Reflection on the Legality of 'Private' Discrimination in Light of Recent Economic and Social Changes in Ethiopia

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Abstract

This essay is an attempt to draw attention to the discrimination people face in urban areas and the emerging market-oriented social relation. People face discrimination in various social settings. Women, children, and other vulnerable social groups face discrimination in the so-called "customary" spheres, and in other non-governmental and governmental settings. But discrimination by private businesses has also become ubiquitous, especially in the urban housing and labor sectors. This is partly because of the deregulation of the economy over the last couple of decades, and the steadily intensifying effort to outsource traditional state functions to local and global private interests. These developments raise questions about the application of constitutional rights to a private conduct, and about the legality of private discrimination more generally.

Key Words: Discrimination, Private / Public Distinction, Housing

1. Introduction

Charges of widespread discrimination by the State and its agents, social associations, and private businesses against individuals and groups of particular ethnic and social background have surfaced recently. The charges, especially those leveled on the social media, reveal that people face discriminations by governmental and non-governmental entities in multiple social settings, such as, employment, housing, and more generally, the procurement and provision of goods and services.[1]

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[1] *See e.g.,* William Davidson, *The Ethiopian Boomtown that Welcomes Water Firms but Leaves Locals Thirsty,* The Guardian, (Mar. 9, 2017). Available at: https://www.theguardian.com/global-development/2017/mar/09/ethiopia-boomtown-water-firms-locals-thirsty-sululta-oromia; Gregory Warner, *Ethiopian Runners Say They Face Discrimination,* National Public Radio (NPR), Heard on All Things Considered (June 5, 2016 at 5:17PM ET). Transcript Available at: http://www.npr.org/2016/06/05/480861401/ethiopian-runners-say-they-face-discrimination); Conor Gaffey, *Oromo Protest: Why Ethiopia's Largest Ethnic Group is Demonstrating,* Newsweek, (Feb. 26, 16). Available at: http://www.newsweek.com/oromo-protests-why-ethiopias-biggest-ethnic-group-demonstrating-430793. *See also,* Adanech Gedefaw, *Determinants of Relationship Marketing: The Case of Ethiopian Airlines,* 14

This essay concerns the legality of these various forms of discrimination people face in the non-governmental sector, also called "private" sphere, from the standpoint of the rights and liberties protected under the Federal Democratic Republic of Ethiopia (FDRE) Constitution. The focus on the discriminations in the "private" sphere is not to suggest that discrimination in other settings is unimportant. In fact, discrimination by the State and its agents is not only ubiquitous and grave; but also the enforcement of constitutional rights and liberties of ordinary citizens against the offices and officials of the State is extremely limited.[2]

Private discrimination raises a curious legal question in light of the profound power and influence that the private entities have come to command in the economy and society. That is: how can constitutional rights and liberties be applied to govern a private conduct that violates constitutionally protected rights and liberties? This question is germane to an important theme in comparative constitutional jurisprudence: the scope of application of constitutional rights and liberties to private conduct, also known as "horizontal effect" or "state action" doctrine.[3]

A particularly important question is whether and how the judicial bodies — i.e., the courts, the Council of Constitutional Inquiry and the House of Federation, apply the constitutional rights and liberties to a discriminatory conduct of a

GLOBAL JOURNAL OF MANAGEMENT RESEARCH 3, 45, 48 (2014) (discussing discrimination between foreigners and locals by the Ethiopian Airlines; Milkessa Midega, *The Politics of Language and Representative Bureaucracy in Ethiopia: The Case of Federal Government,* 7 JOURNAL OF PUBLIC ADMINISTRATION AND POLICY RESEARCH 1, 15 (2015) (discussing discrimination people face at the bureaucracies because of language). For additional discussion, *see* text and references accompanying *infra*, notes 28, 37 - 38, 42 – 43.

[2] The lack of constitutional accountability in Ethiopia has been widely discussed among scholars as well as the public. For the detail discussion, *see e.g.,* Jon Abbink, *The Ethiopian Second Republic and the Fragile "Social Contract",* 44 AFRICA SPECTRUM 2, 3 (2009); John M. Cohen, *"Ethnic Federalism" in Ethiopia,* 2 NORTHEAST AFRICAN STUDIES, NEW SERIES, No.2, 157 (1995); Marina Ottaway, *The Ethiopian Transition: Democratization or new Authoritarianism?*, 2 NORTHEAST AFRICAN STUDIES, New Series, No.3, 67(1996); Theodore M. Vestal, *An Analysis of the New Ethiopian Constitution and the Process of Its Adoption,* 3NORTHEAST AFRICAN STUDIES New Series No.2, , 21(1996).

[3] For further discussion, *see* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights,* 102 MICHIGAN L. REV. 3 387 (2003).

private person.[4] The broad purpose of the essay is to highlight the incipient asymmetry of power and property wrought by the EPRDF officials' effort to deregulate the economy.

The subject obviously requires thorough and sustained legal and sociological researches. This essay is an initial reflection of my interest in the intersections of constitutional rights and the public/private divide. Hence, it is an attempt to highlight general questions and insights regarding discrimination and the public/private distinction that can stimulate interest on the part of the legal profession.

In the next part of the essay, I draw on comparative materials to discuss the notion of private discrimination by situating it within the public/private distinction in liberal constitutional law and theory. The subsequent parts canvas some general yet key points in regards to socio-legal aspects and significance of private discrimination in the urban settings.

2. Discrimination and the Public/Private Distinction

The principal object of constitutional rights and liberties in a liberal constitutional regime is the governance of conduct of the State and its agents.[5] In other words, the primary purpose of a liberal constitution is to regulate vertical relation between State and individuals or community of individuals. Thus, how the State and its agents decide to serve one person instead of another concerns the constitutional rights and liberties. The distribution of burdens and benefits by the State and its agents on the basis of race, ethnicity, sex and other classifications would be a constitutionally suspect discrimination in liberal constitutional regimes. This means that, among other things, the body charged with the authority of constitutional review has the power to review decisions of a governmental agent on the basis of the constitutional rights and liberties concerning discrimination.

[4] In addition to the FDRE Constitution, various international legal instruments and domestic laws and regulations are important to appraise the question of legality of private discrimination. The essay, nonetheless, is limited to the Constitution.

[5] *See e.g.,* Paul Brest, '*State Action and Liberal Theory: A Case Comment on* Flagg Brothers v. Brooks', 130 U. PA. L. REV. 1296 (1982). The liberal constitutional thought can be understood in at least two traditions: The Lockean "natural rights" tradition that prescribes sharp public/private distinction and the Hobbesian "positive constitutionalism", which tends to collapse the distinction.

According to the logic of liberal constitutional thought, private conducts, however, are a secondary object of the constitutional rights and liberties.[6] They are the primary objects of private law regimes, if even an object at all. This means, among other things, that the body charged with the authority of constitutional review lacks the power to review a private conduct that violates the constitutional rights and liberties. Thus, for example, while such a body can review the constitutionality of a public university's admission policy that requires students waive the right to associate or express their opinion; it arguably lacks the authority to review if a private university enforces the same policy.

The divide in the application of constitutional rights and liberties stems from a broader conceptual and doctrinal divide that permeates the liberal legal thought known as the "public/private" distinction. Morton J. Horwitz shows that the distinction emerged as early as the formation of the European nation-state and the enlightenment thought that began in the 16th Century. The rise of market as the dominant mode of economic and social organization and the concurrent effort of "orthodox judges and jurists to create a legal science that would sharply separate law from politics" in the 19th Century engendered a global proliferation of the distinction.[7]

The classic conceptual and architectural division of the law into "public law" that is conceived as political and proper sphere of regulation/intervention by State, and "private law" that is conceived as apolitical and the proper sphere of individual autonomy is an aspect of the distinction.[8] The distinction is understood in the area of constitutional law and jurisprudence to mean that constitutions concern the conduct of State and its agents, whereas private law concerns the private conduct of individuals.

A plethora of problems have been identified with the theory and applications of public/private distinction. To begin with, a coherent conception of the distinction is impossible.[9] The line between the "private" sphere and the "public" sphere is less obvious than it is assumed. Jurists who influenced

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[6] ERWIN CHEMERENSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 507 (3rd ed., 2006) (hereinafter, Principles and Policies).

[7] Morton J. Horwitz, *The History of Public Private Distinction,* 30 PENN. L. REV 6, 1423, 1425 (1982).

[8] *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY, Vol. 2, 6541-54 (Guenther Ross & Claus Wittish Transl., 1958).

[9] *See e.g.,* Erwin Chemernsky, *Rethinking State Action,* 80 NE. U. L. Rev 3 (1985).

Western legal thought staring from the late 19th Century up to the 1960s, which is often referred to as the period of "Social Legal Thought", show that the "private" constitutes and is constituted by the "public".[10] Robert Hale, one of the iconoclastic jurists of that period, for instance, argues that the public/private distinction is an ideological construct in the service of capital as opposed to labor.[11]

Another problem concerns the idea that the power of the State is anti-thesis of autonomy of the individuals. The idea is derived from the Lockean theory of limited government, understood to mean that a private sphere must be reserved to protect the rights and liberties of the individuals against threats of the State.[12] However, ample legal and socio-legal materials confirm that private actors, such as corporations, traditional/customary regimes, dominant racial and ethnic groups, and other social categories can wield formidable power and influence that can threaten the rights and welfare of individuals and vulnerable social groups.[13]

A related problem concerns the conception of the "private" as an apolitical sphere that must be free from interventions by the State. This conception is premised on the assumption that the "private" is pre-political and internally symmetrical — i.e., individuals in this sphere wield equal (or equivalent) power and the State must be assigned the role of the arbiter whose duty it is to keep the rules of the game.[14] It has long been recognized that the "private" sphere involves serious political stakes and that the Lockean conception of State-society relations masks the stakes and distributive outcomes. In other words, the "private" is

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[10] Duncan Kennedy, *Three Globalization of Law and Legal Thought: in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 37-59, (David M. Trubek & Alvaro Santos eds., 2006).

[11] Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 POLITICAL SCIENCE QUARTERLY 3, 470 (1923).

[12] *See* Brest, *supra* note 5, *at* 1296 -97.

[13] For detail discussion on the significance of customary/informal regimes in Ethiopia, *see* ALULA PANKHURST & GETACHEW ASSEFA (EDS.), GROSS-ROOTS JUSTICE IN ETHIOPIA: THE CONTRIBUTION OF CUSTOMARY DISPUTE RESOLUTIONS (2008). *See also* Larry Alexander, *The Public/Private Distinction and Constitutional Limits of Private Power,* 10 CONST. COMMENT. 361 (1993) (for a discussion on the role of private corporations in other jurisdictions).

[14] JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 137 (Macpherson ed. 1980).

asymmetrical and deeply political, and non-intervention by the State in this sphere is intervention by another name.

3. The Distinction in Comparative Constitutionalism

The effort to establish a neat public/private distinction in constitutional law and jurisprudence has been largely futile. But judges and jurists in various jurisdictions have developed and continue to develop techniques and doctrines to navigate the intricate problems inherent in the distinction. Post-Cold War constitutions approach the issue along the spectrum between two opposite doctrines: the doctrine that prescribes sharp public/private distinction, on the one hand, and doctrine that collapses the distinction, on the other hand. The constitutional regimes that follow the first approach are often called "classical liberal", whereas the second approach is understood to resonate with the "social liberal" constitutions.[15]

The classical liberal approach prescribes a bright-line rule of the distinction. Judges and jurists in this approach maintain a sharp vision of the "private" sphere to which, according to their vision, constitutional rights and liberties must not apply. The approach was epitomized by the "state action" doctrine, which judges and jurists in the United States developed during the period often referred to as the "Classical Legal Thought".[16]

The US Supreme Court deployed the doctrine to draw a sharp distinction between the "private" and the "public" (as well as between the "federal" and the "state" spheres) in one of its landmark decisions of the 19th Century, the *Civil Rights Cases*.[17] The case, which in fact was a group of five cases, concerned the constitutionality of the Civil Rights Act of 1875[18], a statute enacted by the US Congress.

Congress passed the Act to ban race and color based discriminations in regards to access to public accommodations in order to curb the pervasive discriminations faced by African Americans and other people of color in public places, such as public transportations, hotels, inns, and theatres. Relying on the

[15] Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law,* 1 I. Con. 1, 79, 80 - 4 (2003).

[16] Kennedy, *supra* note 10, at 26 - 58.

[17] 109 US 3, (1883).

[18] 18 Stat. 335-37.

Act, some African Americans sued certain "whites only" establishments that refused them services because of their race. The Court held, however, that the Act was unconstitutional on the ground that the "federal constitutional rights do not govern individual behavior" and that "Congress lacks the authority to apply them to private persons."[19]

Beginning in the early 20th century, the Supreme Court eventually retreated from this orthodox version of the state action doctrine in favor of more flexible interpretations. Subsequent court decisions overturned the *Civil Rights Cases* precedent, and Congress enacted several civil rights laws since the 1960s. To be sure, US courts have not rejected the doctrine totally. It is still binding in the sense that courts cannot consider a claim of constitutional violation in the absence of some action by a state entity.[20] But courts have often found state action and applied federal constitutional rights to what would have been a private conduct under the orthodox approach.

Shelley v. Kraemer[21] is the landmark case in this vein. Shelley, an African-American family, purchased a house in Missouri, and Louis Kraemer, a white resident in the neighborhood sued them alleging that the property was subject to a restrictive covenant that prevented "people of Negro or Mongolian" race from occupying the property. The Supreme Court of Missouri enjoined Shelley from occupying the property on the ground that a state action was lacking because the covenant was a private agreement. The Supreme Court reversed the injunction on the ground that an injunction ordered by the court that enforced a racially discriminatory covenant was state action flouting the equal protection clause of the US Constitution.[22]

The trend in constitutions of the social liberal approach collapses the public/private distinction. Constitutions that follow this approach commit to the so-called "positive rights" and "negative rights".[23] The commitment to positive rights is often understood to require the horizontal application of constitutional rights and liberties to private conduct. This application can be

[19] Chemerensky, Principles and Policies, *supra* note 6, *at* 513.

[20] Robin West, *Response to State Action and a New Birth of Freedom,* 92 GEO. L. J. 819, 823-24 (2oo4).

[21] 334 US 1. (1948).

[22] *Id.*

[23] For a classic reading on "negative rights" and "positive rights", *see* Isaiah Berlin, *Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY (Isaiah Berlin ed., 1969).

either direct or indirect. Direct application is likely if the substantive constitutional rights envisage the regulation of private conduct. Indirect application, which perhaps is the most common doctrine, holds when the State and its agents are required to take constitutional rights and liberties in to account in making decisions.

The German Constitutional Court gave a leading formula of the indirect horizontal effect of constitutional rights and liberties in the *Lüth case*,[24] a landmark case on the subject. Lüth, who was president of a press club, called for boycotting Veit Harlan, a film director who gained fame during Nazi regime for his anti-Semitic work. Two film companies claimed that Lüth has discouraged film companies and theatres to show Harlan's latest work, and the German public to see the film. The trial court granted injunction against Lüth on the basis of private law rule that required a person who causes damage to another person, intentionally and in a manner contrary to good morals, to compensate the victim. Lüth appealed against the judgment to the Constitutional Court, and the court reversed the injunction on the ground that the lower court's decision failed to take into account the constitutionally protected right to freedom of expression to which Lüth was entitled.

While conceding that the principal purpose of constitutional rights is to protect the rights and liberties of the individual against interference by public authorities, the Constitutional Court formulated the profoundly influential doctrine of "horizontal effect" which has been adopted into comparative constitutional jurisprudence. According to the Court's reasoning, the Constitution establishes an "objective order of values" that permeates the entire legal system, and hence courts must interpret private law in the spirit of the constitutional norms.[25] Other countries that uphold the doctrine of horizontal effect of constitutional rights and liberties include South Africa and Canada, both of which have been influential internationally.[26]

One of the key differences between the classical liberal and social liberal approaches is the degree to which constitutional rights and liberties govern private conduct. While the former tends to uphold a sharp public/private

[24] Lüth, BVerfGE 7, 198; 1 BvR 400/51 (1958).

[25] DONAL P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, 363 (1997).

[26] Tushnet, *supra* 15, *at* 80 – 83.

distinction and limit constitutional rights and liberties to state action, judges and jurists in social liberal constitutions emphasize not only the identity of the offender but also the rights and liberties at issue. Hence, the latter judges and jurists tend to collapse the public / private distinction.

Nevertheless, it is important to note that the doctrinal differences between the two do not necessarily translate into functional differences. The fact that the US constitutional jurisprudence upholds the state action doctrine does not mean that US courts are less likely to apply constitutional rights and liberties to conducts of private persons than the courts that uphold the doctrine of horizontal effect do. The application of constitutional norms in any jurisdiction depends not only on the doctrines but also on the entire constitutional structure, norms, and interpretive contexts.[27]

Which approach would bear comparison to Ethiopia's constitutional law and jurisprudence? Consider the following excerpt from Amanda Farrant's report about the stigma and discriminations faced by women living with HIV:

> … HIV-related stigma and discrimination in Ethiopia has a devastating impact on those affected. Not only do they find themselves rejected by their families and communities, but they can also be excluded from other elements of society: people stop eating food from their homes or buying produce they have grown. Of course, it also means you are no longer welcome at the most important local ritual: the coffee ceremony.
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> Seblework Kebede, a 33-year-old mother of four, understands what it means to be shunned: 'It is eight years since I have known I am positive. I have lived a very terrible life not being able to be part of the community. I used to sell milk from home: when people heard that I was HIV positive they stopped buying from me.
>
> *'People would call me names like "woman with the virus". It really affected my life.'*
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> Zenebech is 32. Like Seblework, her story is typical of the traumatic experiences many of the women had suffered. She explains: 'I was abducted when I was 18 and forced into marriage. I have two children. Some years later my husband died. I got tested after he died and found out I was positive, along with my children who are now 10 and five. They get bullied a lot at school.
>
> *'When my brother-in-law found out we were HIV positive, he took our property from us and forced us to move away. So we left the rural area where we had been living and my sister helped me to come to the town. I was stigmatized like hell.*

[27] *Id.*

> *When landlords found out that I was positive, they caused problems and tried to evict us. I wanted to kill myself.* [28]

The excerpt raises set of questions that concern the horizontal effect of rights and liberties protected by the Constitution. One of the questions is whether the landlords who evicted (or attempted to evict) Zenebech and her family can be held responsible for violation of the right to equality or the rights of women provided for in the Constitution. And whether Seblework's customers who stopped buying milk from her because of her health status can be held responsible for violation of the right to equality or the rights of women provided for in the Constitution.

A related question is how the constitutional rights of a victim of discriminatory private conduct interact with the rights and liberties of the private perpetrator. In other words, if court or the House of Federation has the authority to review the constitutionality of a private conduct, a follow up question would be whether and how Zenebech's constitutional rights and liberties trump the landlord's property and contract rights, and Seblework's rights and liberties trump the rights and liberties of her customer.

The key question is whether a court or the House of Federation can apply the constitutional rights and liberties to a private conduct that violates the constitutionally protected rights and liberties. Consider the following examples in the light of this question: Can an *'Idir'* that refuses to admit people of certain religion be held liable on grounds of the constitutional rights and liberties? How about a political party that admits only people of a particular ethnicity? How about a political party that is open to everyone *de jure*, but discriminates against women *de facto*? How about a real estate developer that rents apartment to single men only? How about a bar that admits foreigners only? How about an employer who fired an employee because of the employee's political views, or religious affiliation?

[28] Amanda Farrant, *Living with HIV: Ethiopia's Positive Women, (July 10, 2015), available at: https://medium.com/@caglobal/living-with-hiv-ethiopia-s-positive-women-91bb35f42143#.onidk7njk*. For further discussion on discrimination against people living with HIV and other diseases, *see* Garumma T Feyissa et al., *Stigma and Discrimination Against People Living with HIV by Health Care Providers, Southwest Ethiopia,* 12 BMC Public Health, 522 (2012). Available at: http://www.biomedcentral.com/1471-2458/12/522.

The answers to these questions are normally found in the constitutional texts and doctrines that judges' and jurists' develop. There are constitutional rights and liberties that are expressed in terms that suggest Ethiopia's approach is aligned with the approach of social liberal constitutionalists, but doctrines have not yet been developed.

The pertinent constitutional texts include the Supremacy Clause, Equality Clauses, and other rights protected by the Constitution. The Supremacy Clause declares that "customary practices" which contravene the Constitution are "of no effect",[29] and charges "[a]ll citizens, political organizations, other associations as well as their officials" with the duty to obey the Constitution and to ensure its observance.[30] The Equality Clause prohibits discrimination on the basis of race, color, and other classifications.[31] The provision on the right to access to justice guarantees the right to seek judicial enforcement of "justiciable matters".[32] In another clause, political parties and organizations that "significantly affect public interest" are charged with the duty to non-discriminatory membership, and citizens are entitled to the right to be members subject to the "special and general requirements" of the organization.[33]

These clauses guarantee rights and liberties that protect individuals and social groups against discriminations. They can also be understood to mean that the Constitution, particularly the Supremacy Clause, charges not only the State and its agents but also private actors, including the customary regimes, with the duty to comply and ensure compliance with the constitutional rights and liberties. However, there are clauses that express the conventional public/private distinction. The text of Article 13 (1), for instance, can be understood to mean that the duty to respect and enforce the constitutional rights and liberties is limited to the State and its agents.[34]

Another problem is the lack of evidence in regards to how judges and jurists interpret the clauses and the question of horizontal effect/state action doctrine more generally. Neither a court decision nor a scholarly material that deals

[29] FDRE CONST. Art.9 (1).

[30] FDRE CONST. Art.9 (2).

[31] FDRE CONST. Art. 25.

[32] FDRE CONST. Art. 37.

[33] FDRE CONST. Art. 38.

[34] FDRE CONST. Art. 13. (1).

directly with the constitutionality of a discriminatory private conduct is available. Indeed the legal and organizational process for reviewing the constitutionality of conducts of State agents is too imperfect to meet the minimum expectation. The situation in regards to review of a private conduct on the basis of the constitutional rights and liberties is worse.

This problem might be due to structural aspects of the Constitution, specifically the allocation of the power and the legal processes of constitutional review. The Constitution charges the House of Federation,[35] an assembly of officials nominated by state governments to represent ethnic groups, and the Council of Constitutional Inquiry,[36] a council of experts in various fields nominated by the President of the country for a term, with the authority to "interpret" the Constitution and the power to review the constitutionality of laws. Ambiguities surround the role of judges of the courts in the application / interpretation of the Constitution. The arrangement is motivated apparently by the desire to "democratize" the Constitution, which is premised on the assumption that professional judges have the propensity to cater to the demands of an elitist constituency. The structure, compositions, and decision-making processes of the House of Federation show, however, that the House is visibly political and parochial, i.e. a conduit implementing the ruling party's agenda. It has often acted in a way that is elitist and technocratic.[37]

To sum up, whether and how Ethiopian courts would treat a private conduct that flouts the constitutional rights and liberties is not obvious, if not totally unknown. The constitutional expressions of rights and liberties raise more questions than they answer about horizontal effect of constitutional rights and liberties. The next section highlights some of the private discriminations that are significant in the current Ethiopian social settings, and thence justify a greater attention on the part of the legal profession, and beyond.

[35] FDRE CONST. Art. 61-8, Art. 83.

[36] FDRE CONST. Art. 82, Art. 84.

[37] For discussion of the Ethiopian constitutional review mechanism and problems associated with the House of Federation, *see e.g.,* Chi Magbako et al., *Silencing Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights,* 32 FORDHAM INT'L L. J. 1 259 (2008); A. Fiseha, *Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience,* 52 NETHERLANDS INT'L. L. REV. 1, 1 (2005); Minasse Haile, *The New Ethiopian Constitution: Its Impact on Unity, Human Rights and Development,* 20 SUFFOLK TRANSNAT'L L. REV. 1(1996).

4. Significant Kinds of Private Discrimination

People face private discrimination in many forms. Women, children, and other religious and social groups face discrimination in most of the traditional social settings in Ethiopia. The most egregious kinds of discriminations occur in the agrarian social arenas, often by the so-called "customary" regimes, despite efforts by governmental and non-governmental organizations to change these traditions and practices.[38] The fact that the social lives in Ethiopia have always been rife with various forms of discriminations, especially in relation to gender, age, social cast, sex and other social groups, is hardly contentious.

The 1990s saw the introduction of a supposedly liberal constitutional democracy and a free market economy.[39] However, the changes have engendered new social changes and a correspondingly different kind of private discriminations: discrimination by private market actors. Here I will attempt to explain how these types of discrimination occur, and why they are salient.

The changes over the last 25 years have been tremendous. They include: the diffusion of culturally homogeneous communities in to heterogeneous rural and urban communities; rapid urbanization; emergence of private providers of goods and services; rise of commerce and impersonal exchanges as the mainstay of the economic and social activities; and, steadily intensifying dependence and interdependence among individuals.

Various factors account for the changes. One of the factors is the movement of individuals from one community to another community. In particular, movements of people that traverse the contours of ethnicity and other identity-bound local social organizations bear a significant role in the fissions and fusions of culturally homogeneous local communities. To be sure, such movements are not new. Previous governments have made the effort to resettle people from one area into other areas under various programs, on top of the privately induced movement of people that has always existed.

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[38] For discussion of social discrimination, *see e.g.,* Marcus Baynes-Rock, *Ethiopia's* Buda *as Hyenas: Where the Social is more than the Human,* 126 FOLKLORE 3, 266 (2015); Sayuri Yoshinda, *Why Did the Monjo Convert to Protestant? Social Discrimination and Coexistence in Kafa, Southwest Ethiopia, in* PROCEEDINGS OF THE 16TH CONFERENCE OF ETHIOPIAN STUDIES 299 (Svein Ege et al., eds., 2009).

[39] *See* FASIL NAHUM, A CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT (1997).

The increased role of market as a medium of economic and social relations is another leading factor of the change. Population growth, scarcity of land, expansion of communication infrastructure, concentration of job and modern amenities of life in the urban areas, and the presence of labor and capital from abroad are some of the factors that accentuate the change. These factors explain also the proliferation of towns and cities, epicenters of micro-globalization, where individuals of various locales, professions, cultures and other social background come together.

The ideology that shapes and governs the changes and the emerging economy and society is neoliberalism, which centers primarily on privatization and deregulation of the economy, outsourcing the traditional functions of governments to private businesses, and the sanctity of private property.[40] Another key feature of the neoliberal ideology is what Jean and John Comaroff call the "fetishism of the law", which is unqualified faith in the law and courts, "rule of law", as the necessary and sufficient conditions of governing the economy and society.[41]

Some people face unfamiliar kinds of private discriminations in the emerging urban centers. Social dependence and inter-dependence are high in these areas. In a typical urban life in Ethiopia, an individual is likely to depend on another person, probably a corporate person, to get food, housing, medications, and other basic necessities through the medium of impersonal and paper-money market. Urbanization is often associated with progressive social change. It is believed, often intuitively, that diverse cultures, preferences, life-styles, and the autonomy of individuals more generally, flourish in urban centers. However, urbanization can also expose individuals to vulnerabilities, isolations and discriminations, particularly if life in the city means a sudden loss of the familiar social setting and exposure to impersonal economic and social relations.

Take the case of housing rental market in cities and towns. Only a small number of people who migrate to Addis Ababa and other cities afford to buy a house. Hence, the majority of in-migrants and new generations of the residents depend on the rental market. It is well known that the rental market is tough for

[40] For a discussion of Ethiopian neoliberalism, *see e.g.,* Fassil Demissie, *Situated Neoliberalism and Urban Crisis in Addis Ababa, Ethiopia,* 6 JOURNAL OF AFRICAN STUDIES 4, 1475 (2008).

[41] John L. Comaroff and Jean Comaroff, *Reflections on the Anthropology of Law, Governance and Sovereignity, in* RULES OF LAW AND LAWS OF RULING: ON THE GOVERNANCE OF LAW 31, 32 -3, (Franz von Benda-Beckmann et al., eds., 2009).

everyone on the demand side. But evidence from parts of Addis Ababa show it is nearly impossible for some people. Interviews with a few residents show that families with children, persons with disabilities, single women, religious and other distinct ethnic minorities face discrimination in the housing rental market because of stereotypes and prejudices associated with the needs and life-styles of these social categories.[42]

People prefer to rent out their houses to single and physically 'fit' men than families or single women or a person with a disability. Ethnicity, religion, and other social backgrounds are another set of the key determinants of a person's position in the rental market. The ability to communicate in the Amharic language, the language of the Amhara people and the *lingua franca* in Addis Ababa and other major cities, is another determinant. The lack of fluency in the language can militate against a person's chance in the rental market, because the lack of fluency is an indicator of a person's identity, and it can also impair communications with the landlord.[43]

To be sure, most of the renters in the Ethiopian urban centers are largely landlords living in one of the units they rent. Hence a degree of discriminatory admission the landlords may make is understandable. If a landlord wanted to choose individuals that are more likely to maintain the atmosphere of "home" in the accommodation, it should not be a serious social ill. The desire to protect the autonomy and preferences of such landlords might have to trump the right to equality of others.

The so-called "Mrs. Murphy exemption" governs a similar situation under the U.S. Civil Rights Act of 1968, also known as the "Fair Housing Act".[44] The Act bans discrimination in regards to sale, rental, and financing of housing on the basis of race, religion, national origin, and sex; but it exempts discriminatory rental provided that the owner who lives there rents the house to no more than three persons or families.[45]

Another aspect of the discrimination concerns the steadily increasing role of corporations and the corresponding vulnerability of consumers to discrimination. Private corporations have become significant parts of the lives and livelihoods of

[42] Interview with R. K. and T. G., Residents of Addis Ababa, Ethiopia (Apr. 25 2017).

[43] *Id. See also,* Midega, *supra* note *1*.

[44] 42U.S.C.A. §§ 3601-3631.

[45] *Id.*

ordinary individuals. This is mainly because of the policy of privatization and the steadily growing presence of transnational capital over the last two decades. The majority of state owned enterprises created during the previous government, which barely functioned anyway, have been privatized. A few have been restructured to act along the lines of the profit incentives — i.e., to provide goods and services on the basis of terms and conditions that are supposedly set by the logic of demand and supply in a supposedly free market economy.

Corporations shape how they relate to consumers, and even how people relate to each other. A case in point is the so-called "outsourcing", a practice that has become popular seemingly on the ground of business efficiency. When privatization does not occur, the government relegates its traditional functions to corporations in the interest of so-called "public-private partnership". The corporations outsource some of their business functions to other corporations. Both the government and the corporations deploy these maneuvers in order to rearrange the legal relations they have with the labor and the consumer and to refract their legal responsibilities. For instance, big companies use the so-called "employment agencies" to avoid direct legal and managerial relations with the labor.

Urban dwellers rely on corporate businesses for daily necessities as well as for jobs and income. Even in the rural areas that are thought to be beyond the realm of modern commerce, rural dwellers procure fertilizers, pesticides, herbicides, seed, and other farm inputs and technologies from foreign and local corporations and intermediaries such as banks and other credit firms. In short, private providers occupy important parts and are poised to have even more critical role in the emerging social relation.

The third issue concerns political imperatives of private discrimination in a multicultural society. The economic, social and political development over the last two decades suggest that private discriminations occur usually along the lines of ethnicity and other social cleavages among Ethiopians. An explanation is the fact that ethnicity, or identity more generally, has become the backbone of the politics and the governance narratives.

Multi-cultural societies that have social inequality along the lines of social cleavages often face factional competitions and confrontation. Outcomes of such factionalism have been devastating. Albert O. Hirschman, a renowned social theorist, gives a plausible explanation for the phenomena as follows: Unequal growth in such societies gives rise to "relative deprivation" that can lead to the

depletion of tolerance for social inequality, and eventually, to violence.[46] Economic growth is a noble thing; but unequal growth can be worse than poverty for it can lead to long-lasting factionalism and hostilities that undermine social fabrics. Evidence from Nigeria, Pakistan, and other multi-cultural societies shows factional objections and violence obliterated remarkable economic changes and promising prospects these societies once had, because of social inequalities.[47]

The recent protests in various parts of Ethiopia instantiate Hirschman's thesis. The reports about the protests and protesters show that many people believed not only that the distribution of power and property over the last two decades has been along the lines of ethnicity; but also that the state has been the main auxiliary of this exclusive social group and its growing economic and political clout. Some of the reports show that political affiliations shaped the unequal distribution of power and property. The important point is not about accuracy of the reports or what else might actually caused the protests. The question, rather, is what role private discrimination might have in creating or perpetuating social inequalities, relative-deprivations, and the emergence of factional hostilities and violence along the lines of social cleavages.

That social groups or networks often use private discrimination to maintain an exclusive status is a plausible observation. Thus, how the private actors, whose sphere of influence has been steadily increasing, would treat ordinary persons and people of the "other" social category can generate politically significant outcomes. The leaders do not seem to see social, political and legal significance of private discrimination. The "ownership" model of property, which means that the owner has an assailable power over the things he or she owns,[48] is deeply entrenched in the ideology and governance architecture of the ruling party.

The reflection in this essay is on the question whether the bodies charged with the authority of constitutional review can enforce constitutional rights and liberties to a private discriminatory conduct. It is not about legality of private discrimination *per se*. Statutory laws, State administrative bodies, and private regulatory regimes can regulate private discriminations. Labor laws and regulations, commerce laws, and business license regulations might concern some aspects of private discrimination.

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[46] ALBERT O. HIRSCHMAN, THE ESSENTIAL HIRSCHMAN 74 (Jeremy Adelman ed., 2013).

[47] *Id.*

[48] JOSEPH WILLIAM SINGER, THE PARADOX OF ENTITLEMENT (2000).

The constitutional clauses discussed in the preceding section of this essay can also offer tentative starting points to interrogate legality of private discrimination in certain fields. The Equality Clause and the Supremacy Clauses can be key to start with an effort to apply the constitutional rights and liberties to a private conduct that contradicts the anti-discrimination clauses of the Constitution. There exist various interpretive possibilities on the basis of the constitutional texts. However, in the absence of evidence of judges' and jurists' approach, the legality of private discrimination is a black hole of the Ethiopian constitutional jurisprudence. Even if a consensus emerges on the horizontal effect of constitutional rights and liberties, questions of standing, evidence or proof, remedy and other procedures may mar the enforcement of the rights and liberties to private conduct.

5. Conclusion

This essay attempted to situate private discrimination at the intersections of the steadily intensifying power of the "private" and the norms and values envisioned in the constitutional rights and liberties. Some problems of "private" discrimination might be addressed if courts give horizontal effect to constitutional rights and liberties. Other kinds of discriminations, the ones that occur often in the housing rental market and other personal relations and competing/conflicting values, might require special and specific laws and regulations detailed enough to guide decision-making. This is because of the fact that private discrimination often cuts both ways—i.e., it can be a legitimate expression or exercise of the rights and liberties of one person and violation of the rights and liberties of another. Judging the legality of private discrimination involves balancing fundamental and multiple values that compete and conflict.

An important caveat is in order. The reflection on private discrimination is neither to suggest that other kinds of discriminations, and the lack of respect for the other basic rights and liberties more generally, are less important. Nor is it to propagate the hope that a simple solution that can address the problem of private discrimination is available. I am acutely aware of the fact that law may actually depoliticize and normalize the questions of private discrimination and thereby aggravate the problem. But I think this is one of the questions worthy of debate and discussion.