Ibid

In addition, the constitution also recognizes justified limitations to freedom of expression under Article 29(6).[87] The constitution authorizes to place legal limitations to protect the well-being of the youth, and the honor and reputation of individuals and human dignity.[88] At this juncture, the constitution deviates from the international instruments which make "*rights of others*" as justified limitation.[89] The constitution sets the honor, reputation and human dignity as an exception to freedom of expression. Nevertheless, thanks to Article 13 (2) of the constitution, chapter three should be interpreted in light of international instruments. Thus, the "*rights of others*" could justify limitations. [90]

In most cases, the Medias may disseminate information about pending cases or one under investigation, which has the tendency to divert the outcome of the trial.[91] Before the court starts its investigation or proceeding, the Medias may comment or publicize information of such nature that obstructs or scandalizes the proceeding. Consequently, the public will expose to such pretrial publicity and, gives its judgment on pending cases before the decision of the court. The FDRE constitution fails to explicitly address such issues, in fact it is general in its nature, hence not expected to govern detail matter. In due course, the legislator

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87 Id, Art. 29(6)

88 Ibid.

89 ICCPR Art 19

90 FDRE Constitution. *Supra* note 93, Article 13(2)

91 In Ethiopia, the Medias are disseminating information regarding pending cases or suspected persons. Be this as it may documentary films also prepared on suspected persons, that narrates the story of the crime, the identity or character of the accused and it comments as if the suspects are terrorists. Among this documentaries, Jihadawi Harekat Weyane Propoganda Film About Ethiopian Muslims', available at, https://www.youtube.com/watch?v=SFx997viTWY&t=1955s last accessed December, 24/2018, *Menabawi metac* documentary, available at, http://www.youtube.com/watch?v=kh841d3ycam&t=2634s last accessed june 4, 2019.

should enact specific court contempt law so as to protect the justice system, independence & impartiality of judges, fair trial rights and public confidence to the justice system. Therefore, a closer look in to constitutional provision justifies the regulation of court contempt rules which criminalize Medias from disseminating information that affect the administration of justice.

5.2 Court Contempt under Ethiopian Media Proclamation No. 1238/2021

The Ethiopian Government tries to modernize some legislation after the current administration came to power. In due course, the government amends and changes different laws including the Media law, so as to enable citizens to better exercise their rights. This new legislation on the media was enacted with a view to remove structural and institutional impediments that hinder the right to freedom of expression as recognized under the constitution and international instruments.[92]

Further, it also aims to accommodate the social, economic, political and technological developments and to make the media as a building block of democratic society.[93] This legislation brings significant changes compared to its predecessor. The new law tries to incorporate new ideas which are not governed by the old legislations.[94] Coming to our point of concern, it is worth examining e the provisions of this legislation in terms of how it governs the interplay between freedom of expression

[92] Ethiopian Media Proclamation No. 1238/2021, Federal Negarit Gazeta No. 22, 2021Addis Ababa, 5th April, 2021, preamble.
[93] Ibid.
[94] Freedom of the Mass Media and Access to Information Proclamation, 2008, Federal Negarit Gazetta., Proc.No.590, 14th year, No.62,

and court contempt and how it strikes a balance between these two competing rights.

The proclamation, in its Article 68 and the following provides for a content based restriction.[95] The provision strictly requires broadcast Media to be balanced, impartial in reflecting diverse views, ensure the accuracy of sources and to take measures to correct mistakes in transmitting ideas.[96] These principles are very important in order to build health and public watch dog media environment. Be this as it may, the provision also provides the content of information which should not be transmitted by same Media. [97] It states:

Any program or news transmitted through broadcasting service shall not:

a) Violate the right to privacy of everyone subject to the requirements of the public interest;

b) Offend human dignity;

c) Cause actual harm, or encourage behavior which is harmful to health or safety;

d) Incite crime or disturbance of peace and security; and

e) Incite hatred or contempt on grounds of race, language, national or ethnic origin, color, religion, gender, age or mental or physical disability[98].

Looking into these provisions, one could note that the broadcast Media should abstain from disseminating/ transmitting information of such a content so as to strike a balance between freedom of expression and

95 Media proclamation. *Supra* note 100.
96 Id. Article 68(1)
97 Ibid.
98 Ibid.

individual rights. The question worth pondering at this point is whether Media are allowed to transmit information on pending cases or a case under investigation. What will be the rights of individual suspect and what if the information has such a content that obstructs, scandalizes or contempt the court and the Administration of justice? The proclamation is silent on this issues and it begs a question of controversy among the media, academia, politicians and other stakeholders. The issue remains unresolved and its effect evident at times when the Media are disseminate information about pending judicial proceeding, particularly where the case is sensitive, of political nature or offences against the government.[99]

5.2. The FDRE Criminal Code

An act to be considered as a criminal conduct, it must fulfill three basic ingredients: it must have moral (mental), material and legal elements.[100] Looking into the Ethiopian criminal code in this light, one could see it The FDRE criminal code tries to regulate court contempt in a less strong tone under Article 449 and the following provisions. The code in its Article 449 defines court contempt as, an act that, "… *in any manner insults, holds up to ridicule, threatens or disturbs the Court or a judge*

[99] Different documentary films about suspected persons have been conducted in Ethiopia so far. Unfortunately, the medias comment on the crimes, it discloses the dangerous nature of the suspects, pre mature evidences, and other information which have to be proved with in the court proceeding. As an example it is easy to look some documentaries of Ethiopian Television (EBC) like, Jihadawi Harekat Weyane Propoganda Film About Ethiopian Muslims', available at, https://www.youtube.com/watch?v=SFx997viTWY&t=1955s last accessed December, 24/2018, *Menabawi metac* documentary, on former METAC officials, available at, http://www.youtube.com/watch?v=kh841d3ycam&t=2634s last accessed June 4, 2019.

[100] The FDRE Criminal Code *supra* note 91.

in the discharge of his duty; or (b) in any other manner disturbs the activities of the Court."[101]

This provision of the code is similar to the Indian definition given for Civil Contempt. The To have a cleared picture of it , it is worth examining as what kind and content of information's scandalize, prejudice or interfere with the administration of justice. The criminal code fails to regulate such issues under the ambit of crime of contempt. However, in other provisions of the code, it tries to regulate some acts as criminal contempt made by other jurisdictions. [102] For example, under Article 451, the code states that, *whoever publishes information, a note, a précis or a report which is inaccurate or distorted concerning judicial cases which are adjourned, proceeding or pending, is punishable ...*[103]

This provision of the code prohibits only inaccurate and distorted publications of pending cases. The question here is what if the information or publication is a real story that has the tendency to ridicule, scandalize, interfere with the independence of the judge or endangers the rights of the accused. Although the information is accurate it may develop negative attitude in the mind of judges. In addition, a publication which is accurate in the minds of the writer of the story may be false after the final proceeding. The accuracy or otherwise of any information over the judicial proceeding overt after the judges examine evidences and pass final verdict. Even though the publication is true, it may potentially undermine the accused's right to fair trial and presumption.[104]

101 Id. Art 449.
102 Id. Art 451
103 Ibid.
104 Shewan marvel. *Supra* note 11, p.56

Be this as it may, the criminal code also tried to criminalize Tendentious Publications intended to pervert the Course of Justice.[105] The provision of the code reads:

> *Whoever, in any manner whatsoever, publishes or spreads news, a note, a precis, a criticism, a report or a pamphlet which is inaccurate, or known to be tendentious, or which distorts the facts, and which has been draw up for the purpose of influencing a judicial decision in a case being or to be tried, whether by informing the accused person or his accomplices or by acting upon the feelings of the judge, jurors, witnesses, experts or officers of the Court generally, Is punishable with fine not exceeding one thousand Birr Or simple imprisonment not exceeding six months.* [106]

Off course, this provision again tries to govern distribution of tendentious information's on case being or to be tried. However, it again fails to forecast and regulate accurate publications on pending cases that has potential danger over fair trial rights and independence of the judiciary. Because: Firstly, the provision prohibits only false or erroneous information and it can impliedly be inferred that, it allows the dissemination of accurate information on pending cases, though it have negative effect on independence and impartiality of judges . However, according to Devika and Shashank who note on assessment parameters, *'... Even if the person making the comment honestly believes it to be*

105 FDRE Criminal Code. *Supra* note 91. Art 457
106 Id. Art 457.

true, still it is a contempt of Court if he prejudices the truth before it is ascertained in the proceedings.'[107]

Underlying the remarks of these scholars is that, the accuracy or otherwise of information would be ascertained after dissemination and the public or judges heard the information. When the judge hears this information whether accurate or in accurate, they may perceive something about the case because the accuracy of the information will investigate after its transmission or the judges hears the alleged publicity. Furthermore, courts are duty bound to ascertain the accuracy of a charge based on the evidence presented to it. When the law gives a right for Media to disclose accurate information on pending cases, it is an intervention on the function of the court to ascertain the truthfulness of certain allegation. This is because once the media disclosed the information, before the court conduct trial and hears evidence, it may affect the perception and position of judges and judges may relied on the publicity of the media and failed to investigate facts based on evidence properly. This phenomenon, which is widely known as trial by media than by the court, is globally common in many jurisdictions.

Therefore, the Ethiopian criminal code doesn't regulate the transmission of accurate information in the eyes of the media. However this is contrary to presumption of innocence. Although a person commits a crime, he is presumed innocence until the court decides guilty. But according to the above provision, the media can publicize as if the person is criminal once the media believes that the information is accurate in the absence of convection by a court of law. Such kind of

[107] Devika Singh and Shashank Singh, 'Media Trial: Freedom of Speech Vs. Fair Trail,' *IOSR Journal of Humanities and Social Science (IOSR-JHSS), Volume 20*, Issue 5, Ver. IV (May. 2015), pp. 88-94

publicity is very dangerous to the right to fair trial, exposing parties to be tried by media than by the court, unless properly regulated.

Secondly, the act should be done intentionally to influence a judicial decision in a case being or to be tried. Here the required mental element is intention and the provision doesn't take negligence into account negligence. At this juncture it important to ask: what if the media publicize information other than the purpose to influence judicial decision? For example, the media may publicize accurate or inaccurate information on pending cases, just to give information to the public about the justice system or to get public eye. Then, judges as one part of the community may hear this publicity and take some perception about the case. One need to bear in mind that, it is not to influence the decision of the court but indirectly; it may influence the decision of the court. On the other hand, there are reporters and journalists who are motivated by commercial ends. Most Medias may report high profile criminal pending trials for purposes other than influencing judicial decision such as, to generate monetary benefits, to suck up public attention/perception to the media and others. The criminal code does note foresee such instances and remains silent over it, but still the judges may hear such reporting and it may bias their judicial decision.

Thirdly, it is too difficult to investigate whether the information is disseminated intentionally or with negligence as far as it is exposed to subjective interpretation. Further, it is vague and the media will use the intention element as a defense to escape from criminal punishment.

Therefore considering this gap, the author holds that the criminal code also failed to regulate criminal court contempt comprehensively. It only prohibits in accurate information on pending cases which is made intentionally to influence the decision of the court. In due course,

Medias may use this as a justification to escape from penalties, after the dissemination of adverse pretrial publicity.

6. Major Legal Gaps under Ethiopian Laws.

While different sets of legislative intent underlie the stipulations regarding court contempt, one can still notice caveats of ambiguity and inconsistency among the different legislative sources of Ethiopia. The Ethiopian Criminal Code as well as media law suffers clarity as far as the regulation of court contempt is concerned. This legislative gap in turn begs a problem in the practical application of freedom of expression and court contempt. The next section will be dedicated to examining the major contentions over this issue pervading the practice world and the scholarly discourse. As discussed earlier, the Ethiopian Mass Media laws in no way deals with the interplay of court contempt and freedom of expression. Further, it failed to balance this competing rights / interests in its legislative discourses. By the same token, the FDRE criminal code failed to regulate the issue clearly, and adequately. Consequently, Ethiopian media are disseminating unregulated information on pending cases in many disruptive formats such as documentary films.[108] This in turn have adverse effect on the administration of justice and the right to fair trial as discussed in subsequent sections.

[108] In Ethiopia many documentary films had been conducted on pending criminal cases. Among few, On Jahadawi Harekat documentary, the suspect totally admits the allegation against them. particularly one of the suspect, Aman Assefa confess the whole allegation on the documentary and he also disclosed other hidden evidences which is likely affect the fairness of the trial. See also, Ustaz Abubeker Ahmed Interview with journalist Habetamu Ayalew on ESAT television, available at, https://www.youtube.com/watch?v=1GbA4QWaOp4, last accessed july, 2, 2019. On this documentary he said that, the documentary was made through coercion and the suspect confesses an act which is not performed by them. The defense attorney Temam Ababulgo also claimed to the trial court that, the documentary was made through influence and it affects the suspect's right to fair trial

6.1. Unregulated Media Freedom and its Harm on the Administration of Justice

The Medias are the fourth estate which plays a pivotal role in controlling government, disclosing information and to foster democracy. To this end, the media should be free from interferences in collecting, disseminating and holding information. As Mackeown states, 'democracy is best served through a number of opinions being aired freely.'[109] Accordingly, '*if the government involved in regulation of certain ideas through prohibition, the government would no longer be democratic, and thus its citizens could no longer be free and equal persons.*'[110] However, this does not imply to justify that. The Medias should be free of regulations and they should confer absolute freedom. If the media get absolute freedom to express any information without any limit, it will undermine the social integrity and other fundamental values. Coming to our point of concern, although the media play an important role for democracy, truth and self-development, it may have also negative consequences unless it is properly regulated. In this part of discussion the effects of media from the view of court contempt will be discussed.

I. Independence of Judiciary

[109] Mckeown, T. 'Hate Speech and Holocaust Denial: The Prohibition of False Historical Discourse in Modern Society' (2014) LLM Research Paper on file at Faculty of Law Victoria University of Wellington, p.33.

[110] Shewan Marvel. *Supra* note 10

The Black's Law Dictionary also defines Independence as '*the state or condition of being free from dependence, subjection, or control*.'[111] Thus independence of the Judiciary implies that, first the mind set up of judges should be free from any kind of influences, pressures, interferences of any sources.[112] In second place, independence of judiciary revolves around the institution itself; hence, the court should be free from any organs or persons intervention in its legal authority. [113] This fundamental principle should be protected by fundamental regulations to enhance effective administration of justice. However, in contemporary world, this principle is eroded by different wings and the Medias, too. The Medias publish and disclose information which endangers the independence and impartiality of the judiciary, particularly on cases which is under proceeding. In this part, we will look into some of publicities/ information which have such a problem.

In most cases, the Medias publish, comment or reflect on the merits of the case which is under court proceeding or under police investigations. Furthermore, the Medias disclose premature evidence, prior record of the Accused, interview of government officials and witness and others. This, in turn may bring trial by Media, which usurps the functions of the courts by pronouncing on the guilt of an accused prior to a court of law.[114] Evidence to be used at the trial may be published in newspaper or transmit by Media and discussed widely. Where the media publish reports on matters still to be decided by courts, including evidence to be

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111 Black's Law Dictionary West Publishing co. 1979 at 769

112 Garba Umaru Kwagyang and Magaji Chiroma, A Comparative Analysis Of The Independence Of Judiciary In , Nigeria And Malaysia, Journal Of International Academic Research For Multidisciplinary Impact Factor 1.393, ISSN: 2320-5083, Volume 2, Issue 4, May 2014, pp. 299

113 Ibid.

114 Shawn Marvin. *Supra* note 11

presented and the likely outcome of the cases, they are interfering with the functions of the judiciary.[115] Such discussion and debate do not circumvent judges and may exert pressure on them to decide a matter in a certain way. The task of adjudication is not an easy one and is made all the more difficult by adverse pretrial publicity. Where trial by media interferes with or disrupts the functions and duties of the judiciary in this manner, right to fair trial comes to an end.

In one notable case at Canada respondent Ahmad points out, '*Stir caused by media does not leave the judges untouched. Undoubtedly, judges are human beings and the pressure created by the media, too, influences them.'*[116]

In another notable case, Justice Frankfurter points:

> *No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forebears how powerful the pull of the unconscious and how treacherous the rational process is ... and since Judges, however stalwart, are humans,…Thus, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print ... It is a condition of that function – indispensable in*

[115] Gerald F. Uelmen, 'Ethics, Media and the O.J. Trial, International Society of Barristers Quarterly', 1995, pp. 395-404, at p.400

[116] Ahmad F. 'Human Rights Perspective of Media Trial' (2009) *Asia Law review Quarterly Volume 1, no. 47*, p. 58. See also Her Majesty the Queen v. Fahim Ahmad, et al. supreme court of Canada, 2011, constitutional law case no.33066, available at, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7918/index.do last accessed May 21/2022.

> *a free society – that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence.* [117]

In a similar vein, in *Rex Vs. Parke,* Wills J. states about the Media pretrial publicity that:

> *I think It is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him, would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty.* [118]

As a matter of fact, judges are human beings and they can be easily influenced by what they hear, observe and smile from the external community. In addition , judges as a part of the community they may be heard media reports, documentaries, comments or any publications about pending cases or a case under investigations particularly when the case is sensitive having political issues. Consequently, it may affect the independence and impartiality of judges. Thus, any act which contravenes the independence and impartiality of the court or influences on the administration of justice is crime of contempt and it must be properly be regulated.

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[117] Pennekamp vs. Florida, U.S. Supreme Court 1946, file no. 328 US 331 at 357, available at, https://supreme.justia.com/cases/federal/us/328/331/ last accessed, May, 02/2022.

[118] R v. Parke: (1903) (2) KB 432, as cited by law commission of India. *Supra* note 87, p. 197

II. The Right to Presumption of Innocence

The international Bill of rights recognized that every accused person has the right to presumption of innocence until proven guilty.[119] Most importantly, this fundamental principle requires the prosecutor's burden of proof beyond reasonable doubt to make the accused convicted. However, in contemporary digital world, the right to presumption of innocence is extensively eroded by adverse media publicity.[120] The Medias may declare the guiltiness of an accused; evidence to be used at trial is publicized widely and provokes the public to speculate on the merits of the criminal prosecution. Following this information, the public may declare the suspect, detained or arrested person as a criminal, causing presumption of innocence to be buried. Unfortunately, as part of the community judges may hear the information of the media and their mind will be affected by media provocation. This is because, presumption of innocence revolves on the mind of judges and the mind of judges must be free of prior information. Consequently, Media may provokes or scandalize the fault or guiltiness of the Accused and the judges may declare the suspect as criminal due to media pressure without trial hearing and examining evidences presented. Thus, judges will ignore presumption of innocence as a fundamental right. As discussed earlier any acts which scandalize or hamper the administration of justice is a court Contempt. Thus it needs strong regulation and the Medias should escape from provoking and scandalizing pretrial publicity so as to protect presumption of innocence.

III. The Harms on Equality of Arms

[119] UDHR art. 11/2, *Supra* note 2 and ICCPR art. 14/2, *Supra* note 7

[120] Shawn Marvin. *Supra* note 11

It is undeniable fact that there must be at least two parties in any court proceedings. These parties must appear and adjudicated equally for all procedural and substantive purposes.[121] The principle of Equality of arms requires that, all parties to the case must be granted the right to access to justice without any discrimination. Any kind of favor, assistance, preferences or special privileged designed to either of the parties are against the principle of equality.[122] The court should give equal opportunity in hearing evidences and defending the allegations and it should conduct the trial in balanced way. However, it is commonplace to see the trespassing this principle in one or another way. Before the investigation starts or the trial is being conducted, the media disclose information about the background of the accused, prior conviction, premature and untested/unproved evidence to the public.

This, in turn, may erode the right equality of arms in two ways. Firstly, the judges as member of the community may preconceive due to the publicity heard. Accordingly, the judges will not adjudicate the case genuinely in free and innocent mind setup. Be this as it may, the judges will become hesitant to examine evidences of both parties rather, and judgments may be made as per the information of Medias.[123] Secondly, in criminal matters the prosecutor has the burden to prove its allegation beyond reasonable doubt.[124] In other words, the public prosecutor should convince judges that the accused has committed the crime. However, this duty of the prosecutor will be too demanding due to the

[121] Lawyers Committee for Human Rights, 'What is a Fair Trial? A Basic Guide to Legal Standards and Practice, 2000, pp 1.

[122] Temminck Tuinstra, J. P. W. (2009). Defence counsel in international criminal law. [PhD Thesis, fully internal, Universiteit van Amsterdam], p.145-149.

[123] Id

[124] Worku Y. Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases , *Mizan Law Review, Vol. 8, No.1*, pp 263-268.

Media's pretrial publicity. Where judges are already convinced by what the Medias publicize, they may not examine the admissibility or truthfulness of the evidence presented by prosecutor. On the contrary, judges will give little credit for the defense or evidences of the accused. On the other hand, the accused is not expected only to rebut the evidence of the prosecutor; he has to rather present evidences which counter pretrial publications and to reverse the mind of judges from prior perception. The prosecutor is assisted by publication of Medias that as the court may have already conceived the accused to have committed the crime. This in effect shifts the burden of proof to the helpless accused.

To the contrary, the scenario of the case could favor the prosecutor than the accused. In such instances it makes the burden of the Accused too demanding to defend the case that, he will not go free for the sole reason that, he rebuts the evidence of prosecutor. Rather, the accused also has the duty to rebut the Media's pretrial publication from the mind set of judges. Therefore, pre-trial publicity will mitigate the burden of the prosecutor, but it aggravates the burden of the accused. Yet, it continues to endanger equality of arms within the proceeding and obstructs the administration of justice. Acts which endanger / hamper the court from administering justice are crime of court contempt and it must be regulated by independent bodies

IV. Public Confidence on the Justice System

It is fundamental to establish a judiciary which assures public confidence and trust to create democratic citizen and to ascertain rule of law with in the nation.[125] To this end, the government should give

[125] Harshita Tomar1& Nayan *supra* note 8, p.12. See also Arturm Selwyn Mrill, Public Confidence In The Judiciary: Some Notes And Reflections, Journal of Law And Contemporary

special focus to the justice system and institutions to build public confidence. In case the public have not a trust or have reservation on courts, it is difficult to expect rule of law.[126]

Among the harms of media on the justice system, this one is the most and critical issue which needs immediate regulation. The Medias may impart information on pending cases or a case under police investigation particularly, where the crime is sensitive or high profile crimes. In most cases the Medias sends a message that, the suspect commits the crime, even imparts the manner of commission, the evidences and merits of the case before the trial is started. The public then will conceive by what the Medias disclose and gives their judgment against the accused. The problem arises in cases where the court rendered a ruling different from what the media publicizes before. For example, the media may publicizes that, the suspect has committed the crime and may present evidences which may be admissible or not in the eyes of the court. Consequently, the public may labeled the suspect as a criminal and expect the punishment from the ruling of the court.

However, after the court held the proceeding and examine witnesses, it may acquit the suspects. At this juncture, the public will lose confidence over the court where, it decides in contrast to what the public predict and perceived before. Thus, once the public is influenced and convinced by media before, it guesses or expects the court to render a decision consistent with the widely held conviction. As a matter of fact, the court may decide otherwise and public may believe that the court is corrupt or incompetent. Such perception undermines the honor and reputation of the court and it is dangerous to rule of law in general. Therefore an act

Problems, p.76

[126] Rottman, David B. and Tomkins, Alan, "Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges" (1999). Alan Tomkins Publications. 12. p.24

that repudiates or downgrades the honor and reputation of the court is court contempt. Unless the Medias are regulated from commenting, disclosing and waving on pending cases before the court render final decision; it strongly affects the justice system and the public trust of courts in particular.

Conclusion

Contempt of court encompasses any conduct or interference that obstructs the independence and impartiality of the judiciary, the right to a fair trial, and the proper administration of justice. Conversely, the right to freedom of expression is firmly recognized as a fundamental entitlement under both international and national human rights instruments, safeguarding the right to hold opinions, and to seek, receive, and impart information and ideas of all kinds.

In practice, however, this entitlement is often exercised by the media in ways that undermine judicial integrity. For instance, the disclosure of sensitive details about pending cases—including the identity and prior criminal history of suspects, the nature of alleged crimes, the likely punishment, and other prejudicial information—can imperil judicial impartiality by shaping public opinion or even influencing the mindset of adjudicators. Beyond mere reporting, media outlets have been observed to scandalize, distort, ridicule, or obstruct the administration of justice, thereby constituting what is commonly termed "trial by media." Such practices erode the presumption of innocence, damage public confidence in the judiciary, undermine the right to fair trial and finally go to weaken the rule of law.

Recognizing these dangers, many jurisdictions have enacted dedicated contempt of court laws to regulate prejudicial publications and balance

freedom of expression with the essential principles of judicial independence and fair trial guarantees. Countries such as India and Kenya, for example, have adopted legal frameworks that restrict media conduct in relation to pending proceedings, thereby safeguarding both the credibility of the judiciary and the rights of accused persons.

By contrast, Ethiopia lacks a comprehensive and independent body of contempt of court legislation. Neither the Mass Media Proclamation No. 1238/2021 nor the FDRE Criminal Code adequately addresses the tension between freedom of expression and the protection of judicial independence. Ethiopian law and the institutions rely on scattered and fragmented provisions that fail to provide coherent regulation of this delicate interplay.

Specifically, Articles 449 and 457 of the FDRE Criminal Code illustrate this inadequacy. Article 449 defines contempt narrowly, limiting it to insults, threats, or disruptions directed at the court or its officers. This formulation excludes broader categories of contempt recognized in other jurisdictions, such as publications that prejudice ongoing proceedings or scandalize the judiciary, which pose equally grave threats to fair trial rights. Article 457, in turn, prohibits inaccurate or tendentious publications concerning pending cases. Yet, in practice, determining the accuracy of reporting prior to final adjudication is inherently problematic. Moreover, even accurate reporting can compromise fair trial guarantees by shaping public perception, eroding the presumption of innocence, and exerting undue pressure on judges. Crucially, Ethiopian law remains silent on the procedural consequences or remedies available when prejudicial publicity has occurred, leaving courts ill-equipped to counter its detrimental effects on the administration of justice.

In summary, Ethiopia bears an obligation to enact independent court contempt law that strike a balance between freedom of expression on pending cases and the right to fair trial and just administration of justice in general. Firstly, As per Article 14(1) of the ICCPR, it empowered courts to exclude the press and public from proceedings when publicity would prejudice the interests of justice. This underscores the principle that media freedoms are not absolute where they threaten the fairness of proceedings or judicial impartiality. Secondly, the ICCPR in its Article 19(3) of the ICCPR and The UDHR under Article 29 explicitly permit restrictions on freedom of expression when necessary to respect the rights of others, to protect national security, public order, or public health and morals. Within this framework, restrictions on prejudicial publications are not only permissible but required where such publications undermine the right to a fair trial or the independence of the judiciary.

As a State Party to the ICCPR, Ethiopia bears a binding obligation to respect, protect, and fulfill the rights enshrined therein. Art.2/2 of the ICCPR obligated states to take legislative or administrative measures to give effect for the rights guaranteed under the convention. Ethiopia has to enact independent court contempt law that reconciles the competing values of freedom of expression and the preservation of judicial integrity and fair trial rights. The absence of a dedicated and robust contempt of court statute leaves Ethiopia vulnerable to the corrosive effects of unchecked media influence on judicial proceedings.

Thirdly, According to article 29 of the UDHR the right to freedom of expression is not absolute; it is subject to legitimate limitations where necessary to protect the rights and freedoms of others. Among others, the right to a fair trial stands as a cornerstone of justice and the rule of

law. This right encompasses the right to presumption of innocence, to be tried before an independent and impartial tribunal, the right to be heard, the principle of equality of arms, and other procedural safeguards integral to due process rights. Adverse pre-trial publicity, particularly when disseminated through mass media, directly endangers these guarantees by prejudicing public opinion, compromising judicial impartiality, and undermining the presumption of innocence. Accordingly, Ethiopia has to regulate such publicity under the framework of contempt of court and treated as a legitimate limitation on freedom of expression, ensuring that the exercise of media freedoms does not erode the fundamental right of individuals to a fair and impartial trial and the administration of justice.

Enhancing the Efficiency and Effectiveness of East African Institutional Arbitration Rules: Comparative Lessons from Global Best Practices

Gedion Ali Gebeyehu[§] Petra Butler [§§]

Abstract

The rapid economic integration and globalization of commercial activities in East Africa have significantly increased the demand for efficient and effective dispute resolution mechanisms, with institutional arbitration emerging as a preferred alternative to conventional litigation. This paper presents a comparative analysis of the procedural rules established by four principal arbitration institutions in East Africa: the Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institution (AACCSAAI), Nairobi Centre for International Arbitration (NCIA), Kigali International Arbitration Centre (KIAC), and Tanzania International Arbitration Centre (TIAC). Employing doctrinal and comparative methodologies, the study examines key procedural aspects of these institutions including—the appointment and challenge of arbitrators, the governance of fast-track and emergency arbitration, and the management of multi-party and multi-contract disputes—through the lens of the core principles of international commercial arbitration: party autonomy, procedural fairness, and efficiency. Benchmarking these aspects against the standards of globally leading arbitral institutions, the study reveals

§ PhD candidate, Department of Law, School of Law, Bahir Dar University, P.O.Box 79, Bahir Dar, Ethiopia. email: gedibet@gmail.com .

* Corresponding author

§§ Professor of Law, Executive Dean of Faculty of Law, and Director of Institute of Small and Micro States, University of Canterbury, New Zealand. Email: petra.butler@canterbury.ac.nz

notable procedural limitations that impede alignment with international best practices. The findings underscore the critical need for continuous innovation and integration of best practices within East African institutional arbitration rules to enhance efficiency and effectiveness, while safeguarding fairness and party autonomy. The paper argues for reforms that balance stakeholders' roles in arbitrator appointments, broaden and clarify procedures for challenges, introduce robust expedited processes, and adopt comprehensive multi-party, and emergency arbitration rules.

Key Words: East Africa, Arbitration Institutions, Arbitration Rules, Party Autonomy, Procedural Fairness, Efficiency

Introduction

East Africa stands out as Africa's fastest-growing region and an increasingly attractive destination for foreign investment.[1] Over recent decades, the region has undergone remarkable economic transformation, creating new opportunities across sectors such as extractive industries, infrastructure, energy, and telecommunications.[2] This surge in trade and investment inevitably brings disputes, underscoring the need for neutral, efficient, and effective dispute resolution mechanisms.[3] Arbitration, with its notable advantages over traditional court litigation such as party autonomy, confidentiality, finality, and procedural flexibility, has emerged as the preferred method for resolving international commercial

[1] African Development Bank Group, African Economic Outlook Report, 2025, p.3
[2] Ibid.
[3] Gabriel Moens and Peter Gillies, International Trade and Business; Law, Policy and Ethics, 1st ed., Cavendish Publishing, (1998), p.729

disputes.[4]

Central to modern arbitral practice are functional arbitration institutions that administer and facilitate arbitration proceedings. As Amazu A. Asouzu aptly notes, arbitral institutions serve as the engines driving arbitral reform and development, igniting enthusiasm among governments, private parties, and arbitration users alike.[5] Globally, these institutions have grown rapidly, evolving beyond mere administrative roles to actively shaping the arbitration process to meet user needs.[6]

In response to primary user concerns such as efficiency and effectiveness, many arbitral institutions have innovated by introducing provisions for emergency arbitration, expedited procedures, and mechanisms to handle multi-party and multi-contract disputes.[7] A competitive professional environment among arbitral institutions drives ongoing innovation, as each institution refines and integrates successful practices developed by others.[8] This dynamic competition elevates arbitration standards by improving speed, reducing costs, enhancing enforceability, and promoting fairness.[9] Ultimately, these advancements benefit the parties relying on arbitration and contribute to the broader

[4] Gary B. Born, International Arbitration: Law and Practice, 3rd ed., Kluwer Law International, (2021), p.9

[5] Amazu A. Asouzu, International Commercial Arbitration and African States, 1st ed., Cambridge University Press, Cambridge, (2001), p.10

[6] Remy Gerbay, The Functions of Arbitral Institutions, Wolters Kluwer, (2016), p.30

[7] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, 6th ed., Oxford University Press, (2015), p.50-52

[8] See, Queen Mary, University of London, (2015), International Arbitration Survey: Improvements and Innovations in International Arbitration, p.14

[9] Ibid.

facilitation of international trade.[10]

Despite these global advancements, the development and existence of competent arbitration institutions in East Africa is still very much in its infancy.[11] Even the established arbitration institutions do not yet attract high volume of international arbitration cases neither is the domestic arbitration market growing exponentially.[12] Statistics shows that most disputants (East African and East African registered companies) nominate arbitration institutions in other parts of the world to administer their disputes in preference to using arbitration institutions in the region.[13]

This study conducts a comparative analysis of the institutional arbitration rules of four East African arbitral institutions: the AACCSAAI[14] in Ethiopia, NCIA[15] in Kenya, KIAC[16] in Rwanda, and

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[10] Moens and Gillies, *Supra* note 3, p.729

[11] School of Oriental and African Studies, University of London, 2020 Arbitration in Africa Survey Report

[12] For example, data from the ICC over the sixteen year period between 2000 and 2015 show that 1,608 African parties were disputants under ICC Rules of arbitration. Over the same period African cities were nominated as seats only ninety-four times. None of the arbitration institutions in East Africa and even in Africa have administered disputes with similar number of African parties as ICC.

[13] See SOAS 2020 Report. *Supra* note 11

[14] The AACCSAAI commenced operations in 2002 and was legally established under the Chamber of Commerce and Sectoral Associations Establishment Proclamation No.341/2003. From its inception, the institute adopted its own arbitration rules, which were revised in 2008 and have remained unchanged since then.

[15] NCIA was established in 2013 under Act No. 26 of 2013. It introduced its first arbitration rules in 2015 and has since revised them twice—first in 2019 and again in 2022—to align with international standards and respond to user needs. The NCIA envisions becoming the premier choice for alternative dispute resolution and aims to be recognized as a leading institution in international commercial arbitration by delivering quality and innovative processes.

[16] The KIAC is Rwanda's sole arbitration institution, established by Law No. 51/2010, on January 10, 2010, which also outlines its organization, functioning and competence. KIAC officially began operations in May 2012; with a mandate to facilitate both domestic and

TIAC[17] in Tanzania. The focus on these institutions is both deliberate and timely. Firstly, their host countries have recently undertaken significant arbitration law reforms—Ethiopia in 2021, Tanzania in 2020, Kenya in 2012, and Rwanda in 2008—aimed at positioning themselves as arbitration-friendly jurisdictions and competitive international arbitration seats within the region and beyond.[18] Secondly, two of these institutions—NCIA and KIAC—rank among Africa's top ten arbitral institutions, further underlining their regional prominence.[19] Thirdly, the host countries of these institutions lead efforts in hosting the annual East African International Arbitration Conference, which has an objective of promoting cooperation between African arbitral institutions and build international arbitration capacity, knowhow, and network in Africa and beyond.[20]

While the institutions have made commendable progress in modernizing their arbitration rules and professionalizing services, the development remains ongoing. To fully meet the expectations of arbitration users regarding efficiency and effectiveness, institutional rules must continuously evolve and align with global best practices.[21] Currently,

international dispute resolution through arbitration and other ADR methods.

17 Section 77 of the Arbitration Act of Tanzania establishes the TIAC. According to its official website, TIAC is a company limited by guarantee, founded in 2019. On January 29, 2021, the Tanzanian government published the Tanzania Arbitration Centre Management and Operation Regulations, providing a regulatory framework for the Centre. TIAC's first arbitration rules came into effect in 2021, and have remained unchanged since then.

18 See, Kenya, Arbitration Act No. 4 of 1995 (as amended in 2012); Rwanda, the Arbitration and Conciliation in Commercial Matters (Law No. 005/2008); Ethiopia, Arbitration, Conciliation and Working Procedure Proclamation, Proclamation No. 1237/ 2021; and Tanzania, Arbitration Act 2020, Cap 15

19 SOAS Report. *Supra* note 11

20 East Africa International Arbitration Conference, www.eastafricaarbitration.com, (accessed March 27, 2025)

21 Redfern and Hunter. *Supra* note 7, p.49

East African arbitral institutions lag in maintaining continuous innovation and adopting proven international procedural standards.[22] This gap highlights a lack of sustained commitment to improvement and limits their potential to serve the growing demands of commercial parties and arbitration practitioners effectively.[23]

This study adopts a holistic approach, moving beyond isolated procedural issues to a comprehensive auditing of fundamental institutional procedural rules, including the rules governing arbitrator appointment and challenge, governance of fast-track and emergency arbitration, and administration of multi-party disputes. These elements are analyzed through the prism of the core principles of international commercial arbitration—party autonomy, procedural fairness, and efficiency. This broad perspective captures systemic strengths and weaknesses, providing a more nuanced and integrated understanding of how East African arbitration institutions operate within the evolving global arbitration landscape. Without this broad focus, isolated analyses risk overlooking systemic reform opportunities.

To draw lessons from global best practices, the International Chamber of Commerce (ICC) rules serve as the primary benchmark, given the ICC's status as the leading arbitral institution worldwide. Based on the Queen Mary University of London International Arbitration Surveys over the last 10 years, including the most recent 2025 survey, ICC is recognized consistently as the globally leading arbitral institution, followed by Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), and London Court of

22 SOAS Report, *Supra* note 11
23 Ibid.

International Arbitration (LCIA).[24] The ICC's immense global reach is exemplified by its involvement in cases featuring 2,392 parties from 136 jurisdictions only in the year 2024, underscoring its unmatched neutrality and breadth.[25] The ICC rules are widely recognized for their comprehensive and progressive procedural standards that address the evolving demands of contemporary arbitration.[26] They exemplify a well-balanced combination of party autonomy, procedural fairness, and efficiency, while continuously evolving in response to market feedback and advancements in technology.[27]

Complementing the ICC benchmark, the rules of HKIAC, SIAC, and LCIA are referenced as appropriate, particularly where they offer innovative or contextually superior solutions to specific procedural issues. These top four globally leading arbitral institutions share a notable commonality: an ongoing commitment to adapting their rules and operations to meet the evolving expectations of the international business community. This is not a static adherence to tradition, but a dynamic process—evident in their frequent updating of rules. For instance, over the past sixteen years (2010–2025), the ICC has revised its arbitration rules three times—in 2012, 2017, and 2021[28]—while the LCIA has updated its rules twice, in 2014 and 2020.[29] Similarly, HKIAC

[24] According to yearly International Arbitration Surveys from 2015 to 2025 by the School of International Arbitration at Queen Mary University of London, the top four most preferred arbitration rules globally are the ICC, HKIAC, SIAC, and LCIA rules. See, Queen Mary, University of London, 2025, International Arbitration Survey: The Path Forward: Realities and Opportunities in Arbitration, p.10 and Queen Mary, 2015 survey, *Supra* note 8

[25] ICC 2024 Statistics, https://iccwbo.org/ (accessed March 27, 2025)

[26] Jacob Grierson and Annet Van Hooft, Arbitrating Under the 2012 ICC Rules: An Introductory User's Guide, Kluwer Law International, (2012), pp.7-17

[27] Ibid.

[28] International Chamber of Commerce, https://iccwbo.org/ (accessed March 27, 2025)

[29] The London Court of International Arbitration, http://www.lcia.org/ (accessed March 27, 2025)

has undertaken three revisions in 2013, 2018, and most recently in 2024,[30] and SIAC has implemented four revisions, occurring in 2010, 2013, 2016, and 2025,[31] with further revisions regularly anticipated. These reforms are driven by user feedback and address critical themes such as procedural fairness, efficiency, and technological integration.[32]

In contrast, East African arbitration institutions have exhibited less frequent updates to their rules. The AACCSAAI has not revised its rules between 2010 and 2025, with its last update dating back to 2008.[33] KIAC adopted its rules in 2012 but has made no subsequent revisions;[34] TIAC, established in 2021, adopted its rules that same year without further amendments.[35] NCIA, which initially adopted its rules in 2015, has revised them only once, in 2019.[36] This disparity highlights how East African institutions lag behind the leading global arbitral institutions in terms of rule modernization and responsiveness.

Redfern and Hunter aptly observed that the landscape of international arbitration has evolved rapidly in recent years, with new laws, rules, and

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[30] Hong Kong International Arbitration Centre, http://www.hkiac.org/ (accessed, April 21, 2025)

[31] Singapore International Arbitration Centre, http://www.siac.org.sg/ (accessed, April 28, 2025)

[32] See Queen Mary, University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, Improvements and Innovations in International Arbitration, p.3

[33] Addis Ababa Chamber of Commerce and Sectoral Association, www.addischamber.com/Arbitration (accessed, May 12, 2025)

[34] Kigali International Arbitration Centre, https://kiac.org.rw/why-choose-us/about-kiac/ (accessed, Jan. 25, 2025)

[35] See Tanzania International Arbitration Centre, https://tiac.or.tz/ (accessed, February 10, 2025)

[36] See Nairobi Centre for International Arbitration, https://ncia.or.ke/ (accessed, May 25, 2024)

procedures continually emerging.[37] The rules of arbitral institutions must not remain stagnant; they need to be regularly updated to reflect modern practices.[38] Conducting an efficient and effective modern arbitration is challenging under rules crafted for a different era. Parties rightfully expect that institutional rules will be periodically reviewed and revised as necessary to reflect current standards.[39]

The ongoing ability of the globally leading arbitral institutions to innovate continuously and respond promptly to users' evolving needs is central to their sustained leadership in the global arbitration landscape.[40] Their evolution from local arbitration forums to institutions of global importance stands as both a testament to their foundational principles and their adaptability in a rapidly changing world.[41] For these reasons, this study employs the ICC rules as the primary benchmark, with reference to the rules of SIAC, LCIA, and HKIAC as appropriate.

By applying this layered benchmarking methodology, the study mainly identifies both strengths and gaps within East African institutional arbitration rules and draws targeted lessons for reform. This comparative lens ensures that recommendations harmonize regional arbitration practices with globally tested best practices, thereby enhancing the institutional arbitration landscape in East Africa for the benefit of local and international users.

Organized in three sections, the paper begins by outlining the core

37 Redfern and Hunter. *Supra* note 7, p.49
38 Ibid.
39 Ibid.
40 Queen Mary, 2025 survey, *Supra* note 25, p.10
41 Ibid.

principles of international commercial arbitration to be used as evaluative criteria to audit the East African institutional arbitration rules. The second section offers a detailed comparative analysis of the procedural rules of AACCSAAI, KIAC, NCIA, and TIAC, benchmarked primarily against ICC rules using the three core principles as the evaluative criteria. The analysis reveals procedural limitations that hinder full alignment with contemporary international standards. Accordingly, the final section provides concluding remarks and proposes targeted reforms designed to enhance the efficiency, effectiveness, and global competitiveness of East African arbitral institutions, thereby advancing the region as a credible hub for international commercial arbitration.

1. Party Autonomy, Procedural Fairness and Efficiency in International Arbitration

International arbitration is distinguished from domestic litigation by a set of foundational principles that justify its unique procedural and substantive design. These core principles—party autonomy, procedural fairness, and efficiency— are central to the legitimacy and broad acceptance of arbitration across diverse jurisdictions. Moreover, they function as critical criteria for evaluating the effectiveness and quality of arbitration rules and institutional practices globally. This section offers a concise overview of these foundational principles, which will serve as an analytical lens in the subsequent evaluation and benchmarking of the institutional arbitration rules of prominent East African arbitration institutions against those of globally leading arbitral institutions.

1.1. Party Autonomy

Party autonomy is regarded as arbitration's guiding spirit. This is

affirmed in contemporary national arbitration statutes as well as in the rules of arbitral institutions. Etymologically, autonomy means self-rule—a moral right to self-determination that applies both to states and individuals.[42] In arbitration, this principle manifests as parties' freedom to control the dispute resolution process. Since arbitration arises from the parties' mutual consent, the parties remain the ultimate architects of their proceedings. Accordingly, as Gaillard and Fouchard explain, party autonomy—subject to the governing law—empowers the parties to shape the arbitration process, particularly in relation to the procedural framework that governs their dispute.[43] This includes freedom to select arbitrators, determine the place (seat) of arbitration, choose applicable rules and languages, and agree on procedural modalities. This principle ensures confidentiality, neutrality, and flexibility—attributes central to arbitration's effectiveness in resolving international commercial disputes.[44]

One of the main reasons arbitration is preferred over litigation, especially in cross-border contexts is precisely due to party autonomy.[45] The flexibility provided by party autonomy contrasts sharply with the fixed procedural requirements and jurisdictional constraints inherent in litigation, where courts apply local procedural laws that parties often cannot influence.[46] For instance, as noted above, party autonomy allows

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42 Hurst Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights, 2nd ed., University of Pennsylvania Press, (2011), p.27 ff

43 Emmanuel Gaillard and Philippe Fouchard, On International Commercial Arbitration, Kluwer Law, (1999), p.1

44 Ibid.

45 In arbitration, parties can tailor dispute resolution processes to their needs and commercial expectations including choosing arbitrators, opting for expedited procedures, or limiting discovery, which would be impossible or impractical in traditional court systems. See, Gary Born, *Supra* note 4, p.15

46 Gaillard &Fouchard, *Supra* note 43, p.1

choosing a neutral seat of arbitration and deciding on the place of hearings. This helps avoid home-court bias and ensures that no party benefits from the jurisdictional advantages typically enjoyed in domestic courts.[47] This neutrality is a significant factor driving parties away from litigation, which can be unpredictable when foreign courts with unfamiliar legal systems, languages, and cultural norms hear disputes.[48]

Institutional arbitration respects party autonomy in two principal ways. First, the institution's rules apply only to the extent that the parties have incorporated them into their arbitration agreement. Second, the parties retain the freedom to determine the procedural rules that will govern the arbitration. However, there are limitations on party autonomy under institutional arbitration rules.[49] These limitations can be broadly categorized into two types: external and internal limits. Externally, party autonomy must yield to mandatory legal provisions and public policy imperatives of the arbitral seat or other applicable jurisdictions, which may restrict the parties' freedom to deviate from foundational legal norms.[50] Such overriding mandatory rules serve as a boundary within which party autonomy must operate, ensuring that arbitral proceedings and awards remain valid and enforceable.[51]

Internally, the acceptance of institutional arbitration inherently entails consent to a procedural regime established by the chosen institutional rules, which often include mandatory provisions that cannot be

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47 Ibid.

48 Gary Born, *Supra* note 4,p.15

49 Giuditta Cordero-Moss, Limits to Party Autonomy in International Commercial Arbitration, *Oslo Law Review,* (2014), p.49

50 Ibid.

51 Ibid.

derogated by the parties.[52] These provisions are designed to preserve the integrity, fairness, and efficiency of the arbitral process.[53] For instance, institutional rules such as those of the ICC and SIAC impose certain procedural requirements—like the ICC's expedited procedure being mandatory in designated cases or the tribunal appointment powers vested in the ICC Court in exceptional circumstances—that circumscribe party autonomy so as to safeguard procedural consistency and enforceability. Consequently, while parties retain substantial discretion in shaping their arbitration agreements, this discretion is circumscribed by the necessity to comply with both the mandatory provisions embedded within institutional rules and the overriding legal framework governing arbitration.

Thus, party autonomy in institutional arbitration is best understood as a qualified freedom— one that allows extensive customization but ultimately functions within a framework designed to uphold the legitimacy and effectiveness of the arbitral process. Recognizing these limits is essential to appreciating the balance arbitration strikes between party-driven procedural flexibility and institutional and legal safeguards. This balance ensures that arbitration remains a viable and respected dispute resolution method in international commercial practice.

1.2. Procedural Fairness

52 Ibid.
53 Ibid.

Procedural fairness requires arbitration not only to deliver a resolution but also to do so fairly and transparently, ensuring the parties both receive and perceive justice.[54] This principle intertwines with party autonomy because individual autonomy underpins the parties' desire for a just process. Rational individuals, reflecting on their interests behind a veil of ignorance—which prohibits knowing the eventual decision—will naturally prefer a fair procedure over merely a personally favorable outcome.[55] Justice is; therefore, integral to party autonomy, emerging from individual decisions to resolve disputes under agreed rules that ensure fairness.[56]

International procedural norms are essential for ensuring the substantive accuracy and legitimacy of decisions.[57] The greater the opportunity for parties to present the basis for their case, the more likely the outcome will be just and well-founded.[58] Nonetheless, even a correct and favorable result cannot compensate for a flawed or unfair procedure.[59] Stakeholders across various sectors emphasize the importance of achieving fair outcomes in every dispute. However, such fairness must be firmly anchored in a clear and consistent legal framework to enable effective management of dispute resolution risks in advance. In other words, fairness and commercial practicality are vital, but must be attained through a predictable and reliable process.[60]

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54 Mattis Kurkela and Santu Turunen, Due Process in International Commercial Arbitration, 2nd ed., Oxford University Press, (2010), p.3

55 John Rawls, A Theory of Justice, Revised Edition, Harvard University Press, (1999), p.118

56 Ibid.

57 Kurkela and Turunen. *Supra* note 54, p.203

58 Ibid.

59 Id. p.204

60 Ibid.

Accordingly, procedural fairness in international arbitration demands, first and foremost, that the parties' agreement to arbitrate be respected and enforced, ensuring their effective access to arbitration as their chosen means of resolving disputes.[61] It also requires that parties have a genuine opportunity to participate in the lawful constitution of the arbitral tribunal.[62] The fundamental guarantees of procedural fairness include the arbitrator's obligation to treat the parties equally, fairly, and impartially, while providing each side with a fair chance to present its case and respond to the opposing arguments.[63] Additionally, the arbitral tribunal must address all issues submitted before it. Thus, mere access to arbitration is insufficient; the process itself must be conducted fairly.[64]

1.3. Efficiency

Arbitration must prioritize efficiency by minimizing unnecessary delays and costs, thereby enhancing its appeal over litigation.[65] Although arbitration need not always be cheaper than court litigation, costs and speed are important practical considerations influencing party choices.[66] Efficiency extends beyond just saving time and money; it also requires maintaining due process and ensuring a just outcome. Parties seek a dispute resolution process that is neither cheap at the expense of justice

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61 Id. p.206
62 Ibid.
63 Ibid.
64 Ibid., Institutional rules embodying procedural justice provide among other safeguards, for the appointment of neutral and qualified arbitrators, clearly outlined procedures for challenging arbitrators, confidentiality protections, and mechanisms to prevent undue delays or procedural abuses. Arbitration's ability to adapt to the needs of parties and provide a fair hearing tailored to complex commercial realities is a key advantage over the rigid court litigation.
65 Lucy Greenwood, Sketch: The Rise, Fall and Rise of International Arbitration – A View from 2030, *Sweet & Maxwell*, *Vol.77*, Issue 4, (2011), pp.435-441, p.437
66 Gary Born. *Supra* note 4, p.10

nor prolonged to inflate costs. At its best, efficient arbitration equates to effective case management that leads to a sound resolution.

Concerns regarding the efficiency of arbitration emerged more than two decades ago, highlighting persistent challenges related to delays and rising costs.[67] These issues were perceived as significant threats to the viability of international arbitration, with parties frequently expressing frustration over protracted proceedings and increasing legal expenses.[68] According to the 2006 Queen Mary Survey, the average arbitration duration was approximately two years, with some cases extending up to three years.[69] Counsel fees comprised more than half of the total costs, while fees for tribunals and institutions accounted for the remainder.[70] This high cost and lengthy duration led, as noted in a 2008 Queen Mary Survey, to 41 percent of in-house counsel preferring transnational litigation for resolving international disputes.[71]

In response, the arbitration community has initiated various reforms aimed at improving efficiency.[72] Arbitral institutions have taken significant steps to address these challenges through rule modifications.[73] A landmark contribution came from the ICC, which in 2007 issued a report on "Techniques for Controlling Time and Costs in Arbitration."[74] The principles of this report were incorporated into the

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67 Greenwood, *Supra* note 65, p.437

68 Ibid.

69 Queen Mary, University of London, 2006 International Arbitration Survey: Corporate Attitudes and Practices, p.1

70 Queen Mary, University of London, International Arbitration Survey, 2008 Corporate Attitudes and Practices, p. 19

71 Id. p.1

72 Greenwood, *Supra* note 65, p.439

73 Ibid.

74 See ICC Publication No. 843, Techniques for Controlling Time and Costs in Arbitration,

ICC Arbitration rules effective from January 2012, reinforcing effective case management.[75] The ICC Commission's 2015 guide for in-house counsel further standardizes best practices, contributing to a soft law framework on arbitration efficiency.[76]

In a parallel development, the International Bar Association introduced its 2013 Guidelines on Party Representation, which underscore the ethical obligation of counsel to act with integrity and refrain from tactics that unnecessarily delay proceedings or inflate costs.[77] Similarly, prominent institutions such as HKIAC, SIAC, and LCIA have pursued modernization of their rules to promote efficiency. These reform efforts predominantly adopt two strategic approaches. First, they introduce explicit regulatory provisions designed to facilitate efficient arbitration. Second, they grant tribunals broader discretion and responsibility to manage proceedings effectively, all while safeguarding due process and respecting party autonomy.[78]

1.3.1. Explicit Regulatory Mechanisms Promoting Efficiency

Contemporary institutional arbitration increasingly relies on explicit regulatory mechanisms embedded within arbitration rules to enhance

(2007), ICC Commission on Arbitration and ADR, Task Force on Reducing Time and Costs in Arbitration

[75] Grierson and Hooft, *Supra* note 26, p.7

[76] See ICC Commission on Arbitration and ADR, Report: Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives(2015)

[77] International Bar Association, Guidelines on Party Representation in International Arbitration, 2013, available at, https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F (accessed May 2025). Such obstructive tactics of recalcitrant parties, although regrettable, are recognized procedural challenges in arbitration.

[78] Loukas Mistelis, Efficiency. What Else? Efficiency As the Emerging Defining Value of International Arbitration: Between Systems, Theories and Party Autonomy, Queen Mary University of London, School of Law Legal Studies Research Paper, (2011), p.30

procedural efficiency. These mechanisms represent institutional efforts to streamline arbitration proceedings and address the complexities and costs commonly associated with international dispute resolution.[79]

A significant innovation in this regard is the adoption of expedited or fast-track procedures.[80] These provisions, typically available either by party agreement or as default rules for lower-value disputes, enable faster resolution by setting shorter deadlines, promoting the appointment of a sole arbitrator, and limiting extensive document production and prolonged hearings.[81] By alleviating procedural burdens, expedited procedures help control both costs and duration without sacrificing procedural fairness, thus catering to parties seeking swift remedies.[82] Prominent institutions such as ICC, SIAC, and HKIAC have established separate expedited arbitration rules that impose restrictions on submissions and accelerate timelines, often requiring the issuance of a final award within six months—substantially quicker than standard arbitration schedules.[83]

Another key regulatory mechanism promoting efficiency is the default number of arbitrators.[84] Opting for a sole arbitrator instead of a default three-member tribunal reduces both costs and scheduling conflicts.[85] Due to this, modern institutional rules require the default appointment of

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79 Ibid.
80 Ibid.
81 Tom Webster & Michael Buhler, Handbook of ICC Arbitration: Commentary and Materials, 5th ed., Sweet & Maxwell, (2021), pp.540
82 Ibid.
83 International Chamber of Commerce Arbitration Rules, (2021), Appendix VI, Article 4(1), Hong Kong International Arbitration Centre Arbitration Rules (2024), Article 42 [hereinafter, HKIAC], Singapore International Arbitration Centre Arbitration Rules, (2025), Rule 14
84 Mistelis, *Supra* note 78, p.31
85 Ibid.

a sole arbitrator for straightforward or low-value disputes.[86]

Joinder and consolidation provisions represent another dimension of efficiency enhancement.[87] By allowing related parties or claims to be joined into a single proceeding, such provisions mitigate the risk of inconsistent decisions and duplication of efforts, fostering consistency and streamlining case administration. These mechanisms are particularly valuable in complex multi-party or multi-contract disputes prevalent in commercial arbitration today.[88]

Furthermore, institutional rules often prescribe firm timelines for procedural steps and award issuance. These deadlines create a structured procedure that disciplines the process and curtails protracted delays, an essential factor for parties who prioritize certainty and prompt enforcement.[89]

The regulatory mechanisms provided above are illustrative rather than exhaustive, aiming to highlight some of the techniques and tools that promote efficiency in arbitration. Collectively, they underscore institutional arbitration's dedication to delivering a dispute resolution process that is both efficient and effective. By doing so, these

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[86] See for example, London Court of International Arbitration, Arbitration Rules, (2020), Article 5(8) and ICC, *Supra* note 83, Article 12

[87] Klas Laitinen, Multi–Party and Multi-Contract Arbitration Mechanisms in International Commercial Arbitration: A Study on Institutional Rules of Consolidation, Joinder, and Intervention from a Finnish Perspective, LLM thesis, (2013), pp.3-6

[88] Ibid.

[89] For example, according to Article 30(1) of the ICC Rules, the arbitral tribunal must render its final award within six months. The SIAC 2025 Rules set an even shorter three-month deadline under Rule 53. Additionally, Article 15(10) of the LCIA Rules mandates that the tribunal deliver the final award "as soon as reasonably possible" after the last submission, emphasizing practical expedition.

frameworks reinforce arbitration's appeal as a preferred method for resolving international commercial disputes and establish important benchmarks for emerging institutions aiming to foster arbitration-friendly environments across diverse jurisdictions.

1.3.2. Arbitral Tribunal's Discretion and Duty on Efficiency

The arbitral tribunal in institutional arbitration is vested with considerable discretion alongside a concomitant duty to enhance the efficiency of the arbitral process.[90] This mandate is embedded in many leading institutional arbitration rules, reflecting the contemporary shift towards procedures that are not only fair and impartial but also expeditious and cost-effective.[91]

Tribunals exercise broad discretionary powers to manage procedural aspects, including setting timelines, regulating submissions, and controlling evidentiary processes. Such flexibility enables tribunals to adapt procedures to the specific needs of each case and its parties, thereby fostering procedural economy without compromising due process.[92]

Beyond exercising discretion, tribunals carry an explicit duty to conduct arbitration efficiently and economically. This duty acknowledges arbitration's key advantage over litigation: its potential to resolve disputes without undue delay or excessive cost.[93] By balancing rigorous management of proceedings with fairness to parties, arbitration tribunals

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90 Mistelis, *Supra* note 78, p.31
91 Ibid.
92 Ibid.
93 Ibid.

help preserve arbitration's appeal as an effective dispute resolution mechanism. This duty is articulated both as a general mandate and through concrete procedural mechanisms.[94]

Institutional rules commonly empower tribunals to tailor procedures in line with the case's complexity, monetary value, and technological considerations, while ensuring parties' reasonable opportunity to be heard.[95] For instance, the HKIAC rules grant arbitrators considerable flexibility to design efficient procedures appropriate to the dispute's specifics.[96] The LCIA rules impose a duty on arbitrators to act impartially and to adopt efficient procedures, granting broad procedural discretion.[97] Similarly, the UNCITRAL rules require tribunals to avoid unnecessary delay and expense, ensuring a fair and efficient process.[98] The ICC rules likewise urge parties and tribunals to conduct arbitrations expeditiously and cost-effectively, in proportion to the dispute's complexity and value.[99] Tribunals may limit oral hearings, shorten written submissions, and prevent redundancy in witness testimonies. Supporting this, ICC's Appendix IV offers a toolbox of case management techniques aimed at controlling time and costs, thereby fostering international consistency and predictability.

In summary, the arbitral tribunal's discretion and duty to promote efficiency constitute fundamental elements of modern institutional arbitration rules. These frameworks grant tribunals the authority and guidance necessary to conduct proceedings swiftly and economically,

94 Ibid.
95 Ibid.
96 HKIAC, *Supra* note 83, Article 13(1)
97 LCIA, *Supra* note 86, Article 14(4) and 14(5)
98 UNCITRAL Rules, Article 17
99 ICC, *Supra* note 83, Article 22

while safeguarding fairness and respecting party autonomy. Through a combination of broad procedural discretion, clear efficiency mandates, and specific case management tools, institutional rules embed efficiency as a core value essential to maintaining arbitration's global legitimacy and appeal.

1.4. Balancing Party Autonomy, Procedural Fairness, and Efficiency: The "Magic Triangle "Central to "Best Practices" in International Commercial Arbitration?

Balancing party autonomy, procedural fairness, and efficiency is essential in institutional rule making and arbitration practice. These principles inherently interact in a dynamic tension requiring trade-offs and context sensitive prioritization.[100] The triangular configuration under the "magic triangle"[101] metaphor eloquently conveys the dynamic tension inherent among these principles, where optimizing one may inadvertently challenge the others.[102] For instance, enhancing procedural fairness through extended hearings may impinge upon efficiency, while prioritizing expediency could constrain party

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[100] Joerg Risse, Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings, *Arbitration International, Vol. 29*, (2013), p.453

[101] This conceptual framework illustrates that each vertex of the triangle distinctly represents one of the three core principles, visually and conceptually emphasizing their interdependent relationship. Party autonomy, positioned at one corner, underscores the fundamental principle that parties possess the freedom to tailor arbitration proceedings according to their specific needs, procedural fairness, occupying the second vertex, ensures that the arbitration process upholds the principles of due process, including equal treatment of parties, notice, and the opportunity to present one's case, thereby safeguarding the legitimacy and acceptability of arbitral awards. Efficiency, located at the third corner, focuses on the imperative to resolve disputes in a timely and cost-effective manner, mitigating delays and expenses typically associated with traditional judicial processes.

[102] Risse, *Supra* note 100, p.453

autonomy or procedural protections.[103] This framework encourages institutional rule-makers and parties to make informed, context-specific trade-offs, aiming to find the most appropriate balance tailored to the complexity, stakeholder expectations, and commercial value of each case.[104]

Arbitral institutions have responded to this dynamic by adopting expedited procedures and flexible case management tools, alongside standards that preserve fairness and party autonomy.[105] However, practical challenges emerge when tribunals attempt to balance these principles, sometimes resulting in unenforceable awards. For instance, the tension between efficiency and due process is well illustrated in the famous *"Stolt- Nielsen v. AnimalFeeds"* case, involving multiple claims against several ship owners under similar arbitration agreements.[106] The claimants sought to consolidate their claims in a single arbitration, while the respondents opposed.[107] The tribunal initially allowed consolidation, premised on common questions of fact and law.[108] However, the U.S. Supreme Court vacated the award, ruling that the arbitrators exceeded their powers by imposing a policy choice rather than applying the governing law. The Court emphasized that respondents' procedural right not to be subjected to a consolidated arbitration without consent must be respected.[109] This decision underscores that even well-intended efficiency must yield when it conflicts with sacred procedural

103 Ibid.
104 Ibid.
105 Klaus Peter Berger and J. Ole Jensen, Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators, *Arbitration International,* (2016), p.416
106 US Supreme Court, Stolt- Nielsen vs. Animal Feeds case*,* 559 US 662
107 Ibid.
108 Ibid.
109 Ibid.

guarantees, even if that means accepting some delays and additional costs. As Fellas rightly observes, speed should never come at the cost of fairness. Conversely, fairness also necessitates a degree of efficiency, since justice too delayed is justice denied.[110] Hence, arbitration frameworks must carefully balance these principles to secure just outcomes grounded in party autonomy, while maintaining pragmatic efficiency to control costs.

A carefully calibrated three-way balance between party autonomy, procedural fairness, and efficiency constitutes the "magic triangle" at the heart of "best practices" in international commercial arbitration. This balanced triad provides a robust foundation for assessing and improving arbitration rules, laws and practices worldwide.

In the context of East African arbitral institutions, the central challenge lies in crafting arbitration rules that strike a pragmatic balance among these principles without sacrificing any. Achieving accessible, reliable, and efficient dispute resolution is crucial to strengthening the region's arbitration framework and enhancing its attractiveness in line with evolving global standards.

2. Comparative Analysis of East African Institutional Arbitration Rules: Benchmarking Against Core Principles of International Commercial Arbitration and Global Best Practices

[110] John Fellas, A Fair and Efficient International Arbitration Process, *Dispute Resolution Journal* Vol.59, No. 1, (2004), p. 78-80

This section offers a comparative analysis of the procedural rules of AACCSAAI, KIAC, NCIA, and TIAC, benchmarked primarily against ICC rules using the core principles of international commercial arbitration—party autonomy, procedural fairness, and efficiency—as the evaluative criteria. Additionally, the analysis references the rules of SIAC, LCIA, and HKIAC as appropriate. The analysis focuses on critical procedural issues including—the appointment and challenge of arbitrators, the governance of fast-track and emergency arbitration, and the administration of multi-party disputes— aiming to identify pathways for enhancing efficiency and effectiveness in East African arbitration rules.

2.1. Appointment of Arbitrators

Once the decision to initiate arbitration has been made and the corresponding notice or request for arbitration has been properly submitted, the subsequent step is to constitute the arbitral tribunal. Unlike a national court, which is a permanent institution where applications can be filed at any time, an arbitral tribunal must be formally established before it can assume jurisdiction over the parties and the dispute.[111] Due to this, the appointment of arbitrators is a crucial step in arbitration, significantly influencing the efficiency and fairness of the dispute resolution process.

Comparing the rules of ICC, KIAC, NCIA, AACCSAAI, and TIAC, we observe shared principles alongside distinct procedural nuances that reflect their respective balances between party autonomy, procedural

[111] Redfern and Hunter, *Supra* note 7, p.230

fairness, and efficiency. Notably, all these institutions[112] allow parties the freedom to decide whether a sole arbitrator or a three-member panel will resolve their dispute. When parties fail to agree on the number of arbitrators, the institutions differ in their default positions. ICC, KIAC and NCIA typically default to a sole arbitrator unless the institution considers the dispute sufficiently complex to warrant three arbitrators.[113] Conversely, AACCSAAI Rules reverses this default, starting with three arbitrators unless it decides a sole arbitrator is more suitable.[114] TIAC, on the other hand, does not specify a default number and entrusts its management committee panel with deciding the default number of arbitrators after considering all relevant circumstances.[115] While this approach affords TIAC greater institutional control, it may result in delays and complications since the management committee must convene and decide on a case-by-case basis.

The determination of a default number of arbitrators is a critical consideration for efficiency. The difference impacts the arbitrations speed and cost, with a sole arbitrator generally enabling faster and less expensive proceedings.[116] It is often impractical to require a three-person tribunal for straightforward or low-value disputes. The benefits of referring a dispute to a sole arbitrator are self-evident. Scheduling meetings and hearings is simpler, as coordinating among multiple

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112 Kigali International Arbitration Centre Arbitration Rules, (2012), Article 12, Nairobi Centre for International Arbitration, Arbitration Rules, (2019), Rule 7(1), Addis Ababa Chamber of Commerce and Sectoral Association Arbitration Institute Arbitration Rules, (2008), Article 10, Tanzania International Arbitration Centre Arbitration Rules, (2021), Article 9, and ICC, *Supra* note 83, Article 12(1)

113 ICC, *Supra* note 83, Article 12(2), KIAC, *Supra* note 112, Article 12, NCIA, *Supra* note 112, Rule 7(1)

114 AACCSAAI, *Supra* note 112, Article 10(1)

115 TIAC, *Supra* note 112, Article 8

116 Redfern and Hunter, *Supra* note 7, p.238

arbitrators is unnecessary.[117] Costs are also reduced, as the parties only incur the fees and expenses of one arbitrator instead of three. Additionally, the arbitration process generally proceeds more swiftly with a sole arbitrator because there is no need to reach a joint or majority decision.[118] Consequently, the AACCSAAI's preference to appoint a traditional default of three arbitrators and TIAC's case-by-case determination by management committee do not fully align with modern efficiency expectations. It is therefore recommended to adopt the approach of ICC, KIAC and NCIA, which default to a sole arbitrator unless the complexity of the dispute justifies a three-member tribunal.

AACCSAAI also stands out for allowing the appointment of more than three arbitrators, which is unusual in the other institutions.[119] It is difficult to envisage circumstances in which it would make sense to appoint an arbitral tribunal of more than three members. Even in a case of major importance, three carefully chosen and appropriately qualified arbitrators should be sufficient to dispose satisfactorily of the issues in dispute.[120] This approach risks undermining arbitration's hallmark advantages, namely, speed and cost.[121] A more than three-member tribunal is more expensive than arbitration conducted by a sole arbitrator or a three-member tribunal and will usually take longer to render an award, the more arbitrators involved, the longer the process may take, which could push arbitration closer to the pace of traditional litigation.[122]

117 Ibid.
118 Ibid.
119 AACCSAAI, *Supra* note 112, Article 10(5)
120 Redfern and Hunter, *Supra* note 7, p.240
121 Id., p.238
122 Ibid.

When it comes to appointing a sole arbitrator, the ICC, NCIA, and KIAC rules allow the parties to jointly nominate their preferred candidate.[123] If they fail to do so within the prescribed time frame, 30 days for ICC and NCIA,[124] and 15 days for KIAC, the institution steps in to make the appointment. TIAC follows a similar approach with a 30-day deadline,[125] while AACCSAAI sets a 20-day limit.[126]

For the appointment of three arbitrators, the ICC, KIAC, and NCIA rules provide that each party nominates one arbitrator, while the institution appoints the third arbitrator, who acts as the tribunal's president unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation.[127] This direct institutional appointment tends to speed up the process and reduce the risk of deadlock.[128] It facilitates a faster and more straightforward appointment process, effectively minimizing delays and procedural bottlenecks. In contrast, TIAC and AACCSAAI empower the two party-appointed arbitrators to select the third arbitrator.[129] Only if these arbitrators fail to agree within a set period—30 days for TIAC, and 20 days for AACCSAAI—does the institution intervene to appoint the chairperson.[130] The authors argue that this approach, while giving the parties more control, may lead to delays and complications. It sacrifices timeliness, with institutional intervention

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123 ICC, *Supra* note 83, Article 12(3), KIAC, *Supra* note 112, Article 12, NCIA, *Supra* note 112, Rule 7(2)

124 ICC, *Supra* note 83, Article 12(3), NCIA, *Supra* note 112, Rule 7(3)

125 TIAC, *Supra* note 112, Article 9(2)

126 AACCSAAI, *Supra* note 112, Article 10(4)

127 ICC, *Supra* note 83, Article 12(5), KIAC, *Supra* note 112, Article 14, NCIA, *Supra* note 112, Rule 7(6)

128 Redfern and Hunter, *Supra* note 7, p.242

129 AACCSAAI, *Supra* note 112, Article 10(5) TIAC, *Supra* note 112, Article 10(3)

130 Ibid.

only serving as a fallback mechanism. This fundamental difference between the two approaches impacts not only the speed but also the certainty of tribunal formation.

Given the paramount importance of efficiency and promptness in arbitration, in the appointment of the third arbitrator, it would be prudent for institutions like AACCSAAI, and TIAC— currently vesting this power in the two party-appointed arbitrators— to revisit and amend their rules to empower the institution itself with this authority when the parties make no alternative arrangement. This recommendation stems from the practical and principled advantages demonstrated by established institutions like the ICC, whose approach to tribunal constitution has become a benchmark for fairness, efficiency, and quality in international arbitration.[131] When the power to appoint the third arbitrator rests solely with the two party appointed arbitrators, there is an inherent risk of deadlock or strategic maneuvering that can delay the constitution of the tribunal.[132] Such delays not only prolong the dispute resolution process but also increase costs and uncertainty for the parties involved. By contrast, when the institution assumes the role of appointing the third arbitrator, it acts as a neutral and experienced authority capable of swiftly resolving any impasse. This institutional intervention ensures that the arbitration proceeds without unnecessary interruption, preserving the procedural momentum essential for effective dispute resolution.[133]

Institutional appointment enhances the impartiality and independence of the tribunal, which in turn contributes to the procedural fairness of the

131 Gary Born, *Supra* note 4, p.148
132 Gerbay, *Supra* note 6, p.82
133 Ibid.

process.[134] Unlike party-appointed arbitrators who may have closer ties to the parties, the institution has a vested interest in maintaining the integrity and reputation of its arbitration process. It applies rigorous conflict-of-interest checks and draws from a diverse and qualified pool of arbitrators, ensuring that the presiding arbitrator is not only impartial but also suitably experienced and competent. This oversight helps to safeguard the fairness of the arbitration and bolsters confidence among parties and practitioners alike.[135]

Moreover, it is important to recognize that empowering the institution to appoint the third arbitrator does not diminish party autonomy. Parties remain free to agree on alternative appointment mechanisms if they so choose. This mechanism works only in the absence of prior agreement of the parties with regard to the appointment of arbitrators. In light of these considerations, it is recommended that AACCSAAI and TIAC revise their arbitration rules to grant themselves the power to appoint the third arbitrator, unless the parties have agreed upon another procedure for such appointment. Such a reform would significantly contribute to the efficiency and overall effectiveness of arbitration under their auspices, ultimately benefiting all parties engaged in dispute resolution.

2.2. Challenge of Arbitrators

Institutional arbitration rules incorporate provisions to challenge

134 Ibid.
135 Ibid.

arbitrators primarily to ensure the impartiality, independence, and competence of the arbitral tribunal, which are fundamental to fair and just arbitration proceedings.[136] These provisions help maintain the confidence of the parties in the arbitral process, facilitate the enforcement of arbitral awards, and uphold the integrity and legitimacy of arbitration.[137]

The rules of ICC, AACCSAAI, KIAC, NCIA, and TIAC—all generally contain provisions allowing parties to challenge arbitrators. The key distinctions among these institutions' rules relate to the permissible grounds for such challenges, the procedures for initiating them, the body responsible for deciding them, and the finality of these decisions.

Regarding grounds for challenge, the ICC Rules grant parties broad and reasonable rights to seek the removal of an arbitrator. Under Article 14(1), a party may challenge an arbitrator based on alleged lack of impartiality or independence, or "otherwise"—a deliberately expansive term that is interpreted to encompass any circumstance where an arbitrator is unable to perform their duties as required under the rules. This interpretation is reinforced by Article 15(2), which empowers the ICC Court to replace an arbitrator on its own initiative if they are prevented from performing their functions—whether *de jure* or *de facto*—or are failing to fulfill their duties in accordance with the rules or within the prescribed time limits. For example, in a notable 2010 case, the ICC Court accepted a challenge after it was shown that an arbitrator had developed substance abuse problems and could no longer act

136 Gary Born, *Supra* note 4, p.170
137 Ibid.

effectively.[138]

The KIAC, NCIA, AACCSAAI, and TIAC rules similarly allow for challenges, though the specificity and procedural steps differ. Typically, these rules stipulate that a party may only challenge an arbitrator it appointed for reasons that arise or become known after the appointment.[139] The challenging party must notify the other party, the challenged arbitrator, the other tribunal members, and the relevant institution.[140] However, under the AACCSAAI rules, notification to the director of the institution alone is sufficient.[141] The challenge must be made in writing and must specify the reasons for the challenge.[142] If the other party does not agree to the challenge and the arbitrator does not voluntarily withdraw, the ultimate decision rests with the arbitral institution.[143]

The first distinction among the rules of the ICC, KIAC, NCIA, AACCSAAI, and TIAC concerns the grounds for challenging an arbitrator. Article 17 of the KIAC rules allows a challenge if

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[138] See the ICC Secretariats Guide to ICC 2012 Arbitration Rules, Paragraph 3-567, the authors believe General Standard 2 of the IBA Guideline on Conflict of Interest in International Arbitration provides helpful guidance with respect to independence and impartiality; Standard 2 (c) states that; "Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching the arbitrator's decision."

[139] TIAC, *Supra* note 112, Article 13(3), NCIA, *Supra* note 112, Rule 11(2), KIAC, *Supra* note 112, Article 17, AACCSAAI, *Supra* note 112, Article 14(5)

[140] TIAC, *Supra* note 112, Article 14(2), KIAC, *Supra* note 112, Article 18, NCIA, *Supra* note 112, Rule 11(3)

[141] AACCSAAI, *Supra* note 112, Article 14(1)

[142] TIAC, *Supra* note 112, Article 14(2), KIAC, *Supra* note 112, Article 18, AACCSAAI, *Supra* note 112, Article 14(1) NCIA, *Supra* note 112, Rule 11(3)

[143] TIAC, *Supra* note 112, Article 14(4), KIAC, *Supra* note 112, Article 19, AACCSAAI, *Supra* note 112, Article 14(4), NCIA, *Supra* note 112, Rule 11(6)

circumstances create justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator lacks the qualifications agreed upon by the parties.[144] While both ICC and KIAC rules address impartiality and independence as grounds of challenge, KIAC uniquely adds the arbitrator's failure to meet agreed qualifications as an additional ground. In contrast, the AACCSAAI rules demand only a written statement specifying the reason for the challenge, without enumerating particular grounds.[145] This lack of specificity may invite challenges based on less justifiable reasons, thus potentially compromising procedural fairness and cost effectiveness and enabling the recalcitrant party broader scope to challenge.

By comparison, the NCIA and TIAC rules limit challenges strictly to situations that raise justifiable doubts as to the arbitrator's impartiality or independence, omitting other grounds such as lack of agreed qualifications or functional incapacity. This narrower focus may restrict parties' ability to address legitimate concerns about an arbitrator's suitability, as the ICC and KIAC have demonstrated by permitting challenges in a wider range of circumstances.[146] For instance, challenges have been recognized not only for impartiality or independence concerns, but also for failure to advance the arbitration with reasonable dispatch or for not meeting agreed qualifications.[147]

The second point of difference relates to the deadline for submitting a challenge. Institutional rules specify time limits for raising challenges to ensure that challenges are brought promptly and that the arbitration

144 KIAC, *Supra* note 112, Article 17
145 AACCSAAI, *Supra* note 112, Article 14(1)
146 KIAC, *Supra* note 112, Article 17, ICC, *Supra* note 83, Article 14(1)
147 Ibid.

process remains efficient and do not become unduly delayed by excessive or tactical challenges. This balance protects the integrity of the process while avoiding misuse of challenges as dilatory tactics. The ICC rules allow a party 30 days from awareness of the relevant facts to file a challenge.[148] By contrast, NCIA, AACCSAAI, TIAC, HKIAC, and SIAC require challenges to be made within 15 days, while KIAC sets a 14-day deadline.[149] Although the ICC's 30-day window may seem comparatively long, it is designed to enhance legal certainty and afford parties sufficient time to assess the validity of their challenge carefully.[150] This reduces the risk of hasty or insufficiently considered challenges in the midst of the proceedings merely to avoid the objection that the challenge might be time barred and reduce the risk of procedural disruptions.[151]

The third point of distinction among these five sets of rules pertains to the finality of the decision rendered on arbitrator challenges. The ICC rules, under Article 11(4), explicitly provide that the ICC court's decisions on challenges to arbitrators are final and not subject to appeal. Similarly, the KIAC and AACCSAAI rules affirm that the institution's decision on a challenge is final.[152]

In contrast, the NCIA and TIAC rules do not explicitly address the finality of such decisions, thereby leaving open the possibility of further recourse or uncertainty. Including a clear finality clause, as seen in the

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148 ICC, *Supra* note 83, Article 14(2)

149 NCIA, *Supra* note 112, Rule 11(3), KIAC, *Supra* note 112, Article 18, AACCSAAI, *Supra* note 112, Article 14(2), TIAC, *Supra* note 112, Article 14(1), SIAC, *Supra* note 83, Rule 27

150 Webster & Buhler *Supra* note 81, pp.258-260

151 Ibid.

152 AACCSAAI and KIAC, *Supra* note 112, Article 14(4) and Article 19 respectively

ICC and KIAC rules, would significantly enhance the efficiency and predictability of the arbitral process.

In summary, based on this analysis, it is recommended that the KIAC, NCIA, AACCSAAI, and TIAC rules be revised to align more closely with the ICC's provisions on arbitrator challenges. Specifically, the grounds for challenge should be broadened to include not only impartiality and independence, but also functional incapacity and lack of agreed qualifications, as appropriate. This expansion will help achieve a careful balance between party autonomy and procedural fairness. Furthermore, the time limit for filing a challenge should be set at 30 days, providing sufficient opportunity for parties to assess their position and prepare a well-founded challenge. This time frame strikes an appropriate balance between efficiency and fairness in the proceedings. Finally, the rules should explicitly state that institutional decisions on challenges are final, ensuring clarity and efficiency in the arbitral process. Incorporating these changes would enhance the reliability, efficiency, and fairness of the arbitration rules, aligning them with international best practices and improving the overall user experience.

2.3 Location of the Hearings

Institutional arbitration rules allow hearings to be conducted at any convenient location to provide flexibility, practicality, and efficiency in the arbitration process.[153] This flexibility accommodates the diverse geographic locations of parties, arbitrators, and witnesses, reducing travel burdens and costs while ensuring procedural convenience. Most

[153] Gautama Mohanty, The Debate of Seat Vs. Venue in International Commercial Arbitration Proceedings: Addressing the Bone of Contention, *International Commercial Law Review*, p.2

importantly the choice of hearing venue does not affect the legal seat of arbitration which is the jurisdiction governing the arbitration's procedural law and enforceability of awards.[154]

Under the institutional rules of the ICC, HKIAC, LCIA, NCIA, KIAC, TIAC, and AACCSAAI regardless of the location of the seat, the tribunal may hold hearings in any geographical location it deems convenient.[155] The ICC, HKIAC, LCIA and NCIA rules require the tribunal to consult the parties view before deciding the hearing locations.[156] In contrast, the TIAC, KIAC and AACCSAAI rules do not mandate such consultation, a practice that runs counter to the fundamental principle of party autonomy in arbitration.[157]

Since party autonomy embodies the freedom of parties to define the parameters of their arbitration agreement and to govern the arbitral process—including the freedom to determine the seat and venue of the arbitration—it is recommended that these rules be revised to require the tribunal to consult the parties, consistent with the approach of ICC, HKIAC, LCIA and NCIA rules.

Furthermore, the HKIAC, LCIA, NCIA and KIAC rules clarify that, regardless of where hearings or deliberations occur, the arbitration is deemed to take place at the seat, and any award or order is treated as

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154 Ibid.

155 ICC, *Supra* note 83, Article 18, HKIAC, *Supra* note 83, Article 14(1), LCIA, *Supra* note 86, Article 16(2), NCIA, *Supra* note 112, Rule 18(3), TIAC, *Supra* note 112, Article 19(2), AACCSAAI, *Supra* note 112, Article 19(2), KIAC, *Supra* note 112, Article 23

156 ICC, *Supra* note 83, Article 18, HKIAC, *Supra* note 83, Article 14(1), LCIA, *Supra* note 86, Article 16(2), NCIA, *Supra* note 112, Rule 18(3)

157 TIAC, *Supra* note 112, Article 19(2), AACCSAAI, *Supra* note 112, Article 19(2), KIAC, *Supra* note 112, Article 23

having been made there.[158] In contrast, AACCSAAI and TIAC rules mandatorily require that the award must be rendered at the seat of arbitration for it to be valid, even if hearings or deliberations take place elsewhere.[159] The authors argue this is an outdated practice that does not reflect the realities of modern arbitration. Requiring the rendering of awards to be physically at the seat can cause unnecessary travel, delays, and inconvenience, especially in cross-border disputes. Insisting physical presence or signature at the seat is increasingly regarded as technologically regressive and fundamentally at odds with the core principle of efficiency in arbitration.

Regarding remote hearings and deliberations, TIAC and NCIA rules are notably technology-friendly compared to KIAC and AACCSAAI rules. They explicitly allow hearings or deliberations to take place remotely by videoconference or other appropriate means.[160] These provision mirror Article 26(1) of the ICC and Article 19(2) of the LCIA rules, which introduced remote hearings and deliberations, reflecting the shift towards digital proceedings. Further, under the NCIA, ICC, and LCIA rules, tribunals can choose to hold a hearing remotely even if a party requests an in-person hearing.[161] This added discretion aims at pre-empting possible dilatory tactics on the part of the parties in circumstances where an in-person hearing would be impossible resulting in a *de facto* abeyance of the proceedings. It is recommended that the provisions of KIAC and AACCSAAI be amended to expressly allow virtual hearings especially in line with the provisions of LCIA, which do

158 HKIAC, *Supra* note 83, Article 14(1), LCIA, *Supra* note 86, Article 16(2), KIAC, *Supra* note 112, Article 23, NCIA, *Supra* note 112, Rule 18(5)

159 AACCSAAI, *Supra* note 112, Article 19(4), TIAC, *Supra* note 112, Article 19(4)

160 TIAC, *Supra* note 112, Article 31(2), NCIA, *Supra* note 112, Rule 22(5)

161 NCIA, *Supra* note 112, Rule 22(5), LCIA, *Supra* note 86, Article 16(3), ICC, *Supra* note 83, Article 26(1)

have comprehensive provisions tailored to employ technology to enhance the efficiency and expeditious conduct of the arbitration, including hearings.[162]

2.4. Emergency Arbitrator

The introduction of emergency arbitration is widely regarded as a significant innovation in the development of international commercial arbitration.[163] Emergency arbitration provides parties a mechanism to seek urgent interim relief before the full arbitral tribunal is constituted, addressing issues like irreparable harm and preserving the status quo in urgent disputes.[164]

Before the introduction of emergency arbitration rules, parties had two options for emergency relief: applying to national courts or waiting for the arbitral tribunal to be formed.[165] This innovation helps fill a gap where waiting for the constitution of the tribunal or resorting to national courts could result in delays or inefficiencies. The mechanism balances urgency with fairness, enabling prompt interim relief while safeguarding due process through subsequent review by the full tribunal.[166]

Challenges remain, notably in enforcement and fairness balance, but ongoing reforms and greater institutional adoption show its establishment as a core feature of modern international arbitration

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162 LCIA, *Supra* note 86, Article 16(3)

163 Peter J.W. Sherwin and Douglas C. Rennie, Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis" *The American Review of International Arbitration*, Vol. 20, No. 3, (2010), p.10

164 Ibid.

165 Ibid.

166 Ibid.

practice.[167]

Several arbitration institutions—including ICC, SIAC, LCIA, HKIAC, KIAC and NCIA—have incorporated emergency arbitration provisions in their rules over the past 15 years, reflecting its growing acceptance and importance.[168] In contrast, AACCSAAI and TIAC rules have not yet adopted such provisions. The ICC's emergency arbitration provisions embody several key principles. First, they apply only when parties have agreed to arbitrate under the ICC rules, specifically excluding investment treaty arbitrations and third parties.[169] Second, the provisions do not prevent parties from seeking urgent interim relief from competent courts at any time, either before or after applying to the emergency arbitrator.[170] Third, the emergency arbitrator's jurisdiction is limited to genuine urgent situations where relief cannot await the arbitral tribunal's constitution, preventing misuse of the procedure.[171] Fourth, decisions by the emergency arbitrator take the form of orders, not awards, and parties must comply with these orders.[172] Finally, the rules impose strict time limits: the emergency arbitrator must be appointed within two days of the application, and must issue an order within 15 days, subject to possible extension by the court's president.[173]

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167 Ibid.

168 Several institutions have incorporated emergency arbitration rules: The International Centre for Dispute Resolution (ICDR) was the first institution to introduce emergency arbitration provisions in 2006. Following ICDR, SIAC in 2010, ICC in 2012, HKIAC in 2013, and LCIA in 2014 incorporated emergency arbitration into their rules, reflecting the growing global recognition of emergency arbitration as an essential tool for obtaining urgent relief in international arbitration.

169 ICC, *Supra* note 83, Article 29(6)

170 Id., Article 29

171 Ibid.

172 Ibid.

173 Ibid., Appendix V, Article 2(1), and Article 6 (4)

The KIAC and NCIA rules share many of these procedural features with the ICC. For instance, all three require the appointment of the emergency arbitrator within two days of the application and mandate that a procedural timetable be established within two days of file transmission.[174] They also require the emergency arbitrator to render a decision within fifteen days.[175] Each institution demands that prospective emergency arbitrators sign statements of impartiality and independence,[176] and all provide mechanisms for challenging an emergency arbitrator's appointment within a short period—three days under ICC and KIAC,[177] and one day under NCIA[178]—with the respective arbitral institution having the final say on such challenges.[179]

Despite the similarities among the emergency arbitration provisions of the ICC, KIAC, and NCIA, several significant differences remain. A notable distinction arises in the criteria governing access to emergency arbitration. Both the ICC and KIAC arbitration rules explicitly stipulate that emergency arbitration should be reserved for situations where urgent interim relief is genuinely necessary and cannot await the constitution of the arbitral tribunal,[180] whereas under the NCIA rules, there is no clearly provided requirement for the center to scrutinizing whether the situation can wait the formation of the arbitral tribunal or

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174 Id., Appendix V, Article 2(1), and Article 5(1), KIAC, *Supra* note 112, Schedule II, Article 2 and Article 5, NCIA, *Supra* note 112, Second Schedule, No.3 and Paragraph 11

175 ICC, *Supra* note 83, Appendix V, Article 6(4), KIAC, *Supra* note 112, Schedule II, Article 6, NCIA, *Supra* note 112, Second Schedule, No.14

176 ICC, *Supra* note 83, Appendix V, Article 2(5), KIAC, *Supra* note 112, Schedule II, Article 2, NCIA, *Supra* note 112, Second Schedule, No.5

177 ICC, *Supra* note 83, Appendix V, Article 3(2), KIAC, *Supra* note 112, Schedule II, Article 3

178 NCIA, *Supra* note 112, Schedule 2, Paragraph 9

179 ICC, *Supra* note 83, Appendix V, Article 3(2), KIAC, *Supra note* 112, Schedule II, Article 3, NCIA, *Supra* note 112, Rule 11(3)

180 ICC, *Supra* note 83, Article 29 (1), KIAC, *Supra* note 112, Article 34

not. The ICC's and KIAC's careful limitation reflects a deliberate balancing act within the arbitration framework. Emergency arbitration is designed as a provisional mechanism to address exceptional circumstances—typically where there is a risk of irreparable harm or the need to preserve the status quo— before the full tribunal is in place to hear the case.[181] By restricting emergency arbitration to truly urgent matters, the ICC and KIAC rules preserve the primary role of the arbitral tribunal as the ultimate decision-maker on both procedural and substantive issues. This approach also serves to prevent the misuse of emergency arbitration as a tactical tool. If parties are allowed to seek emergency relief without demonstrating genuine urgency, the process could become congested with premature or unnecessary applications, undermining the efficiency and effectiveness of the arbitral process. Furthermore, limiting emergency arbitration to urgent cases helps avoid duplicative or parallel proceedings that could delay the resolution of the dispute rather than expedite it. Given these considerations, it is recommended that the NCIA incorporate a similar requirement into its rules.

An additional point of departure involves the permissible form of the emergency arbitrator's decision. Under the ICC and KIAC arbitration rules, emergency arbitrator decisions are issued in the form of orders.[182] The NCIA rules, however, permit emergency arbitrators to render their decisions as either orders or awards.[183] This flexibility is particularly significant in the East African context. One of the principal reasons for favoring the option to issue awards, in addition to orders, is

[181] Redfern and Hunter, *Supra* note 7, p.236

[182] ICC, *Supra* note 83, Appendix V, Article 6(1), and KIAC, *Supra* note 112, Schedule 2, Article 6, paragraph 1

[183] NCIA, *Supra* note 112, Second Schedule, No.14

enforceability. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforceability is generally contingent upon the decision being in the form of an arbitral award.[184] Orders, by contrast, may lack the requisite finality and binding character to qualify for enforcement under the convention in certain jurisdictions.[185] This legal reality makes the ability to issue awards a critical tool for ensuring that emergency relief can be effectively enforced, both domestically and internationally.

Practical experience with the enforcement of emergency arbitrator decisions globally further supports this approach. While some jurisdictions have demonstrated willingness to enforce emergency arbitrator awards, the enforcement of orders remains less certain.[186] This uncertainty can undermine the very purpose of emergency arbitration, which is to provide swift and effective interim relief.[187] By allowing emergency arbitrators the discretion to issue awards, institutions like the NCIA provide parties with a mechanism that enhances the likelihood of enforcement, particularly in cross-border disputes where the relief must be recognized beyond the seat of arbitration.

Admittedly, permitting the issuance of awards may introduce some procedural complexity or delay compared to issuing orders alone. However, in the East African context, where enforcement challenges are a practical concern, this trade-off is justified. The marginal additional time required to issue an award is outweighed by the benefit of securing

184 Redfern and Hunter, *Supra* note 7, p.237
185 Ibid.
186 Ibid.
187 Ibid.

enforceable emergency relief. Consequently, the approach adopted by the NCIA—allowing emergency arbitrators to issue either orders or awards—strikes an appropriate balance between procedural efficiency and enforceability. For arbitration institutions operating in East Africa, this dual option is the more recommended approach, as it reflects an informed response to regional legal frameworks and enforcement realities, thereby enhancing the effectiveness and credibility of emergency arbitration as a dispute resolution mechanism in the region.

In contrast to the ICC, NCIA, and KIAC, which have detailed emergency arbitration provisions, the AACCSAAI and TIAC rules lack comprehensive emergency arbitration mechanisms. For example, TIAC mention emergency arbitrators only in passing, without detailed procedural guidance, suggesting an incomplete incorporation of the mechanism.[188] The AACCSAAI arbitration rules do not contain any provisions concerning emergency arbitration procedures. Instead, AACCSAAI requires parties seeking urgent relief to apply to the courts or await the constitution of the tribunal,[189] a process that can be time-consuming and uncertain, particularly in jurisdictions where courts are not arbitration-friendly. The growing popularity of emergency arbitration reflects its value in providing timely and flexible relief during the early stages of arbitration.[190] For jurisdictions such as Ethiopia, where courts have been criticized for excessive interference in commercial arbitration,[191] integrating emergency arbitration provisions — akin to those in the ICC rules—would significantly enhance the

188 TIAC, *Supra* note 112, Article 28
189 AACCSAAI, *Supra* note 112, Article 16(2)
190 Peter and Douglas, *Supra* note 163, p.16
191 Hailegebriel Gedecho, The Role of Ethiopian Courts in Commercial Arbitration, *Mizan Law Review*, *Vol. 4: No.2*, (2010), p.333

efficiency, reliability, and effectiveness of the arbitration framework.

In conclusion, emergency arbitration procedures provide a vital mechanism for granting urgent interim relief before the constitution of the arbitral tribunal. While the ICC rules stand out for their detail and clarity, KIAC and NCIA have also developed robust provisions, albeit with some gaps. Incorporating such procedures into the rules of AACCSAAI and TIAC would significantly improve parties' ability to secure timely protection and reinforce arbitration's role as an efficient and reliable method of dispute resolution.

2.5. Expedited (Fast-Track) Arbitration

Another innovation, which has improved arbitral offerings, is the expedited arbitration rule. Arbitral institutions introduced expedited arbitration provisions to address the growing demand for faster, and more cost-effective resolution of international commercial disputes, particularly those of lower value or straightforward complexity disputes.[192] Expedited arbitration typically applies when the amount in dispute does not exceed a specified monetary threshold, though it can also be triggered by party agreement or exceptional urgency.[193] Simplified steps characterize this procedure: a sole arbitrator is appointed, usually only one exchange of briefs occurs, a single hearing is held and importantly, the arbitral tribunal is expected to render a final

[192] Leading arbitral institutions worldwide have incorporated expedited arbitration provisions. For instance, SIAC allows expedited procedures if the parties agree to its use, if the claim value does not exceed S$10 million, or if the circumstances justify it. Similarly, the HKIAC offers expedited arbitration when parties consent to its use, when the claim value is below HKIAC's specified threshold on the date the notice of arbitration is submitted, or in cases of exceptional urgency.

[193] Webster and Buhler, *Supra* note 81, p.540

award within a strict deadline.[194]

Major Arbitral institutions have introduced expedited arbitration procedures to address the demand for faster and more cost-effective dispute resolution, but they differ notably in their models and application.[195] The ICC's expedited procedure, introduced for the first time in 2017, operates on an opt-out basis, automatically applying to disputes under a set monetary threshold unless parties agree otherwise, ensuring resolution within six months.[196] In contrast, SIAC (since 2010) and HKIAC (since 2008) employ opt-in models, activating expedited procedures only when parties consent, generally in lower-value or urgent cases.[197]

The primary motivations behind these provisions are threefold: time efficiency, cost reduction, and proportionality in dispute resolution.[198] Time efficiency is achieved by imposing strict deadlines for procedural steps and award issuance. For example, the ICC's expedited procedure mandates that the final award be issued typically within six months from the case management conference, significantly faster than traditional arbitration timelines.[199] Cost savings arise from streamlined processes, such as appointing a sole arbitrator irrespective of party agreement, removing formalities like terms of reference, and limiting written submissions and hearings. Arbitrators' fees are also reduced, making the process more accessible for parties involved in smaller disputes.[200]

194 Ibid.
195 Ibid.
196 ICC, *Supra* note 83, Appendix VI, Article 4(1)
197 HKIAC, *Supra* note 83, Article 42, and SIAC, *Supra note* 83, Rule 14
198 Webster & Buhler, *Supra* note 81, pp.539-550
199 ICC, *Supra* note 83, Appendix VI, Article 4(1)
200 Webster & Buhler, *Supra* note 81, pp.548-550

Proportionality ensures that the complexity and duration of the process match the value and nature of the dispute, avoiding unnecessary procedural burdens for straightforward cases.[201]

The ICC's expedited arbitration provisions automatically apply to disputes valued below US$2 million for agreements made between March 1, 2017, and before January 1, 2021, and US$3 million for agreements from January 1, 2021, onwards, unless parties opt out.[202] This automatic application reflects a deliberate institutional policy promoting efficiency in low value cases. The rules also allow parties to opt in for higher-value or more complex disputes if they mutually agree, providing flexibility.[203]

Despite its advantages, expedited arbitration faces challenges, particularly concerning due process and potential limitations on procedural rights. Leading institutions strive to balance efficiency with fairness, acknowledging that a one-size-fits-all approach may not serve all parties equally.[204] When applied appropriately, expedited arbitration offers benefits such as finality, certainty, and the ability for businesses to resolve disputes promptly, preserving commercial relationships and minimizing legal costs.[205]

Among the four East African arbitration institutions, only the TIAC has expedited procedure provisions. The procedure applies when parties request it and the dispute value do not exceed Tanzanian Shillings 50

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201 Ibid.

202 ICC, *Supra* note 83, Article 30(2) and (3), and Article 1(2) of Appendix VI

203 Ibid.

204 Andreas Wehowsky, Expedited Procedures in International Commercial Arbitration Swiss and International Perspectives, Sui Generis, Zurich (2023), pp.49-50

205 Ibid.

million.[206] TIAC allows either a sole arbitrator or a panel of three arbitrators,[207] to decide the dispute; though appointing three arbitrators contradicts expedited arbitration's primary goals of speeding resolution and reducing costs.

Unlike the ICC rules, which require mutual agreement of parties to apply expedited procedures, TIAC allows a single party to trigger the expedited process without the other's consent.[208] This unilateral initiation raises concerns, particularly regarding party autonomy, a foundational principle in international arbitration.[209] It risks procedural imbalance, where a better-resourced or strategically positioned party might compel a rushed process on an unwilling opponent, potentially undermining fairness and tribunal legitimacy. Moreover, it increases the risk of due process violations, as pressured parties may challenge the award's enforceability on grounds such as inadequate notice or inability to present their case.[210]

Additionally, unlike ICC rules, TIAC's rules do not clearly specify whether hearings can be informal or omitted entirely, a gap that should be addressed in line with ICC standards to better achieve expedited arbitration's goals. Regarding timelines to render the award, TIAC requires the award within three months from the tribunal's constitution, allowing extensions only in exceptional circumstances.[211] This represents a shorter deadline than ICC's six-month period.

206 TIAC, *Supra* note 112, Article 45(1)
207 Ibid., Article 45(5)
208 Ibid., Article 45(1)
209 Wehowsky, *Supra* note 204, pp.49-50
210 Ibid.
211 TIAC, *Supra* note 112, Article 45(3)

In contrast, the rules of AACCSAAI, NCIA, and KIAC currently lack expedited arbitration provisions. It is strongly recommended that these institutions introduce fast-track arbitration rules, as expedited procedures have become a hallmark of modern, user-friendly arbitral institutions. Such provisions cater effectively to parties seeking resolution of smaller or less complex disputes. The institutions should consider whether to adopt an opt-out model, like the ICC, or to require explicit party consent similar to SIAC and HKIAC, depending on their jurisdictional context and user preferences. Meanwhile, TIAC, which has already implemented fast-track provisions, would benefit from revising its existing rules to better align with the fundamental objective of expedited arbitration—delivering timely and cost effective resolutions—while maintaining procedural rigor.

2.6. Joinder of Additional Parties

Joinder provisions have become a pivotal innovation in international arbitration closely linked to the drive for increased efficiency in resolving complex disputes.[212] In the contemporary landscape of international commerce, multi-party and multi-contract disputes are increasingly common, reflecting the intricate nature of global transactions.[213] Joinder allows the inclusion of an additional party (a third party) into an already ongoing arbitration proceeding, usually to save time and costs in disputes involving multiple parties or contracts.[214]

This mechanism allows multiple related parties to be united in a single arbitration proceeding, thereby avoiding the inefficiencies associated

212 Klas, *Supra* note 87, pp.3-6
213 Ibid.
214 Ibid.

with multiple parallel arbitrations. Moreover, joinder enables a comprehensive resolution of interconnected issues in one proceeding, which helps prevent the risk of inconsistent awards and conflicting decisions.[215] Consequently, joinder contributes not only to procedural economy but also enhances the overall fairness and effectiveness of the arbitration process by promoting coherent and well-informed decision-making.[216]

Under the rules of the ICC, KIAC, and NCIA, both the claimant and the respondent may request the joinder of an additional party to the arbitration.[217] In practice, however, it is more common for the respondent to utilize this mechanism, as claimants frequently initiate proceedings against all intended respondents from the outset.[218] The ICC, KIAC, and NCIA rules each address the procedural aspects of joinder, including the requirement for a formal request.[219] A key principle shared by these institutions is that no additional party may be joined after the confirmation or appointment of any arbitrator unless all parties, including the additional party, consent to the joinder.[220]

The ICC and KIAC rules further provide that the secretariat may set a time limit for the submission of a request for joinder, a procedural

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[215] Ibid.
[216] Ibid.
[217] ICC, *Supra* note 83, Article 7, NCIA, *Supra* note 112, Rule 16, KIAC, *Supra* note 112, Article 8
[218] In a number of occasions, the ICC Court has heard applications from a claimant who seeks to name an additional party at some stages after filing its request. See, Webster & Buhler, *Supra* note 81, p.168
[219] ICC, *Supra* note 83, Article 7(2), NCIA, *Supra* note 112, Rule16 (6), KIAC, *Supra* note 112, Article 8(2)
[220] ICC, *Supra* note 83, Article 7(2), KIAC, *Supra* note 112, Article 8 and NCIA, *Supra* note 112, Rule 16(1)

safeguard designed to ensure that such requests are made promptly and that all relevant parties are identified early in the proceedings.[221] In contrast, the NCIA rules do not explicitly grant the secretariat this authority; instead, they generally prohibit joinder after the appointment of arbitrators unless the parties agree otherwise.

At first glance, there may appear to be tension between the secretariat's authority to set a time limit for joinder requests and the general prohibition against joining additional parties after the confirmation or appointment of any arbitrator. However, these provisions are complementary rather than contradictory, each serving a distinct purpose in the arbitration process. In the early stages of arbitration, before any arbitrator has been confirmed or appointed, the secretariat is empowered to establish a deadline by which a request for joinder must be submitted. This procedural rule is crucial for maintaining order and predictability, ensuring that all potential parties are identified and included at the outset. By requiring such requests to be made promptly, the institutions safeguards against delays and procedural uncertainty that might otherwise arise if parties sought to join the proceedings at a later, more disruptive stage. This approach reflects the ICC's and KIAC's commitment to efficiency and the fair administration of justice. The prohibition against joining additional parties after the constitution of the tribunal—as set out in the ICC, NCIA, and KIAC rules—is the default position, designed to protect the integrity of the arbitral process and the parties' legitimate expectations regarding the composition of the tribunal.

In summary, the secretariat's authority to set a time limit for joinder

[221] ICC, *Supra note* 83, Article 7(1), KIAC, *Supra* note 112, Article 8

requests operates in the pre-tribunal phase, promoting early resolution of party-related issues, while the prohibition against late joinder (with limited exceptions) protects the stability of the proceedings once the tribunal is in place. Together, these rules reflect a thoughtful balance between efficiency, party autonomy, and procedural fairness. It is therefore recommended to amend the NCIA rules to incorporate a safeguard, enabling the secretariat to fix a time limit for joinder requests.

The 2021 ICC rules introduced a further degree of flexibility through Article 7(5), which allows the arbitral tribunal—in exceptional circumstances and with the additional party's consent to the tribunal's constitution and the terms of reference—to permit the joinder of an additional party even after the tribunal has been constituted.[222] This represents a departure from the approach under the 2012 and 2017 ICC rules, as well as the current KIAC and NCIA rules, where joinder after arbitrator appointment was only possible with the unanimous consent of all parties.[223] The new ICC provision empowers the tribunal to permit joinder even if a party objects, provided the conditions are met. This flexibility is particularly valuable as the case progresses, especially when joining a consenting additional party would enhance the efficiency and relevance of the final award—for example, where the additional party holds critical evidence or has a direct interest in the outcome of the dispute.[224]

Requiring the joined party to accept the tribunal's composition and the terms of reference helps prevent unnecessary delays, ensures equal

222 ICC, *Supra* note 83, Article 7(5)
223 See Article 7 of the two versions of the ICC rules
224 Webster & Buhler, *Supra* note 81, p.168

treatment in the selection and appointment of the tribunal, and reduces the risk that the award will be challenged or rendered unenforceable. In light of these benefits, it is recommended that the NCIA and KIAC rules be amended to incorporate a provision similar to Article 7(5) of the 2021 ICC rules, thereby enhancing procedural flexibility and efficiency in multiparty arbitrations.

Lastly, it is noted that the TIAC and AACCSAAI rules currently lack provisions on joinder. It is advisable for these institutions to introduce such provisions to better serve their users by accommodating the interests of third parties in arbitration, especially given the increasing complexity of contractual arrangements in modern business. This would enhance the efficiency and effectiveness of arbitration services provided by these institutions.

2.7. Consolidation of Arbitrations

Consolidation is the process of combining two or more separate and pending arbitration proceedings into a single arbitration with a primary objective of saving time and costs, as well as preventing inconsistent or divergent decisions on related claims.[225] This process typically involves merging of related arbitrations, which may have been initiated under different arbitration agreements or may involve different parties. This allows efficiency and avoids conflicting awards by resolving related

[225] Ibid.

disputes in one proceeding.[226]

The ICC, KIAC, and NCIA arbitration rules provide provisions for consolidation.[227] Similar to the 2017 version of ICC rules,[228] consolidation under KIAC and NCIA may occur where all parties involved agree to consolidate the arbitrations,[229] or where all parties to the arbitrations are bound by the same arbitration agreement.[230] Additionally, consolidation can take place even if the claims arise under different arbitration agreements,[231] provided that the arbitrations involve the same parties, the claims relate to the same legal relationship, and the arbitration agreements are found by KIAC or NCIA to be compatible.[232]

Unless the parties agree otherwise, when arbitrations are consolidated under these rules, the consolidated proceedings are conducted within the arbitration that commenced first.[233] Furthermore, as with the ICC rules,[234] consolidation under KIAC and NCIA can only be granted upon the request of a party, meaning that the arbitral institutions do not have the authority to consolidate arbitrations on their own initiative.[235]

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226 Klas, *Supra* note 87, p.5

227 ICC, *Supra* note 83, Article 10, KIAC, *Supra* note 112, Article 11, NCIA, *Supra* note 112, Rule 17

228 ICC, *Supra* note 83, Article 10

229 KIAC *Supra* note 112, Article 11, NCIA, *Supra* note 112, Rule 17

230 Ibid.

231 Ibid.

232 In deciding the consolidation in arbitration under the ICC arbitration rules, the ICC court must take into account all the circumstances of the case. It also must find out whether the requested consolidation will be time- efficient and will avoid the possibility of conflicting decisions. Importantly, the decision of the ICC Court concerning consolidation, (i.e. under Article 10) is not a *prima facie* decision, it is final.

233 KIAC, *Supra* note 112, Article 11(3) NCIA, *Supra* note 112, Rule 17(2)

234 ICC, *Supra* note 83, Article 10

235 KIAC, *Supra* note 112, Article 11, NCIA, *Supra* note 112, Rule 17

While the KIAC and NCIA rules restrict consolidation to cases where all claims arise under the same arbitration agreement, the ICC rules (Article 10(b)) provide greater flexibility by allowing consolidation when claims are brought under the same arbitration agreement or under multiple arbitration agreements. For instance, consider parties W, X, Y, and Z, who are parties to both a Share Purchase Agreement and a Shareholders Agreement. If parties W and Z are involved in arbitration 1, and parties X and Y in arbitration 2, under the ICC rules, consolidation of arbitrations 1 and 2 may be feasible. This approach enhances speed and reduces cost, while helping to avoid inconsistent or divergent decisions on related claims. It is therefore recommended that the NCIA and KIAC rules be amended to include a provision similar to Article 10(b) of the 2021 ICC rules.

By contrast, the arbitration rules of AACCSAAI and TIAC currently lack provisions on consolidation. Given the increasing complexity and diversity of disputes, it is recommended that these institutions introduce relevant consolidation provisions to enhance the efficiency, and procedural consistency of their arbitration procedures.

2.8. Claims between Multiple Parties

Traditional arbitration rules, designed primarily for straightforward two-party disputes, have often proved inadequate in addressing the intricate web of claims and counterclaims that arise in modern business environments.[236] In response, arbitration institutions have introduced explicit provisions allowing for claims between multiple parties within a

[236] Klas, *Supra* note 87, pp.3-6

single arbitration.[237] These provisions aim to enhance procedural efficiency, reduce costs, and avoid inconsistent awards by allowing related disputes involving multiple parties to be resolved in a single arbitration.[238] Moreover, these provisions help resolve practical challenges such as the need for cross-claims, the merging of parallel proceedings, and arbitration of disputes arising from multiple contracts involving the same or connected parties.[239]

The ICC first introduced such provisions in its 2012 revised rules. Article 8 of the ICC rules applies to arbitrations involving more than two parties, allowing any party to bring claims against any other party within the arbitration. To maintain procedural efficiency and fairness, the rules limit the introduction of new claims after the terms of reference are finalized, unless the arbitral tribunal permits otherwise. Importantly, claims under Article 8 can only be made against parties already joined to the arbitration, preserving the consensual nature of arbitration and requiring joinder procedures for any additional parties.[240]

Among four sets of East African rules, KIAC rules are the only in explicitly providing guidance on claims involving multiple parties. Specifically, Article 9 of the KIAC rules allows any party in a multi-party arbitration to make claims against any other party, subject to certain procedural safeguards, including restrictions on introducing new claims after the terms of reference have been finalized without the tribunal's approval.[241] This provision aligns closely with Article 8 of the

237 Ibid.
238 Ibid.
239 Ibid.
240 Ibid.
241 KIAC, *Supra* note 112, Article 9

ICC arbitration rules, which is widely regarded as a comprehensive framework for managing multi-party claims.

At the heart of this development is the recognition that efficiency and fairness in dispute resolution are best served when all related claims can be heard together.[242] When disputes involving several parties are fragmented into separate arbitrations, there is a heightened risk of inconsistent outcomes, increased costs, and procedural delays.[243] By contrast, multiparty claim provisions enable tribunals to address the entirety of the dispute in a consolidated manner, reducing duplication of evidence, minimizing the risk of conflicting awards, and ultimately delivering a more comprehensive resolution.[244] The benefits of these provisions extend beyond mere procedural convenience. They enhance the enforceability of arbitral awards by ensuring that all interested parties have been properly included in the proceedings, thereby reducing the likelihood of challenges on grounds of procedural unfairness.[245] Moreover, institutions that embrace these modern procedural tools are better positioned to attract complex, high-value disputes, reinforcing their reputation as forward-thinking and user-friendly centers for international arbitration.[246]

Given these advantages, it is incumbent upon the AACCSAAI, NCIA, and TIAC to consider incorporating multiparty claim provisions. Doing so would not only align these institutions with international best practices but also ensure their continued relevance in an increasingly

242 Gary Born, *Supra* note 4, p.266
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.

interconnected and sophisticated commercial landscape. Failure to adapt may leave them at a competitive disadvantage, as parties and their counsel increasingly prioritize procedural frameworks that can efficiently and fairly handle the complexities of modern disputes.

3 Conclusion

Efficiency and effectiveness rank among users' primary concerns in international arbitration. In response, many arbitral institutions have innovated by introducing provisions for emergency arbitration, expedited procedures, and mechanisms to handle multi-party and multi-contract disputes. Competition among arbitral institutions fosters ongoing innovation, as each institution refines and adopts successful practices developed by others. This dynamic competition elevates arbitration standards by improving speed, reducing costs, enhancing enforceability, and promoting fairness. Ultimately, these advancements benefit arbitration users and contribute to broader facilitation of international trade.

This paper has conducted a comparative analysis of the procedural rules governing four arbitration institutions in East Africa: the AACCSAAI, NCIA, KIAC, and TIAC. It benchmarks these rules against the core principles of international arbitration and the frameworks of globally leading arbitral institutions with the aim of identifying both the strengths and limitations of the institutions arbitration rules and to propose targeted reforms that would enhance their efficiency, effectiveness, and global competitiveness.

The major findings reveal that East African arbitral institutions lag in maintaining continuous innovation and adopting proven international

procedural standards. Key limitations include arbitrator appointment mechanisms prone to delay and deadlock, which undermines the efficiency that arbitration is meant to provide; inconsistent, unclear, and narrowly restricted challenge procedures that foster uncertainty and potential abuse, undermining procedural fairness; outdated venue rules that undervalue party autonomy and the technological realities of modern arbitration; and underdeveloped provisions for multi-party, multi-contract, and time-sensitive disputes, with potential risks of inconsistent decisions and duplication of efforts.

These findings highlight the critical need for continuous innovation and integration of best practices within East African institutional arbitration rules to enhance efficiency and effectiveness, while safeguarding fairness and party autonomy. Reforms are therefore urgently needed to address the identified limitations: enhancing institutional roles in arbitrator appointments, clarifying challenge procedures, adopting flexible and digital-friendly hearing provisions, and introducing robust expedited, emergency, joinder, and consolidation rules are essential. Implementing these reforms will require a combination of institutional initiative, and engagement with international best practices. Balancing the "magic triangle" of party autonomy, procedural fairness, and efficiency is a persistent challenge. These institutions must carefully calibrate their rules and practices to ensure no principle is sacrificed at the altar of another.

Looking ahead, the future of East African arbitration is promising but depends on sustained commitment to rule reform mainly through continuous innovation and adopting proven international procedural standards. Aligning institutional arbitration rules with evolving global standards will position East Africa as a competitive, reliable, and

arbitration-friendly jurisdiction. This evolution will not only enhance dispute resolution in the region but also contribute to increased regional trade and investment by providing businesses with trusted mechanisms to resolve cross-border disputes efficiently and effectively.

Balancing Customary Norms and Human Rights in Land Rights Governance in Ethiopia

Tafesech Wolede[§] Tadese Amesalu[⬥] Bright man G/ Michael [a]

Abstract

This article examines the challenge of balancing customary land norms with human rights within Ethiopia's plural legal system, with particular emphasis on women's land rights. Customary land administration and dispute resolution mechanisms play a central role in rural governance, drawing legitimacy from local knowledge, social cohesion. However, when applied without adequate constitutional and human rights safeguards, customary norms frequently conflict with fundamental principles of equality, due process, and gender justice. The article adopts a doctrinal methodology and feminist legal perspective, argues that customary law is not value-neutral but embedded in patriarchal power structures that systematically marginalize women in access to land, participation in decision-making, and dispute resolution processes. The findings indicate that there are not sufficient constitutional and procedural safeguards to regulate when some aspects of customary laws contravene the rights of women and other marginalized groups. Moreover, the legal frameworks lack accountability, and gender inclusivity. To address these gaps, the article proposes legal and structural inclusion in the legal frameworks

§ LLB, LLM, PhD candidate in land policy and governance, Bahir Dar University, Institute of Land Administration tafeymare@gmail.com

⬥ Professor, Institute of Land Administration, Bahir Dar University, Bahir Dar, Ethiopia. tadamsbir@gmail.com

[a] Assistance professor Faculty of Law, University of Geneva, Switzerland, Email: bgbmichael@gmail.com

like, repugnancy test, formal recognition accompanied with regulation and support integration of customary laws into the state legal system and codification of customary rules. Collectively, these measures provide a framework to operationalize constitutional and human rights protections, promoting equitable land governance and safeguarding women's rights. This article contributes to the literature by critically analyzing the interaction between customary law and human rights in land governance in Ethiopia.

Keywords: Customary dispute resolution mechanism, land rights, feminist legal theory, repugnancy, recognition

Introduction

The relationship between customary law and human rights is a critical area of legal scholarship, particularly in societies where custom plays a central role, such as Ethiopia.[1] Furthermore, customary law has been a long standing practice consisting of unwritten legal norms derived from social practices that regulate various aspects of community life.[2] One of the key areas influenced by customary law is land administration. Land

[1] Merry, Sally Engle, Human rights & gender violence: Translating international law into local justice, University of Chicago Press, (2024). See also, Nimani, Petrit, Shefqet Avdija, and Artan Maloku, Customary Law And Modern Legal Systems: A Comparative Perspective. *Corporate Law & Governance Review, Vol.7, No. 2* (2025) see also, Milkiyas Bulcha , Cultural Rights under Ethiopian Bill of Human Rights: As a Means and End towards Integrating Human Rights into Plural Legal Norms' in Yonas Birmeta (ed) Human Rights and legal Pluralism in Ethiopia, *Ethiopian Human Rights Law journal*, *Vol. 7*, p.33 (2015). See also, Tadesse Simie Metekia, Ethiopia's unwatched customary courts, (17 November 2025) https://issafrica.org/iss-today/ethiopia-s-unwatched-customary-courts (accessed on 18/12/2025)

[2] Al-Hakim, Ali, Navigating Legal Pluralism: A Socio-Anthropological Analysis of Governance and Law in Multicultural Societies, *Journal of Judikaltura*, *Vol. 1: No. 2*, July, (2023), pp. 23-27.

is a vital asset for many rural communities in Ethiopia, serving not only as property but also as a primary means of livelihood and social identity.[3]

Recognizing the importance of land, the Ethiopian Constitution under Article 40 provides protection for land rights.[4] It also reinforced women's equality in acquiring property explicitly affirming that Ethiopian pastoralists and peasants, including women, have the right to obtain land without payment and to be protected against eviction.[5] This provision together with Article 35 which deals with women's rights, establishes a constitutional basis for equal access to land, use rights, and protection of women's land interests, prohibiting discrimination in land allocation, inheritance, and administration.[6]

However, informal land administration through customary laws remains persistent in Ethiopia, especially in pastoralist and semi-pastoralist areas.[7] Despite attempts through the legislative process to eradicate discriminatory customary norms, there are still persistent discriminatory norms in practice.[8] This causes a major problem as the majority of disputes in general and land-related conflicts in particular, are resolved

[3] Managing land conflict in Ethiopia, Ministry of Agriculture of Ethiopia report retrieved from available at https://igad.int/download/managing-land-disputes-in-ethiopia/ (August, 2021) (accessed on June , 17,2025)

[4] Constitution of the Federal Democratic Republic of Ethiopia) Proc. No. 1/1(1995), *Federal Negaret Gazzeta*, Art. 40

[5] Id. Art.35

[6] Ibid

[7] Abebe, A., and Fiona E. Flintan, Women's land rights: Customary rules and formal laws in the pastoral areas of Ethiopia-complementary or in conflict? Rangelands Research Report, Vol. 4, Nairobi, Kenya, ILRI, 2021

[8] Meron Zeleke, Tadesse Kassa, and Berhanu Mosissa, Women's Property Rights and Claims in Customary Justice Systems A Case Study of Ambo and Hawassa, *Ethiopian Journal of Human Rights*,*Vol.3:No. 1*, (2018) pp. 1-37.

through customary dispute resolution.[9] In addition, customary institution are only linked to the formal court for supervision and support rather than judicial review and appeal process to align them to constitutional and human right principles.[10] Therefore, a lack of sufficient regulation mechanism creates a gap between customary and formal systems, which pose important questions about compatibility, reform, and integration within a pluralistic legal framework. For instance, from a human rights perspective gender equality is a key element associated with rural land as it gives access, ownership and control over land right.[11] However, customary law is often rooted in a patriarchal structure which violates the equality principle.[12] Balancing these disparities has major implications for the land rights of women and marginalized groups, who are among the primary users of customary justice systems.

According to Ndulo, much African constitution's guarantee equality, human dignity, and prohibit discrimination based on gender in their constitution and also give recognition to customary laws without addressing the conflict between customary law norms and human rights provisions.[13] Although there are many differences between customary law and human rights, their primary deference is normative.[14] For

[9] *Supra* note 4

[10] Cohen, David, Kyra Jasper, Alisha Zhao, Khadija Taoufik Moalla, Kasirim Nwuke, Sophia Nesamoney, and Gary L. Darmstadt. "Gender norms in a context of legal pluralism: Impacts on the health of women and girls in Ethiopia. *Global Public Health Vol. 19, No. 1* (2024):

[11] Convention on the Elimination of All Forms of Discrimination against Women art.14, Dec. 18, 1979

[12] *Supra* note 8

[13] Ndulo, Muna, African customary law, customs, and women's rights, *Indiana Journal of Global Legal Studies*, *Vol.18, No. 1*, (2011), pp. 87-120.

[14] Mubangizi, John Cantius, A South African perspective on the clash between culture and human rights, with particular reference to gender-related cultural practices and traditions, *Journal of International Woman*'s *Studies, Vol. 13* (2012), p. 3

instance, customary norms are based on societal traditions which prioritize collective value rather than individual rights and contain some cultural laws and practices which violate the equality principle.[15] These differences create practical problems for the realization of rights for women and marginalized societies in land governance as their access, use, ownership and control over land can be affected by discriminatory customary laws. Furthermore, the co-existence of customary norms in parallel settings creates legal uncertainty over which norms prevail unless the formal law protection translates into practice.

This article poses two central questions. First, 'Is there a legal framework to balance customary norms and human rights principles in the land governance framework in Ethiopia? Secondly, 'How can customary land administration and dispute resolution mechanisms be balanced with human rights norms without undermining their social legitimacy in land governance in Ethiopia?' These questions are addressed using doctrinal methodology and feminist legal theory as analytical lenses. Using this methodology and feminist analytical lenses, this article endeavors to fill the gap in the literature by integrating feminist framework in the analysis of land governance as it argues for context-sensitive policy to balance customary norms with human rights rather than mere formalization.

[15] Munzhelele, Decent, Andani Sweetness Munzhelele, and Edward Munzhelele Humbulani, The Impact of cultural practices on the infringement of women's human rights in South African communities, *International Journal of Business Ecosystem & Strategy, Vol.7. No. 3* (2025)pp. 430-440. See also Digile, Haile Chuluke, and Mengesha RobsoWodajo, The Role of Indigenous Institutions in Conflict Resolution: Abbagar in Focus, Wollo, Ethiopia. *Innovations, Vol. 67,* (2021). See also Getachew Assefa and Alula Pankhurst Facing the Challenges of Customary Dispute Resolution: Conclusion and Recommendations, pp. 257-273

Previous studies have examined the relationship between customary law and human rights. For instance, Assefa focuses on women's rights[16], while Halefom discussed the integration of formal and customary legal systems.[17] Furthermore, the works of Sirna and Mosisa, as well as Bulcha, have laid important foundations in this area.[18] Their empirical research demonstrates that in a multicultural society such as Ethiopia, the absence of a coherent policy framework and clear legal stipulations governing the interaction of multiple justice systems contributes to persistent human rights violations. Their empirical findings further reveal that the state's obligation to promote the cultural rights of diverse groups can significantly affect individual rights in complex and often unforeseen ways.[19] Accordingly, they argue that a carefully regulated policy framework that balances cultural rights with individual rights is essential to ensuring the effective protection of human rights within Ethiopia's plural legal system.

In addition, Bulcha examines the relationship between human rights and legal pluralism in Ethiopia, emphasizing the constitutional recognition of cultural rights and their alignment with international human rights standards.[20] He contends, however, that despite this formal recognition, Ethiopia's centralized legal framework continues to marginalize customary legal systems. The article calls for constitutional and policy

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16 Ayalew Getachew Assefa, Customary Laws in Ethiopia: A Need for Better Recognition, Danish Institute for Human Rights, (2012).

17 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), pp. 339-368.

18 Zelalem T. Sirna and Moti Mosisa G, Legal Pluralism and Its Implication on Human Right in Ethiopia: A Look for Policy Framework in Yonas Birmeta (ed) Human Rights and legal Pluralism in Ethiopia, *Ethiopian Human Rights Law journa*l, *Vol. 7* , p. 71 (2015)

19 Ibid

20 *Supra* note 1 , Bulcha

reforms that move beyond symbolic recognition by fully acknowledging cultural rights and adopting a bottom-up approach to legal pluralism, thereby facilitating the integration of human rights values into local social practices.

Despite their valuable contributions to understanding the relationship between human rights and customary law in Ethiopia, neither Sirna and Mosisa nor Bulcha explicitly examine rural land rights as a distinct area of analysis nor do they analyze how customary land administration and dispute resolution mechanisms affect access to land, tenure security, or equality specifically for women and other marginalized groups.

This article fills an important gap in existing knowledge by bridging the gap between normative human rights standards and lived customary practices in rural land governance. While human rights frameworks emphasize equality, non-discrimination, and access to justice, customary land dispute resolution systems operate within social norms and community-based values that often diverge from these principles. This study moves beyond theoretical debates by examining how these two systems interact in practice and where tensions and complementarities emerge. Furthermore, it proposes practical ways of balancing customary law and human rights by identifying procedural, institutional, and normative safeguards that allow customary mechanisms to function in harmony with human rights standards, without undermining their cultural legitimacy or social effectiveness.

Customary law can perpetuate patriarchal norms that disadvantage women and other vulnerable groups therefore this article endeavor to fill the gap by suggesting a balancing mechanism for customary law and human right in land governance through concrete procedural and

institutional safeguards. This will ensure the constitutional principles like equality, consent, and due processes are meaningfully realized in practice for women and other marginalized group.

This article is organized into six sections. The first section discusses the theoretical aspect from a feminist legal perspective and provides a general review of the Universalist versus cultural relativist debate. The second section examines multi dimensionality of land right, the third section examine land rights under customary law, the fourth section; analyze the Discrepancy between Customary Norms and Human Rights in Ethiopia. The fifth section discuss customary court establishment, the recent beginning, the six section presents insights on the proposed "balance" mechanisms and the final section offers concluding remarks.

1. Theoretical framework

Although there are different types of feminist theories, this article adopts a blended feminist legal framework that draws on multiple strands of feminist theory. For instance liberal feminism provides the normative foundation for evaluating equality, non-discrimination, and women's land rights under constitutional and international law, while radical and cultural feminist insights are employed to expose the patriarchal power structures embedded within customary land administration and dispute resolution mechanisms.[21] Therefore, instead of viewing these feminist approaches as conflicting, the study treats them as complementary lenses to analyze how customary norms and human rights interact in ways that shape women's substantive access to land.

[21] Ho, Serene, Maria Tanyag, and Elisa Scalise, Women's land rights, gendered epistemic tensions, and the need for a feminist approach to land administration, *Land Use Policy, Vol.132* (2023), pp.106-841.

Feminist legal theory challenges the assumption that law is neutral or objective, arguing legal norms and institutions are deeply shaped by gendered power relations that systematically privilege men while marginalizing women and other vulnerable groups.[22] Agarwal finds that women's limited access to ownership and control of property contributes to the gender gap in economic well-being, social status and empowerment.[23] This gender gap to ownership and control of property comes from different aspects. First, Feminists highlights, formal equality in law does not guarantee substantive equality in practice, as women remain excluded from land rights due to entrenched social and customary power relations. This can be attributed to the failure of formal law guarantees of gender equality that do not adequately address the social, economic, and cultural structures that constrain women's rights in practice.[24] Therefore, genuine human rights protection requires transforming underlying power structures, not merely recognizing formal legal equality.

Feminists scholars also critically questioned the public/private divide in law, highlighting how it creates loopholes that allow gender-based inequalities to persist, particularly where issues are classified as "private" and thus shielded from legal scrutiny.[25] Such divides as "private" or cultural matters will not create enough attention to be given by the state to regulate and oversee customary practices or institutions,

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[22] Fletcher, Ruth, Feminist Legal Theory, in Reza Banakar& Max Travers (Eds.), An Introduction to Law and Social Theory (2002). pp.135–154

[23] Agarwal, Bina, Gender and Land Rights Revisited: Exploring New Prospects Via the State, Family and Market, *Journal of agrarian change*, *Vol. 3, No. 1-2* (2003) pp. 184-224.

[24] Hessler, Kristen. Feminist human rights: A political approach, 1St ed. Rowman and Littlefield, (2023), p. 1-190

[25] Nyamu, Celestine I. How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries, *Harv. Int'l. L J Vol. 41*, (2000) pp. 381

allowing discriminatory norms to operate beyond effective legal scrutiny.

Therefore, feminists challenge this divide through the famous slogan that asserts **"**the personal is political" emphasizing that harms experienced in the private spheres such as, within family, community, or customary institutions, are shaped by and reinforce broader structures of power.[26] Consequently, treating customary practices as private affects the protection of women's land rights as customary land administration often operates within the so-called private sphere, where women's exclusion is justified as cultural practice.

According to Walby, patriarchy is a system of social structure and practices, in which men dominate, oppress and exploit women.[27] Feminists argue customary law promotes patriarchy and disempowers women.[28] This analysis can be highly informative for understanding the operation of customary norms on women in land administration and dispute resolution. This is because customary law is shaped and enforced by male-dominated structures in society that control land access, use and ownership, and dispute resolution.

[26] Linda Napikoski, https://www.thoughtco.com/the-personal-is-political-slogan-origin-3528952#:~:text=Her%20essay%20%22The%20Personal%20Is,%22action%22%20such%20as%20protests. Accessed on (26/12/2025)

[27] Walby, Sylvia. Theorizing Patriarchy in Malcolm Waters (E*d),* Modernity: Critical Concepts 2 Routledge (1999), pp. 153-174

[28] Ezer, Tamar, Forging a Path for Women's Rights in Customary Law, *Hastings Women's L* J Vol.27, (2016), p. 65.

1.1 The Debate of Universalism versus Cultural Relativism

Legal and theoretical discourse has long debated the relationship between customary laws and human rights. Universalism is a view that holds human rights are inherent to all human beings by virtue of their humanity.[29] Thus it should be applied equally and universally without regard to culture, religion, gender. Universalists argue that certain rights are fundamental. Thus they are non-negotiable. For instance, rights related to the right to life, equality, freedom from discrimination, and due process are ethical thresholds that transcend cultural boundaries. Therefore, these rights cannot be violated by invoking culture.

In contrast, cultural relativists argue rights and moral values are socially constructed. Therefore, they must be interpreted in light of cultural, historical, and social contexts.[30] Cultural relativists oppose the claim of a universal standard by Universalists, claiming their standards are not culturally informed.[31] This view reflect that society is different and use different sets of moral standards therefore there is no ethical universal standard. Also Cultural relativists, see Universalist idea as imperialism, imposing external values.[32] Universalists rebut this debate by claiming relativists are using culture as justification for violations of fundamental rights.

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[29] Anthony J Langlois, Human Rights Universalism, in The Ashgate research companion to ethics and international relations, Routledge,' (2016), pp. 201-214 available at https://www.researchgate.net/profile/Anthony-Langlois/publication/263223993_Human_rights_universalism/links/6008238992851c13fe240402/Human-rights-universalism.pdf. last accessed on July 27,2025

[30] *Supra* note 13, Nudolo

[31] Obatusin, Simisola C., Customary law principles as a tool for human rights advocacy: Innovating Nigerian customary practices using lessons from Ugandan and South African courts, *Colum. J. Transnat'l L. Vol.56*, (2017), p. 63

[32] Mukherjee, Arun P. The Vocabulary of the "Universal" Cultural Imperialism and Western Literary Criticism, *Journal of Postcolonial Writing, Vol. 26, No. 2*, (1986), pp. 343-353.

Feminist legal theory rejects both rigid universality and uncritical relativism positions. Feminists criticize universalism for assuming formal equality for all. For instance, Hutchings' approach supports a context-sensitive universalism which entails that human rights norms retain universal aspiration, but their meaning and application must be negotiated through dialogue, interpretation, and women's participation.[33] Thus, changes need to transcend from legal rights on paper to practical enforcement to achieve equality. This argument can be contextualized into Ethiopia's context as there are robust constitutional and international human right guarantees for women's land rights. The practice; however, shows there is still persistent discrimination and exploitation of women's rights which affects their land access, use, and control.

Feminists criticize cultural relativism as it can function as a protective shield for patriarchy.[34] For instance, some states have refused to ratify international human rights instruments, citing cultural norms or traditional practices as justification.[35] This has posed different challenges to translating women's rights into national legal frameworks. Therefore, it is imperative to address these gaps on women's land rights by balancing customary laws through feminist theory to enhance the protection and observation of land rights within the Ethiopian legal framework.

[33] Hutchings, Kimberly, Universalism in feminist international ethics: Gender and the difficult labor of translation, in Jude Browne (Ed), Dialogue, Politics and Gender, Cambridge University Press. (2013), pp.81-106

[34] *Supra* note 23, Argwalbina

[35] Zechenter, Elizabeth M. "In the Name of Culture: Cultural Relativism and the Abuse of the Individual." *Journal of Anthropological Research 53, No. 3* (1997), pp. 319-347.

2. Multidimensionality of Land Right

Within the human rights system, there are different approaches relating to protecting land rights. The first one frames land from the aspect of 'the right to property'. Historically the right to property has served as a primary human rights framework for protecting land, emphasizing individual ownership, exclusivity, and protection against arbitrary deprivation.[36] For instance, the Universal Declaration of Human Rights (here in after, UDHR) stipulates property rights under Article 17 of the declaration.[37] Similarly, the African Charter on Human and Peoples' Rights,(here in after, ACHPR) under Article 14, also provides the right to property.[38] In both of these instruments, land rights can be understood as falling under the broader category of property rights. Consequently, the protection of property rights in general and land rights in particular has been safeguarded against arbitrary deprivation by the state through these instruments.

The second approach to land is a derivative approach linking land as instrumental to other economic and social rights, such as the rights to food and housing.[39] This category falls under international human right law instruments like the International Covenant on Economic, Social and Cultural Rights (here in after, ICESCR).[40] For instance, Mekuria's

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[36] Universal Declaration of Human Rights Art.17, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). available at https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf last accessed on June 19,2025

[37] Ibid

[38] African Charter on Human and Peoples' Rights , adopted by OAU, available at , https://au.int/en/treaties/african-charter-human-and-peoples-rights last accessed on July 11,2025

[39] Gilbert, Jérémie, Land Rights as Human Rights: the Case for a Specific Right to Land *SUR-Int'l J. on Hum Rts.Vol.10* (2013), p.115.

[40] International Covenant on Economic, Social and Cultural Rights Art.11, Dec. 16, 1966,

work highlighted the connection between land rights and the right to adequate food, underscoring their impact on the broader human rights of society.[41] The state arbitrarily eviction or displacement of people from their land, especially if the land was their primary means of production, violates the obligation to protect the right to food. This is due to the fact that ability of an individual to feed himself/herself highly depends on the opportunity granted to him/her by society in terms of exploiting productive land or other natural food resources.[42]

The third approach is framed by peasants and indigenous peoples, affirming collective and individual entitlements to customary and communal tenure. For instance, the United Nations Declaration on the Rights of Indigenous Peoples (here in after ,UNDRIP) prescribes that indigenous peoples are entitled to preserve and reinforce their unique spiritual and cultural relationship with lands, territories, waters, and other natural resources that they have traditionally owned, occupied, or used, as well as to safeguard these relationships for future generations.[43] This declaration explicitly recognizes the unique and enduring relationship between indigenous peoples and their land. Similarly, the international labor organization (here in after, ILO) Convention No. 169 reinforces and defines indigenous peoples' rights to lands, territories, and resources under international law.[44]

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993 U.N.T.S. 3.

41 Belachew Mekuria, Human Rights Approach to Land Rights in Ethiopia, *Ethiopian Business Law Series*, *Vol.3*, (2009)

42 Ibid

43 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, G.A. Res. 73/165, U.N. Doc. A/RES/73/165 (Dec.17, 2018).) https://digitallibrary.un.org/record/1650694?ln=en (accessed on 26/8/2025)

44 ILO Convention No. 169, ILO, https://www.ilo.org/resource/convention-169-and-international-day-worlds-indigenous-people (accessed on 11/8/2025)

As can be seen in the above approach, earlier international human rights instruments either protect land indirectly through the right to property or treat land as instrumental to other economic and social rights.[45] However, the recent UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (here in after, UNDROP) adopts a distinct normative development.[46] UNDROP explicitly recognizes the right to land as a standalone human right under article 17.[47] This marks a departure from right to property embedded in liberal, market-centered approaches in many international instruments, which tend to privilege individual ownership. Also, UNDROP adopts a holistic and agrarian justice- oriented approach in contrast to treaties such as the ICESCR, where land access is addressed implicitly through rights to food and housing. UNDROP recognizes land as a basis of food security, cultural identity, livelihood, and dignity, and affirms both individual and collective land rights, including customary and communal tenure systems.

In addition, UNDROP significantly broadens the scope of protection compared to UNDRIP, which recognizes land rights primarily for indigenous peoples, to include peasants, pastoralists, agricultural workers, and rural women.[48] From a feminist perspective, UNDROP is particularly notable for its explicit emphasis on substantive gender equality, requiring states to eliminate structural discrimination in access to land and decision-making over land governance.

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[45] Reta, Demelash Shiferaw, A Human Rights Approach to Access to Land and Land Dispossession: An Examination of Ethiopian Laws and Practices, African *Journal of Legal Studies, Vol.9, No. 2* (2016), pp.100-123.

[46] Granet, Valentine, The Human Right to Land: A Peasant Struggle in the Human Rights System, *Human Rights Law Review, Vol. 24, No. 3* (2024)

[47] *Supra* note 41

[48] Ibid

This declaration has important normative and policy implications for Ethiopia's land administration system, as it recognizes the right to land as a human right. This normative framework, if domestically integrated, could strengthen human rights oriented land governance in Ethiopia. This has major relevance for Ethiopia's land administration, where rural land is constitutionally owned by the state and peoples but administered through a mix of statutory and customary systems with limited procedural safeguards.

Generally, UNDROP provides an international benchmark for integrating customary land governance with constitutional and human rights principles especially for the protection of women's rights, as it requires a transformative obligation to reform unequal land relations.

3. Land Rights under Customary Legal Order

Under customary land tenure, land is not primarily conceived as an individual property but as a collective and relational resource, embedded in social identity, kinship, ancestry, and community belonging.[49] Access to land is often governed by customary authorities such as elders, clan leaders, whose legitimacy stems from tradition and social acceptance. While customary land tenure provides accessibility, cultural legitimacy, and local adaptability, they are frequently exclusionary in practice, particularly for women and other marginalized groups.[50] Women's land

[49] Delville, Philippe Lavigne. Harmonizing Formal Law and Customary Land Rights in French-speaking West Africa, *International Institute for Environment and Development*, *Vol.1.No. 86,* (1999) https://gret.org/wp-content/uploads/2021/12/harmonising.pdf (accessed on 3/4/2026)

[50] *Supra* note 7. See also, Belay, Wubetu Anley, and Mesfin Beyene Abriha, Access to Land for Women In Ethiopia, *African Journal on Land Policy and Geospatial Sciences, Vol.6, No. 5* (2023), pp. 961-977

rights under customary tenure suffer discriminatory customary laws and practices which exclude women from, use and control of land. In customary land tenure women can acquire land through marriage or male relatives. Women's participation in customary land governance is often limited, due to the patriarchal system. In customary land tenure land allocation and enforcement is highly influenced by the patriarchal system.

Even though, customary tenure systems have social legitimacy, some aspects of their land governance raise concerns especially regarding equality, due process, and accountability. The federal land use proclamation under art. 37 recognize customary land administration and use systems.[51] This provision has prescribed two general elements. First, the proclamation mandates regional laws to give recognition to customary institutions; customary land use and management practices, and conflict resolution mechanisms and provide support and follow-up. 2) Customary land use and management rules and conflict resolution mechanisms shall be of no effect where they contravene the fundamental constitutional rights, women rights, as well as the rights and obligations provided by others.[52] Thus, customary law is unconstitutional where its content or effects result in discrimination such as exclusion from land allocation, inheritance. In practice, customary land use and management rules contravene with the constitution and human rights norms. Due to the gap in sufficient procedural and legal framework mechanisms making customary practice and institution accountable is still a challenge.

[51] The Federal Rural Land Administration and Use Proclamation No. 1324/2024, *Federal Negaret Gazzeta* (2024)
[52] Ibid

Another aspect governed by customary law is dispute resolution. Research indicates, most land disputes are resolved through customary resolution.[53] The FDRE Constitution under art, 34(5) allows the adjudication of customary laws, especially in personal and family matters. Similarly, Article 78(5) of the FDRE constitution states that the house of peoples' representatives and state councils can establish or give official recognition to religious and customary courts.[54] Even though the establishment and the recognition of customary courts are recent, many customary dispute resolution mechanisms exist in Ethiopia. Federal and regional land laws also recognize customary dispute resolution mechanisms.[55] This legislation recognizes customary dispute resolution mechanisms without setting safeguarding parameters to protect individual rights, especially women and marginalized groups. Customary dispute resolution mechanisms in practices often deny consent, fair hearing, meaningful participation, or access to appeal.[56]

The constitution in article 34(5) and the federal and regional land administration framework also stipulate customary institutions can adjudicate disputes only if both parties consent.[57] However, in practice parties are influenced to consent to resolve their matter in customary proceedings[58] Customary dispute resolution systems also contravene fair

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53 *Supra* note 3

54 *Supra* note *4*, FDRE Con. Art. 34 (5) and 78 (5)

55 *Supra* note 51, Federal Land Administration Proclamation. See also Regional Land Administration Proclamations

56 The Institute for Security Studies (ISS) in partnership with the Ministry of Justice (MoJ) and the Ministry of Peace (MoP), Report On National Workshop on Customary Dispute Resolution in Ethiopia. See also Alula Pankhurst and Getachew Assefa (Eds), *supra* note 15

57 *Supra note* 4, FDRE Con. 34(5)

58 Yimer, Beneyam Lake, Abegar Indigenous Conflict Resolution System: A Community based Reconciliation, *Systemic Practice and Action Research, Vol.35, No. 4* (2022), pp. 579-590.

trial, which involves fair hearing and representation.[59] In the customary process of dispute resolution fair hearing is not grounded in procedure but focuses on bringing consensus no matter the outcome. Representation is another aspect where customary institutions fail drastically. As the structure of customary institutions reflects patriarchy, land governance systems and dispute resolution systems marginalized women.[60] Furthermore, except for a few customary institutions, most of them lack an appeal system. For instance, though the *Mad'a* customary dispute resolution system in Afar incorporates an appellate structure[61], others such as *Shimglena*, operate on an ad hoc basis and lack formal mechanisms of appeal in certain societies. Even so, the appeal system is informal and socially mediated. While some features like accessibility and social harmony enhance the importance of customary law they pose significant human rights risks, particularly for women, as they undermine due process, accountability, and effective remedies.

The above mentioned gaps, in this article indicate there are not sufficient procedural and legal mechanisms which translate constitutional and human rights principles into the legal system. Therefore, Feminist perspectives pointed out the limits of recognizing customary dispute resolution mechanisms without establishing gender-sensitive procedural standards fails to provide safeguards to ensure that women's rights are protected within customary forums.[62]

4. The Discrepancy between Customary Norms and Human Rights in Ethiopia

[59] *Supra* note 10 , Cohen et.al ,

[60] Asfaw, Tihut and Terre Satterfield. Gender relations in local-level dispute settlement in Ethiopia's Zeghie Peninsula. *Human Ecology Review, Vol.1* (2010), pp. 160-174.

[61] Gebre Ytiso, Understanding Customary Laws in the Context of Legal Pluralism, in Susanee Epple and Getachew Assefa (Eds.) Legal Pluralism in Ethiopia, (2020), pp.71-94

[62] *Supra* note 10, Cohen et.al ,

Even though the conflict between customary norms and human rights is diverse, the primary clash between the two concepts is normative.[63] Customary practices in land administration frequently tolerate gender disparities by favoring male authority and inheritance rights. This restricts women's access to and control over land, even if formal legal reforms to improve women's tenure security has been designed. Patriarchal norms thus embed a limited role for women in decision-making.[64] In many African societies where land symbolizes power, women are largely deprived of inheritance, often in preference to male heirs.[65] In these instances, the normative conflict with human rights law becomes severe.

Another clash between customary norms and human rights is the lack of procedure in customary dispute resolution often results in the exclusion of women as it is characterized by the absence of clear rules, limited transparency, and a lack of fair hearing and appeal system. Feminist scholars note that procedural informality is not neutral but reproduces structural inequality, limiting women's participation and access to fair outcomes despite formal guarantees of equality.[66] Therefore, the lack of clear procedures in customary dispute resolution can be a tool to exclude

[63] Khamar Jahan Shaik, Harpreet Kaur, G. Et al. Law, Culture, and Social Norms: Understanding Customary Practices in Conflict with Constitutional Rights, *Journal of Information Systems Engineering and Management Vol.10, No.3* (2025)

[64] *Supra* note 60

[65] Wamboye, Evelyn F. The Paradox of Women Ownership of Land and Gender Equality in Sub-Saharan Africa: Channels and Obstacles, *Journal of African Development Vol.25, No. 1* (2024), pp. 22-45.

[66] *Supra* note 10. See also Peters, Eline A., and Janine M. Ubink, Restorative and Flexible Customary Procedures and their Gendered Impact: A Preliminary View on Namibia's Formalization of Traditional Courts, *The Journal of Legal Pluralism and Unofficial Law Vol 47, No. 2* (2015), pp. 291-311.

women by reinforcing male-dominated decision-making and unequal structure.

Thirdly, institutional discrepancy between customary norms and human rights also exists.[67] This tension occurs because customary institutions operate through informal, community-based authority to enforce customary law which may contravene human rights principles. Human rights institutions rely on formal rules to create oversight and enforceability. Unless legal and procedural safeguards are placed to monitor customary institutions, this parallel coexistence will result in weak accountability and inconsistent protection of rights particularly for women. For instance, empirical studies from the Oromia Region customary court indicate persistent human rights violations, gender-based exclusion and political interference.[68] This indicates there is still a need for continuous supervision to address alignment of customary norms with constitutional and human right provisions as there are region like Sidama, Amhara, Benishangul Gumuz and Southwest Ethiopia regions which promulgated laws that give recognition for customary dispute resolution mechanisms but are on the process to establish the customary courts.[69] The Ministry of Justice also highlighted that federal

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67 *Supra* note 17. Halefom

68 The Oromia region is a pioneer to implement customary court experience in Ethiopia as some regions like south eastern Ethiopia recently established while other region like Amhara have not established yet. See *Supra* note 1, Tadsse Semie; See also Tim Van Den Bergh, Tadesse Semie Metekia (HiiL, Ethiopia https://www.hiil.org/wp-content/uploads/2024/11/HiiL_Legal-impact-assessment-Oromia-Customary-Courts.pdf (last accessed 3/5/2026)

69 FDRE Ministry of Justice, https://justice.gov.et/en/traditional-dispute-resolution-in-ethiopia/#:~:text=Over%200%20%25-,of%20disputes%20are%20addressed%20through%20customary%20or%20informal%20mechanisms%20rather,and%20Addis%20Ababa%20City%20Administration.

and regional governments must establish effective supervision to administer customary courts.[70]

For many Ethiopian rural societies formal courts are complex, backlogged, not proximate, and costly.[71] Customary institutions therefore function as the primary point of access to justice. However, the constitution is silent concerning the jurisdiction of customary courts, in providing procedural safeguards like oversight and accountability mechanisms. This creates a gap in constitutional commitment to safeguard individual rights, particularly rural women.

Moreover, the FDRE Constitution explicitly recognizes the role of customary law in dispute adjudication. Article 34(5) permits the application of customary and religious laws, particularly in matters relating to personal and family relations.[72] Likewise, Article 78(5) authorizes the House of Peoples' Representatives and State Councils to establish, or formally recognize, religious and customary courts, thereby affirming their place within Ethiopia's plural legal system.[73] The constitution did not discuss comprehensive guidance about procedural safeguards and their integration into the legal framework. The Constitution does authorize recognition of customary courts in family

[70] FDRE Ministry of Justice, **የኢ.ፌ.ዲ.ሪ. ፍትሕ ሚኒስቴር , የመሠረተ ማሕበረሰብ ፍትሕ አገልግሎቶች ሕብረተሰብን ማዕከል ያደረገና ቀልጣፋ የፍትሕ አገልግሎት በመስጠት እና የፍትሕ ተደራሽነትን በማረጋገጥ በኩል ያላቸዉ ሚና የጎላ መሆኑ ተመላከተ** Accessed at https://web.facebook.com/story.php?story_fbid=1246237620880311&id=100064822533625&mibextid=wwXIfr&rdid=grZpkxhLQznOVHJF (12/30/2025)

[71] 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).

[72] *Supra* note 4, FDRE Con.

[73] Id

and personal matters, but without detailed constitutional or legislative parameters for ensuring due process within customary law systems.

Even if there is no constitutional recognition for land matters, legislative recognition inferred from federal and state land use and administration proclamations shows the recognition to adjudicate land disputes using customary mechanisms. However, the recognition of customary dispute resolution mechanisms is only from the aspect of alternatively adjudicating land disputes. These land use and administration legislatures have not placed parameters for ensuring due process, equality, fair hearing, and representation in their legislation for customary institutions to comply. Therefore, recognition of customary laws shall be accompanied with procedural safeguards for the protection of women and other marginalized groups.

5. Customary Court Establishment in Ethiopia: Recent Beginning

Although, the Constitution recognizes the adjudication of disputes through customary laws, the state has failed to create an enabling environment for these institutions to thrive.[74] Even in areas such as personal and family matters, which enjoy constitutional recognition, customary systems have struggled to secure formal space within the legal framework. Nevertheless, recent initiatives have been undertaken to formally recognize and institutionalize customary courts signaling a shift toward integrating these customary legal norms within the state justice system.[75] Among other jurisdictions given to customary courts

[74] Ayalew Getachew, *Supra* note 16,

[75] Ministry Of Justice, https://justice.gov.et/en/initiatives/justice-sector-transformation-roadmap/ (accessed on 12/4/2025)

in Ethiopia their jurisdiction extends to matters expressly authorized by statutory laws which include land matters.[76]

In several Ethiopian regions including Oromia, South West Ethiopia, and Amhara, customary dispute resolution mechanisms are formally acknowledged within the legal framework. For instance, the Supreme Court of the Oromia National Regional State, as part of its comprehensive judicial reform, has formally established and recognized customary courts under Proclamation No. 240/2021 and Regulation No. 10/2021.[77] Since July 2023, approximately 6,250 first-instance customary courts have been serving communities across more than 6,350 localities in the Oromia Regional State.[78] Similarly, the Amhara Region has recognized customary courts pursuant to Proclamation No. 298/2025.[79] According to the Ministry of Justice, the Amhara National Regional State is actively working to establish traditional courts in accordance with the adopted legislation, reflecting a broader effort to integrate customary dispute resolution mechanisms within the formal legal system.[80]

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[76] A Proclamation to Provide for the Establishment and Recognition of Oromia Region Customary Courts, Proc. No. 240/2021, *Megelta Oromia*, (2021), The Amhara regional state Proclamation customary court establishment and Recognition, proc. No. 298/2025, *Zekere Heg* (2025), A Proclamation to Establish and Recognize Customary Courts of the People's Regional Government of Southwest Ethiopia. Proclamation No.35/2024, *Debub Mierab Negarit Gazeta* (2024) Art. 8(1) C

[77] Ministry of Justice https://justice.gov.et/en/regions/oromia (accessed on Dec, 4, 2025.)

[78] HILL Ethiopia, https://www.hiil.org/research/legal-impact-assessment-oromia-customary-courts/#:~:text=Customary%20dispute%20resolution,The%20impact%20assessment (accessed on 10 /4/2025)

[79] *Supra* note 76, See Amhara Customary Court Proclamation No. 298/2025

[80] Ministry Of Justice, Ethiopia https://justice.gov.et/en/regions/amhara/#:~:text=The%20Amhara%20National%20Regional%20State,and%20communities%20in%20the%20Region.(accessed on 10 /4/2025)

Most importantly, Oromia and South West Ethiopia Regions have taken a progressive step by prescribing the mandatory inclusion of female elders in customary court councils, thereby seeking to enhance women's participation and representation within customary dispute resolution mechanisms.[81] This institutional design reflects an acknowledgment of gender equality concerns within plural legal systems. However, the Amhara National Regional State has missed a similar opportunity.[82] As its customary court framework fails to prescribe the mandatory inclusion of female elders or judges, resulting in the continued dominance of male authority within customary councils. This omission reinforces gender asymmetries in decision-making and undermines efforts to align customary dispute resolution with constitutional guarantees of equality and women's rights.

6. Balancing Customary Laws with Human Right Laws

Customary landholding systems in Ethiopia systematically disadvantage women because they reproduce patriarchal power structures that limit women's effective access to land, control over land, and resolution of disputes in land matters. Although formal law in Ethiopia guarantees women equal rights to acquire, use, and transfer land, customary and religious norms frequently override these protections in practice, especially in pastoral and rural areas where custom governs land use and inheritance. Research on pastoral regions such as Afar and parts of Oromia shows that, under customary systems, women often have inferior access to land, little or no role in the dispute resolution process, and are excluded from inheritance except in rare circumstances, making

[81] *Supra* note 76, Oromia Customary Court Recognition and Establishment Proclamation, Art. 10 (3) and south west Ethiopia customary court recognition and establishment proclamation Art 9(2) mandatory female judges

[82] Ibid, Amhara Customary Court Recognition and Establishment Proclamation

formal legal equality meaningless in everyday practice.[83] Even where women can use communal resources, discrimination persists with respect to private holdings and inheritance because informal norms allocate decision-making authority to male elders or kin groups. From a feminist legal lens, this gap between law on the books and law in-practice highlights how customary laws embed gender inequality.[84] Therefore, reforms explicitly addressing the structural exclusion of women in customary tenure, decision processes, and enforcement mechanisms need to be reformed.

As such, balancing concepts and mechanisms such as repugnancy, recognition, codification, and integration can be used as systematic means for reviewing and reforming discriminatory customary rules. Together, these concepts provide a coherent analytical framework for addressing the normative, procedural, institutional, and enforcement tensions between customary law and human rights, ensuring women's participation in decision-making, and aligning customary land governance with constitutional guarantees of equality in access, use and control of land.

I. The Principle of Repugnancy

The doctrine of repugnancy is grounded in the principle that no rule of customary law should be enforced if it is contrary to public policy or

[83] *Supra* note 7

[84] Wardhani, Lita Tyesta, Addy Listya, and Aga Natalis, Assessing State Commitment to Gender Equality: A Feminist Legal Perspective on Legislative Processes in Indonesia and beyond, *Multidisciplinary Reviews* Vol.7:No. 6 (2024); See also Dang, Minh Hoang. Applying Feminist Legal Principles to Achieve Gender Equality in Vietnam's Labor Legislation, *Cogent Social Sciences, Vol.10, No. 1* (2024)

repugnant to natural justice, equity, and good conscience.[85] The doctrine gained widespread application in many African states during the colonial era as a means of regulating customary law.[86] Historically it has served as a filter to identify and invalidate customary laws that conflict with the principles of natural justice, equity, and good conscience, thereby ensuring that customary practices conform to overarching legal and ethical standards.[87] However, Repugnancy test is highly criticized by cultural relativists. For instance, Atuguba argues that concepts such as "natural justice," "morality," "equity," and "good conscience," as applied under colonial legal systems, were vague and subjectively interpreted, often reflecting the biases and priorities of colonial authorities rather than objective standards of justice.[88] In his view, this made the repugnancy test less of a neutral standard and more of a filtration mechanism through which customary law was reshaped to fit Western ideologies, often disregarding the community's own sense of justice. Yet, this doctrine can provide courts with a framework to regulate customary laws and continues to serve as a guiding principle for reconciling local customs with universal standards of justice and

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[85] Uweru, Bethel Chuks , Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism, *African Research Review, Vol. 2, No.2* (2008). pp. 286-295 Udensi, Benneth, and Chike B. Okosa, Contemporary Issues on Repugnancy Test Doctrine In Nigeria, *Chukwuemeka Odumegwu Ojukwu University Law Journal, Vol.9, No. 1* (2025); See also Ntobengwia, Tasiki Desvarieux, and Tangwa Modestine Ginj, The Domination of the Repugnancy and Incompatibility Tests on Customary Law in Anglophone Cameroon*, Journal of Constitutional Law and Jurisprudence, Vol. 3, No.2* (2020), pp. 32-37.

[86] Igwe, Onyeka, Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-Assessing Content and Relevance, (2014). Available at SSRN: https://ssrn.com/abstract=2528497 or http://dx.doi.org/10.2139/ssrn.2528497 last accessed on 19/6/2025)

[87] Raymond Atuguba**.** Law, II Pristine Customary, Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa, (December 7,2022) available at https://intergentes.com/seven-phases-in-the-evolution-of-customary-law-in-sub-saharan-africa/ last accessed on June 19, 2025); See also Bennett, T. W., The Compatibility of African Customary Law and Human Rights. *Acta Juridica* (1991): pp. 18-35

[88] Ibid

human rights. [89]

Even if, the Ethiopian constitution and legislation does not incorporate the repugnancy doctrine, Articles 9 of the FDRE Constitution and Article 37 of the federal land administration and use proclamation establish a compatibility test that performs a functionally equivalent role by invalidating customary practices inconsistent with constitutional norms. However, these principles differ on how they invalidate customary laws. For example, the compatibility test requires customary law to be applied only if they are consistent with constitutional provisions, statutory law, and international human rights norms.[90] The repugnancy test requires customary rules to be enforceable only if they were not "repugnant to natural justice, equity and good conscience" or public policy. Even though, these principles differs they are both used to rule out customary laws which contravene basic constitutional and human right principles. Thus, the compatibility test inferred from the reading of Art.9 of the constitution and Art. 37 of the federal land use proclamation are general clauses and lacks procedural safe guards like criteria for assessment for computability, or review mechanisms capable of systematically screening incompatible customary laws in practice.[91] Empirical research consistently shows that the constitutional bill of rights in Ethiopia faces serious implementation challenges.[92] In order to

[89] Taiwo, Elijah A., Repugnancy Clause and Its Impact on Customary Law: Comparing the South African and Nigerian Positions, Some Lessons for Nigeria, *Journal for Juridical Science Vol. 34, No. 1* (2009), pp.89-115. See also, Udensi, Benneth, and Chike B. Okosa, Contemporary Issues on Repugnancy Test Doctrine In Nigeria, *Chukwuemeka Odumegwu Ojukwu University Law Journal, Vol.9, No. 1* (2025)

[90] Kiye, Mikano E. The Repugnancy and Incompatibility Tests and Customary Law in Anglo- phone Cameroon. African Studies Quarterly Vol.15, No. 2 (2015), pp. 85-106.

[91] See *Supra* note 4, Art 9(1); Land Use Proclamation Art.37 *Supra* note 51

[92] *Supra* note 7, Abebaw and Fiona Fite, Megersa Dugasa. "The Ethiopian Legal Framework on Domestic Violence Against Women: A Critical Perspective." *International Journal of*

fill this gap, a repugnancy framework that incorporates gender-sensitive procedural standards should be transplanted to complement the existing compatibility test. This will have numerous advantages in plural legal settings to oversee customary laws. Thus, despite its critics the repugnancy test operates as a normative threshold mechanism. To address the criticisms of repugnancy, lawmakers can provide clear definitions for concepts such as "natural justice," "morality," "equity," and "good conscience" to reduce ambiguity during enforcement.

Therefore, Repugnancy test can serve Ethiopia, a multi-ethnic society, with a variety of customary laws to filter laws and practices which pose discrimination. Therefore, this principle provides a framework through which cultural norms can be assessed and filtered before being applied to customary courts. By doing so, it offers stronger protection for the human and land rights of women and marginalized groups. For instance, the Oromia court establishment proclamation provides a clear example of this approach. Under Article 26(2), it stipulates that customary laws shall not be applicable if they exhibit listed criteria.[93]

Such law demonstrates how repugnancy principles can be codified into formal law, ensuring that customary norms are upheld only when they align with broader human rights principles. As reflected in the above provision, the Oromia customary court establishment proclamation closely mirrors the standards of the repugnancy test by incorporating

Gender and Women's Studies, Vol. 2, No. 1 (2014): pp. 49-60. See also Tadesse, Mizanie A, Constitutional Rights without Effective and Enforceable Constitutional Remedies: The Case of Ethiopia., *NW. U J Int'l Hum. Rts.Vol.19* (2020), p. 79.

[93] *Supra* note 76, Oromia Court Establishment Proclamation Article 26(2) (a) Where they contravene natural justice; (b) Where they fail to respect equity and justice; (c) Where they negate moral values; (d) Where they discriminate on the basis of religion, sex, appearance, age, disability, race, political opinion, wealth, or any other grounds;(e) Where they violate any human rights. ''

principles of natural justice, equity, and morality, alongside other safeguards.[94] The inclusion of such principles in recent regional laws is an encouraging development, as it demonstrates efforts to balance customary practices with broader human rights standards. However, to ensure consistency, effective monitoring, and a comprehensive legal framework needs to be established at the national level.

II. Recognition and Integration of Customary Law into the State's Framework

Legal pluralism can be defined as 'the presence in the social field of more than one legal order'.[95] This presence of plural legal orders might be created through different instances. According to Sack, legal pluralism may emerge through colonial imposition or through the transplantation of foreign legal systems.[96] In Ethiopia, pluralism arose primarily through transplantation of Western "modern" laws during the codification process, which largely excluded customary norms, except in limited areas.[97] This co-existence; however, often creates competition between the systems for dominance.[98] For instance, formal legal systems typically employ techniques to manage this competition; for example, legal positivism has been used to establish dominance, resulting in subordination and limited recognition of other alternative

94 Ibid

95 John Griffith, What is legal pluralism? *The Journal of Legal Pluralism and Unofficial Law, Vol. 18, Issue 24* (1986), pp. 1–55

96 Sack, Peter, Legal Pluralism: Introductory Comments, In Legal Pluralism. Proceedings of the Canberra Law Workshop, *Vol. VII*, (1986), pp. 1-16.

97 *Supra* note 17, Halefom

98 Sue Farran, Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific. *The Journal of Legal Pluralism and Unofficial Law*, *Vol.38, No. 52* (2006) pp.77-105

orders.[99] In Ethiopia, the Constitution grants only limited recognition to customary laws, particularly in matters of personal and family affairs.[100] However, recognized or not customary dispute resolution systems operate by resolving disputes ranging from minor disputes to criminal matters. Awet contended that in order to create a sustainable legal system, consideration of the deep-rooted traditional systems is vital.[101] This underscores that customary laws, being deeply embedded within society, constitute an essential legal order that requires greater recognition and integration within the formal state framework.

Although the federal constitution and constitutions of regional states acknowledge customary law in limited areas, the particulars have not been clearly defined.[102] This ambiguity has left customary dispute resolution mechanisms operating largely in the shadows. Despite lack of constitutional recognition, both federal and regional rural land proclamations have chosen to incorporate customary dispute resolution mechanisms for addressing land-related disputes.[103] Recognizing plural legal systems is not only instrumental in safeguarding other human rights but also constitutes a human right in itself, thereby imposing on the state a duty to fulfill corresponding obligations.[104] Recognition of customary laws and their institutions provides a platform for the state to

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99 *Supra* note 96, Sack

100 *Supra* note 4, FDRE Constitution, Art.34

101 *Supra* note 17, Halefom

102 *Supra* note 4, FDRE Con. Art 34 (5), regional constitution also adopts this article in their perspective state.

103 The Federal Rural Land Administration and Use Proclamation No. 1324/2024, *Federal Negaret Gazzeta* (2024), See also The Amhara regional Revised Rural Land Administration and Use Determination, 2017, Proc. No.252/2017, *Zikre Hig*, Year 22, No. 14. The Oromia Rural Land Administration/2007, Proc. 103/2005, *Megelta Oromia*, Year 15, No. 12. The Revised Tigray National Regional State Rural Land Administration and Use, 2014, Proc. No. 239/2014, *Tigray Negarit Gazeta,* Year 21, No.1. and other regional land laws.

104 *Supra* note 1, See Milkiyas Bulcha

support the growth and development of cultural institutions while simultaneously establishing mechanisms to ensure the protection of individual and group human rights. Importantly, in contexts where plural legal systems exist, formal recognition by the state has significant implications for the observance of human rights.[105] Aberra reinforces this idea, stating if there is mutual recognition between the multiple legal norms with a well-defined and regulated relationship, the systems work in a mutually beneficial and supportive manner.[106]

However, integration has been criticized for making "customary laws lose their essence" when incorporated into the formal legal system.[107] However, with careful attention to the nature and processes of customary law, integration can occur without undermining their core values. Incorporating customary laws into the state legal system provides a balanced framework that ensures the coexistence of customary legal orders and human rights.

Thus, for society to effectively safeguard its interests and rights, these coexisting legal systems must operate in a complementary rather than adversarial manner. In order to make customary norms complementary to the formal system, defined criteria for formal recognition is needed.[108] This necessity arises because pluralistic legal orders can create gaps between customary institutions and formal courts. Therefore, besides giving recognition to customary institutions, there should be a structured

[105] Ibid

[106] Aberra Degefa , Human rights implications of legal pluralism: reflection on the practices among Borana Oromo' in Yonas Birmeta (ed.), *Ethiopian Human Rights Law Series, Vol. 7*, (2015) College of Law and Governance School of law

[107] Julie Ynès Ada Tchoukou, A Conceptual Framework for Regulating Customary Law within Pluralistic African States: Reassessing Justice Sector Reforms for Reconciling Legal Traditions, *Global Journal of Comparative Law, Vol. 9, No. 2* (2020), pp.245-270.

[108] Zelalem and Moti, *Supra* note 15

framework which supervise and support within the legal system to integrate customary laws.

However, recent studies indicate there is a lack of supervision on customary courts and due to this gap there are human right violations still. The study indicate mandated women elders are still unwelcome or absent in customary proceeding[109] this asserts giving acknowledgment alone miss the central aim of recognition if it lack regulation. There for, recognition should extend to regulations to align them to constitutional and human rights standards. This approach not only enhances the efficiency of customary institutions but also strengthens oversight and accountability mechanisms for better recognition of women's land rights.

III. **Codification**

The relationship between customary and state law in Ethiopia has not been adequately addressed through policy, legal, or institutional frameworks.[110] In the absence of such regulation, various customary institutions continue to govern land and resolve disputes using customary laws, which are often unwritten.[111] The reliance on unwritten laws in land administration and dispute resolution introduces uncertainty and unpredictability. The codification process can uncover discriminatory practices to constitutional scrutiny by disregarding customary laws which contravene constitutional and international human right principles.

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109 *Supra* note 1, See Tadesse Simie

110 Awet Halefom, *Supra* note 17, ,

111 *Supra* note, 69

However, scholars like Zorn argue "Customary rules cannot be neatly separated from their encompassing social orders as distinct institutions and sets of practices, unlike institutionally distinguished modern legal systems."[112] This highlights the inherent complexity of codifying customary law, as it is deeply embedded within broader social and cultural contexts. Codifying customary laws in multi-ethnic societies such as Ethiopia is difficult. Hence, codification should therefore be decentralized, allowing regional or community-specific articulation of norms, while remaining subject to constitutional and human rights standards. Feminist legal theories argue that codification provide ample solutions for identification and exclusion of patriarchal discriminatory practices.[113]

7. Conclusion

Cultural rights are closely linked to land rights, as societies often associate their identities with their land. Even though in Ethiopia land is owned and administered by the state, customary land governance and dispute resolution mechanisms continues to exert significant influence over family law, succession, and property rights. Despite its accessibility, there are certain aspects of customary land governance and dispute resolution institution that undermine the rights of the marginalized groups, particularly women. Although both customary dispute resolution and state laws coexist within Ethiopia's plural legal system, there remains a significant gap in safeguarding the human rights of marginalized groups in general and women in particular.

[112] Zorn, Jean, and Jennifer Corrin Care, Proving Customary Law in the Common Law Courts of the South Pacific, London, The British Institute of International & Comparative Law, (2002)

[113] *Supra* note 10: Cohen et. al.

Balancing measures such as repugnancy, the formal recognition and integration of customary institutions into the state legal system with established monitoring and accountability mechanisms and the careful and decentralized codification of customary norms can enhance transparency and limit discretionary practices that disadvantage women. The combined application of recognition, integration, codification, and the repugnancy test reflects a transformative approach consistent with feminist legal theory. Rather than rejecting customary systems outright, this approach seeks to reform them by challenging their patriarchal foundations while preserving their social legitimacy. Such a framework promotes substantive equality, enhances the protection of rural land rights for marginalized groups like women, and ensures customary dispute resolution mechanisms operate in accordance with justice, equity, and human dignity.

Ideological Foundations of Interest Free Finance: Islamic Economics

Aleyu Abate Yimam[§]

Abstract

Worldview reigns. Every view about the world governs every ideology that could be held on lower themes of world issues such as sociology, politics, and economics. In the endeavor to figure out the difference between Islamic and conventional finance, and actualization of the two as alternative systems, proper grasp of the underpinning values and normative principles behind the specific commercial and financial rules of the sharia is very important. Proper implementation of various sub themes of Islamic economics including interest free finance would require comprehension of the underpinning theoretical framework as developed by the scholars of the field i.e. Islamic economics. This paper provides a succinct presentation of the ideological paradigm of interest free finance as enunciated the primary sources of the sharia and expounded by jurists (Fuqha) and professional Muslim economists since mid-20th century.

Key Words: Worldview, Socialism**,** Private Property**,** Capitalism, Islam

1. Introduction

Hitherto, the western philosophical and legal principles influenced the lives of Muslims in different parts of the world. Yet this has significantly changed with the resurgence and revival of Islamic identity in 20th C, marked by the political freedom of the Muslim World from the western colonizers. This opened the road for the actualization of Islam in political, social and economic Spheres across

§ LL.B, LL.M, PhD Candidate, Bahir Dar University School of Law. The author can be reached at: alyuabate09@gmail.com

Muslim communities around the globe. Parallel development has been reflected in the field of economic transactions and financial dealings of Muslim populations. Furthermore, due to the rising interest and attention from Muslim scholars of deferent periods, Islamic economics and finance has been developing over the years following its emergence accumulating ideas and perspectives on the underpinning theories and principles reflecting the economic worldview of Islam. In the past century, Islamic economics had to face and engage with the deeply rooted and prevailing economic philosophy of capitalism in trying to frame the contours of the Islamic economic ideology and present it clearly and persuasively considering the wealth of literatures and scientific discourses of conventional economics and its dominant utilitarian market economy.

The principles of Islamic economics are directly linked to the foundational concept of monotheism (*Tawhid* - oneness of God) of Islam which basically holds that God has created the universe and man, and made man a vicegerent on earth.[1] Life of man on earth has got grand objectives to achieve by following the guidance of God in every aspect of his life. God has revealed His guidance from the time man has set his foot on earth up to the last nation of Prophet Muhammad. This guidance of God is revealed to human kind through prophets and messengers who are sent for every nation up to the last nation (*Ummah* - the community of Muslim believers) to whom Prophet Muhammad is sent with the speech of God i.e. the Holy Qur'an and the *Sunnah.*[2] These two revelations of God constitute the primary sources for principles and laws governing the life of a Muslim in every

[1] Mustafa O. Mohammad and S. Shahwan, "The Objective of Islamic Economic and Islamic Banking in Light of *Maqasid Al-Shariah*: A Critical Review", *Middle-East Journal of Scientific Research,* (2013), p. 76

[2] The term *Sunnah* denotes the prophetic actions, speeches and approvals in the discourse of *Usul al-Fiqh* (Principles of Islamic Jurisprudence). *Sunnah* as one theme of the study of *Usul al-Fiqh* is introduced in the paper by this author: **አልዩ አባተ ይማም፣ ሱናሕ፡-ሁለተኛው የሸሪዓ ሕግ ምንጭ፣** *2 Hawassa University Journal of Law*, pp. 123-153 (2018).

sphere of life, not being limited only to spiritual and ritual matters, as in other religions.[3]

This paper aims to introduce the economic ideology founded on the Sharia, i.e., the economic worldview of Islam as has been expounded in the past decades in the discipline called Islamic economics, which still has not acquired its independent epistemological identity both substantively and methodologically.[4] The next section provides brief elucidation of the general theoretical basis of Islamic economic system and its unique ideals that make it different from other economic worldviews. The last section further explores detailed economic conceptions deduced from Islamic *Tawhidic* worldview and specific injunctions of the *Sharia*. The section takes varying perspectives to make comparative analysis of such economic ideals of Islam vis-à-vis other world economic outlooks.

2. The Economic Worldview of Islam

The economic world view of Islam emanated from the foundation *Quranic* concept of *khilafah* (vicegerency) of man over the earth that he is the guardian and trustee of the resources;[5] that man is not the absolute owner of the material world generally or properties individually. In Islam, the wealth of the world and the real right of property over wealth rests upon God and humans are mere agents holding the secondary right of property over wealth, meaning that man is subject to the law that God has communicated regarding the exploitation and administration of

[3] Taqi Usmani, Introduction to Islamic Finance (1998), p.1, Available at: https://mcca.com.au/wp-content/uploads/2021/09/an- Accessed on: Oct., 2024.

[4] See Abdulkader Cassim Mahomedy, Islamic Economics: Still in Search of an Identity. In H A El-Karanshawy et al. (Eds.), Islamic Economics: Theory, Policy and Social Justice, Doha, Qatar: Bloomsbury Qatar Foundation (2015). The state of art of Islamic economics is a separate theme that looks for further appraisal of the past developments and the current state of the art. Scholars in the field have assessed various stages the discipline went through and largely came to the consensus that the field has not reached to the level where it is satisfactory in terms of its substance and methodological paradigm.

[5] See Qur'an, 2: 30,6: 165,35: 39, 38: 28 and 57: 7

the wealth of this world.[6] God is a sovereign owner of the earth and humanity; and human beings are expected to abide by the rules of the Divine in any aspect of life, including their economic life either individual or and communally.[7] The relative scarcity of resources requires limitation on the freedom to accumulation of private wealth, and distribution of the same to general interest for society to have a balanced existence.

Distribution of wealth social, justice and equality are at the heart of Islamic economic thought. This core aspect of the religion can, inter alia, be derived from the obligatory *Zakah* as a welfare tax[8], importance attached to charitable acts *(Sadaqa),* charities for public purposes *(Waqf)*, and benevolent loans *(Qard al Hasan)*. When it comes to commercial transactions, it only allows equity based contracts, and condemns debt-based financing contracts.[9] Such rules and emphatic encouragements reflect the social justice purpose of Islam through distributive economic setting. Therefore, Islam does not intend to create a kind of society where few members own the bulk of the resources while others suffer from misery.

As Islam regulates all aspects of life, a Muslim cannot compartmentalize his life into secular and spiritual life if he wishes to subscribe to Islam. This is because Islam has an astonishing broadness of laws that regulates every sphere of life. We find this same governing claim of Islam for economic activities and financial matters.[10] Any business activity which is claimed to be in conformity with the Sharia must meet the conditions underlined for the legality thereof including

6 See: Qur'an 24:33 & 28:77
7 See: Qur'an 6: 164, 57: 7, 17: 15 and 35: 18
8 Qur'an, 57: 7
9 See Taqi, Introduction, *Supra* note 3, p. 12
10 Latifa M. Algaoud and Mervyn K. Lewis, Islamic Critique of Conventional Financing, Handbook of Islamic Banking (eds.) M. K. Hassan and M. K. Lewis, Edward Elgar Publishing Inc. (2007), p. 38.

financial businesses. Economic activities in Islam are something encouraged and sometimes even obligatory upon man. Benefiting from the wealth of the world is the benevolence that God has bestowed upon humans.

Some academics tend to take a perspective that the economic principles now attributed to Islam are already ordained by the older faiths such as Judaism and Christianity; and other idealists such as Aristotle, Adam Smith. And other contemporary economists also claimed to have reflected the same economic ideals.[11] But this is a mere contention presented among few academic circles with no demonstration that could show a system whereby a commercial transaction could be undertaken without involving interest, as Sharia jurisprudence did. For example, hen such economic and financial ideas are presented in contrast with the neo-economic theories, they comment by saying that the difference between the two economic paradigms is just in form: not in substance. This is what is known as intellectual hypocrisy. To approach discipline with ill intention or feeling does not add to the progress of either to the Islamic or conventional economics and finance.

The difference from the point of view of Islam towards wealth with other economic systems like capitalism and socialism is that economic prosperity is not the be-all and end-all of human life. The Islamic outlook of this life on earth (*Dunya*) is as a means to another grand objective of life, i.e., sublimity of character and conduct, and success in the next life.[12] The following section deals

[11] See for instance, the discussion by: Mervyn K. Lewis, Comparing Islamic and Christian Attitudes to Usury, Handbook of Islamic Banking, (eds.) M. K. Hassan and M. K. Lewis, Edward Elgar Publishing Inc., 2017, pp. 64.

[12] Muhammed Usmani, Meezan Bank's Guide to Islamic Banking, Darul-Ishaat Karachi (2002), p.13. Available at: https://archive.org/details/learnislampdfenglishbookmeezanbanksguidetoislamicbankingbyshaykhmuftiimranashrafusmani (Accessed on: Oct. 2024)

with this theme comparative analysis of the economic worldviews in further detail.

3. Islamic Economic Thought and Other Worldviews: A Comparative Analysis

The basis of difference between Islamic economic ideology and other economic outlooks, such as capitalism and socialism, lies in the perspective of Islam takes on the economic life of man; that not every aspect of human life is subject to economic progress and utility; and thus, economic ordinances emanate from its ethical and spiritual philosophy that would make Islamic economics a different economic paradigm from others.

The Assumptions of Islamic economics are different from the approaches of the mainstream economics. Scholars of the mainstream economics agree on three basic assumptions based on which the whole economic paradigm is built. The first assumption is that Man is driven by self-interest and rationalism. By this assumption, altruistic behaviors are ruled out from the impact it may have on real life facts, which however is accepted in Islamic economics and made part of its discourse. Secondly, the supreme goal of human effort is material success according to secular economics, be it capitalistic or socialistic. But this assumption contradicts with the Islamic version of economics that, though material progress is desirable, it may not supersede the success in the hereafter should there be a contradiction. Material success ought to be geared towards *falah* (success) in the life after death (*akhirah*). Thirdly, man has the capacity and knowhow to realize and meet his material needs and objectives. But Islam rejects this assumption of conventional economics, denying the full capacity of man from knowledge and affirming his inadequacy to know what benefits and harms as an individual and society.[13]

[13] Muhammad Akram Khan, Methodology of Islamic Economics, *Journal of Islamic Economics, Vol. 1,*

One of the striking differences between Islamic economic outlook and that of capitalism and socialism is that economic success is not a goal of life or an end by itself in Islam. In the two economic ideologies, economic success of man has been singled out as the main goal of human existence on earth.[14] Thus, Islamic economics, different from the two economic outlooks, has spiritual and ethical concerns that in turn have shaped its structure, value and ideals. Some of these ideals are diminishing selfishness and greed in the economic nature of man, maintaining social cohesion and harmony thereby cultivating spiritual inner-self of an individual member of a society (homo-Islamicus), as opposed to homo-economics as intended to be realized by neo classical economics.[15]

The fundamentals of capitalism are earning and maximizing capital and wealth through the strong preservation of private property rights, market competition and free market transaction. All these core pillars of capitalist economics are not denied by Islam. Except some moral limitations and restrictions, market economy and capitalism (free market being the instrument of capitalism) is essentially not contrary to Islamic economic worldview. It is even stated that Islamic economics is '*capitalism minus interest plus zakat'* indicating to the idea that Islamic economics is essentially capitalism.[16]

Though the economic thought of Islam agrees in most part with the theoretical formulations of capitalism, it further resonates with the real practice in political economies as far such systems are put in place for the greater good and

No. 1, Sept. 1987, pp. 17-20. The paper can also be found as part of the book in the series of Islamization of Knowledge - 15 (ed. Zafar Ishaq Ansari) by the same author titled as: An Introduction to Islamic Economics, International Institute of Islamic Thought And Institute of Policy Studies, 1994.

[14] See M. Umer Chapra, Ethics And Economics: An Islamic Perspective, Islamic Economic Studies, Vol. 16 No. 1 & 2, Aug. 2008, pp. 13-15

[15] See Mahomedy, Islamic Economics*, supra* note 4*,* p. 33

[16] Necati Aydin. Islamic Economics as A New Economic Paradigm. In H A El-Karanshawy et al. (Eds.), Islamic Economics: Theory, Policy and Social Justice. Doha, Qatar: Bloomsbury Qatar Foundation, p. 56.

furtherance of the interests of the public at large proving the flexibility and adaptability of Islamic economic order. Islamic economics has also values highly advocated by other economic philosophies such as socialism having its distinct existence as composition of ideals of divine origin and others justified by public interest *(Masalih al-Mursalah)* and prevention of harm (*daf' al-haraj)* shared by other economic systems. Whilethe principle of, maximization of self-interest isnot negated by Islamic economics, such ideals can readily be compromised for the interest of the public welfare. This, again, seems to be the prevalent economic policy across market economies in the world.

Both Capitalism and Socialism share the same position of tackling economic problem of man and ensuring a prosperous life.[17] According to secularcapitalism and its version of materialist economics, livelihood and economic development of man are the fundamental problem and the ultimate end of human life.[18] It gives unbridled power of decision in favor of profit making purpose, and the control of divine regulation is totally ruled out in this pervasive system of political economy even though some countries like the US seem to have officially accepted the concept of God as it is affirmed on the face of the US dollar.[19]

Islam has an economic system operating within the purview of the purpose of human life as identified in the study of the science of *Tawhid*,[20] which requires human beings to acknowledge the existence, lordship and unity of the Almighty God. This being the primary goal of life and existence in the universe, what is held as a goal in general and in the economic sphere proves to be the subsidiary

[17] Usmani,, *supra* note 12, pp. 13-14
[18] Ibid, pp.13-14
[19] Taqi, Introduction, *Supra* note 3, p. 11.
[20] It is the most accredited science of Islam that advocates for the unity of God and enunciates the main purpose for the existence of human being i.e. to believe in God's unity and abide by the laws of Islam (Sharia) including the rules on economics and finance.

objectives of Islam in the economic sphere as identified in the study of *Maqasid ash-Sharia* (objectives of the Sharia) under the principles of Islamic jurisprudence *(Usul al-Fiqh)*. In other words, the goal of Islamic economics and finance in this regard is similar to that which is articulated in Capitalism and Socialism, i.e., elimination of poverty and economic development. Therefore, the primary materialist objective of life as put in other ideologies takes secondary status in Islamic Economics.[21] This indicates to the idea the philosophical goal of Islamic economics is attached to the general objectives of the religion of Islam. Consequently, the regulation of the economic activity of man must not defeat the purpose that Islam has attached to human life, and divine regulation should take precedence over any other ideologies and economic justifications.

The Holy Quran is clear on the point that the real owner of wealth is the Creator and man is the enjoyer, and the latter derives its secondary right of property as per the laws of the Sharia. The fact that Quran has recognized the right of property of man with limitation next to the original belongingness of wealth to Allah has cut the roots of capitalism, which is built on the unconditional and absolute right of private property, which enables man to use his wealth freely in a manner he likes. In fact Islam, like the Capitalist economy, also believes in the concept of private property, the motive of profit and operation of market forces in the market economy. The difference lies in the fact that the unlimited tendency of making profit as an ultimate purpose of the market is not acceptable in Islamic economics. On the other hand, Islam, by holding this notion of limited private property, disapproves the position of Socialism objecting to the claim that individuals are devoid of the right to private ownership of property, and wealth is collectively owned and administered by the state. Countering this principle, Islam guarantees persons with private ownership as a favor from Allah. The same verses of the Qur'an mentioned above may also be cited here to underpin the position. One can

[21] Mohammad and Shahwan, *supra* note 1, pp. 76-77.

notice at this juncture that Islam remarkably sticks to its firm stand of the Qur'anic principle of *Wasatiyya* (Middle Position),[22] as it does in relation to other issues, that it strikes the middle position of the two extremes of Capitalism and Socialism i.e. the absolute and unconditional right to property of Capitalism and the total denial of private property of Socialism respectively.

Looking into the ideologies from the perspective of distribution of wealth, Islam and Capitalism have similar formulation of factors of production with a small difference while Socialism holds a position at odds with both Islam and Capitalism. Capitalism recognizes all the four postulates of factors of production: capital, land, labor and entrepreneurship. It means wealth is produced by the cooperation of these factors and it will be distributed among those who participate in one of these factors of production.[23]

The Islamic point of view on distribution of wealth is that there are generally two kinds of people who have the right to wealth. The first category consists of those who are directly involved in producing wealth through one of the factors of production as put in slightly different manner. The second group refersto those who are given the right to share some wealth from the direct participants even though they themselves do not take part in the production process.[24] In the first category, Islam believes that the factors of production are three confirming the first three factors as put by Capitalist economy excluding entrepreneurship which has a reward of profit. In Islamic economics, entrepreneurship is considered to be part of labor which is defined as an exertion whether of bodily organs or of intellect. It also includes organization and planning.[25]

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[22] See Mohammad Hashim Kamali, *"*The Middle Grounds of Islamic Civilization: The Qur'anic Principle of Wasaṭiyyah*",* 1(1) *IAIS Journal of Civilization Studies* (October 2008)

[23] Usmani, *Supra* note 12, p. 20

[24] Ibid.

[25] Id. p. 21

The Islamic definition given to Capital and Land is also different as compared to what has been provided under capitalism. Capital in Islamic Economy is defined narrowly as those things which cannot be used in the production process without being wholly consumed, or which cannot be leased hence it excludes machinery;[26] whereas in Capitalism, it is defined expansively as: "the produced means of production" which, in addition to money and foodstuff, includes machineries.[27] In contrast to the narrow definitional approach followed towards land, it is given a broader meaning under the Sharia unlike its capitalist counterpart.[28] Consequently, land does not mean: "natural resources" rather it refers to things which could not be wholly consumed during the process of production. It is to be noted that land, unlike the case in Islam, is defined under capitalism as a means of production that does not go through any process of production (natural resources).[29] The wealth produced from the combined interaction of these three factors would go to capital in the form of profit, not interest; the other shares would be distributed in to land and labor in the form of rent and wages respectively.

Now we turn to the tenets of socialism. Socialism holds a totally odd position with respect to distribution of wealth in light of that Islam and Capitalism stand on. Socialism rejects all factors of production except labor.[30] As discussed above, the concept of private property is not acceptable under the socialist economy; and thus, land and capital are exclusively owned by the state. So the issue of interest will not arise. The entrepreneur is also the government itself, making interest again out of agenda. Labor remains to be the only proper source of income for

26 Ibid.
27 Id. p. 19
28 Id. p. 21
29 Id. p. 19-24
30 Id. p. 20

individuals in the form of wages.[31] This creates a worst situation of concentration of wealth in the hands of a single big Capitalist – the State - which results in arbitrary administration.[32] Moreover, since individuals are not allowed to own the fruit of their labor, they may lack the incentive to work which would possibly lead the state to use force to get their labor, which again will have an evil effect of loss of liberty and inefficiency of work.[33]

However, Islam, unlike Socialism, guarantees persons with the right to private ownership; and it does not distribute wealth only through wages but also in the form of profit and rent. Hence it avoids the evils of Socialism. It also, unlike Capitalism, rejects interest as a mode of distribution of wealth, and further introduces the rightful persons to wealth at secondary level through the system of *Zakat* (alms giving).[34] Thus, it eradicates the possible concentration of wealth in the hands of few people, which is the inherent problem of Capitalism.

Redistributive justice, avoiding accumulation and hoarding of wealth among few members of a society, is a core feature of Islamic economic thought. In addition to equity/risk sharing contracts, *Zakat*, *Sadaqah*, *Waqf* and *Qard al Hasan* are instruments of wealth distribution in Islamic economic system. To remedy wealth accumulation, socialism has opted for the extreme measure of elimination of the concept of private property which in itself has got its evil consequences of depriving the natural right of individual ownership and control over one's labor. As a response to this deficiency of socialism, Capitalism employs the unlimited right of private property and market mechanism with the evil result of capital accumulation in the hand of few wealthy persons, monopoly and unemployment.

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31 Ibid.
32 Id. p. 22
33 Ibid.
34 *Zakat* is one of the five pillars of Islam, and it is a yearly obligation upon a Muslim owning a property above a certain *Nisab* (minimum amount) level.

Most, if not all, of these problems are attributable to interest constituting the backbone of the conventional financial system and the reward of few industrialists. Islamic economics, by denying interest as a return of capital and inculcating the idea of profit and loss sharing in the realm of finance and banking has followed the middle path of the two economic systems. Beside its indictment of interest, it made the larger part of wealth like fire, water, earth, un-owned and uncultivated lands under the common trust. Hence, everyone is entitled to use and benefit from this part of the wealth, and only the remaining part would be open for private ownership through any one of the three factors of productions. This minimizes the possibility of concentration of wealth on few capitalists.

From the market perspective, while the socialistic ideology of planned economy and market has no basis in the Islamic economics, every economic activity cannot be left to the market for determination. In other words, Sharia does not put a restriction on the mandate of the government from regulating and guiding the market whenever it is necessary for the public interest *(Maslahah)* to the extent of determining a just price. There are multiple scenarios where free market competition could go in a wrong direction defeating the purposes of market efficiency. In some sectors of the economy, taking into account other determining factors such as supply and demand, the market with respect to that sector might have to be regulated to the level where the price of products and services are fixed by the authority on behalf of the public. Applying free competitive market may not prove effective; rather than letting imbalance and unfair price and distortion of the economy resulting in social injustice and exacerbating the income and wealth gap in the society.

To sum up, Islam strikes the balance between the extreme self-serving ideals of capitalism and the extreme position of socialism abolishing private ownership and the right to work. But appreciating this balancing approach of Islamic economics, there is even a wide variety of arguments ranging from the proponents of the absolute private ownership and free market to those who legitimatize the control

of market and limitation of right to property for the interest of the public, thought such arguments, which reiterate the ideals of Islamic economics, are not based on divine guidance. Anyway, wherever the moral economic ideals come from, as far as such values are essential, the same justifications can also be attributed to the Islamic economic principles through juristic ratiocination *(Illah)*. This is because, it is generally agreed among Sharia jurists that both the generic and specific principles and rules of Sharia on any respects of societal life including economic interactions are not barren with no objective to realize. Every Sharia rules as enunciated in the primary sources have objectives to bring about in a certain context; and these objectives, if not explicitly stated in the source text *(Nass),* can be identified through *Ijtihad* (juristic reasoning)[35] which exactly is being reflected from conventional economists of capitalism justifying ethics and morality in the context of secular economic set up.

4. Conclusion

The difference Islam has with economic ideologies in the sphere of economy or an other matter emanates from the general worldview it holds towards the life of man and its purpose. The concept of *Tawhid* or the responsibility of man in the life after death, and ideals of altruism and good values beyond utility and selfishness in the material world form the foundational theory upon which Islam presents its economic ideology as distinguished from capitalism and socialism. The higher worldview norm of Islam is reflected and implemented through the specific Sharia injunctions such as the prohibition of interest *(Riba)* and uncertain transactions *(Gharar)*. Economic prosperity and enrichment against the universal human virtues and values is unacceptable under the Sharia framework.

[35] For understanding on *Ijtihad* as the third sources of the Sharia, read: **አልዩ አባተ ይማም፣ ሦስተኛው የሸሪዓ ምንጭ፣ አመክንዮአዊ የሕግ ምርምር *(ኢጅቲሓድ)*፡-ምንነቱና መገለጫዎቹ**, *Jimma University Journal of Law*, Vol. 11 December 2019. Available at: https://journals.ju.edu.et/index.php/jlaw/issue/view/178

These general and scientific ideals are made basis for the formulation of economic theories and principles of Islamic ideological framework. Any effort to realize Islamic finance as part of a country's financial system at the regulatory and market levels might go along the fault lines of manipulation that would defeat the objectives of the Islamic economic ideology in general and the specific sharia rules in particular. Hence, besides efforts to enhance knowledge on the theoretical basis of Islamic finance, technical rules and supervisory mechanisms that would curb the seemingly sharia compliant but inherently defying practices, need to be put in place as part of the regulatory framework. This would maintain customer/public confidence on the system, besides realizing the objectives of the Sharia *(Maqasid)* on the commercial and financial sphere of state and societal interactions.